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THE
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VOLUME VIII.

STATE *ex rel.* WEAR *et al.* v. FRANCIS *et al.*

(*Supreme Court of Missouri*. May 7, 1888.)

1. MANDAMUS—PARTIES TO PROCEEDING—PRIVATE CITIZENS.

A private citizen may be a party to a proceeding for *mandamus* to compel public officers to enforce certain city ordinances.

2. SAME—TO MUNICIPAL OFFICERS—WHEN LIES.

Where a city charter makes it the duty of certain officers to enforce the Sunday laws, leaving the method of enforcement to their discretion, a *mandamus* will not lie to compel such officers to arrest without warrant and prosecute persons for violating said Sunday laws; and a petition for *mandamus*, requesting that an order directing the police not to interfere with the sale of liquor on Sunday, be vacated, though such relief, if asked alone, would be granted, will not be allowed when the request to compel the officers to arrest without warrant is made a part of the petition.

3. CONSTITUTIONAL LAW—DELEGATING LEGISLATIVE AUTHORITY—LAWS OF MUNICIPAL CORPORATION FOR ITS OWN GOVERNMENT.

Act Mo. March 4, 1857, § 1, granting corporate authorities power, when authorized by a majority of the legal voters, to permit the opening of establishments for the sale of refreshments of any kind (except distilled liquors) on any day of the week, is not unconstitutional, in that it is a delegation of legislative power, as it only gives the corporation the right to make by-laws for its own local government.¹

4. ELECTIONS AND VOTERS—CONSTRUCTION OF ELECTION LAW—MAJORITY OF LEGAL VOTERS.

Where a law requires a vote to be taken, and a majority of the legal voters is mentioned therein as being necessary to carry the proposed measure, a majority of all the legal voters entitled to vote is contemplated by the law; and not a mere majority of those voting.

5. STATUTES—CONFLICT—REPEAL.

Act Mo. March 4, 1857, § 1, provides that certain corporate authorities may grant permission to open an establishment for the sale of refreshments of any kind (distilled liquors excepted) on any day in the week, and section 4 provides for the repeal of all laws in conflict with this act. *Held*, that section 4 of the act, when construed with section 1, will not of itself repeal the law forbidding the sale of fermented liquors on Sunday.

Appeal from St. Louis circuit court.

Petition for *mandamus* by the State *ex rel.* James H. Wear and others against David R. Francis and others. The writ was granted in the lower court, and defendants appeal.

¹ An act which provides that any county or town or city of a certain class may, by a majority vote, put such county, city, or town under its operation, is not a delegation of legislative power, *State v. Pond*, (Mo.) 6 S. W. Rep. 469; *State v. District Court*, (Minn.) 22 N. W. Rep. 625; nor a law conferring authority upon a municipality, to be exercised at its discretion, *City v. Hillis*, (Iowa,) 8 N. W. Rep. 638; nor a law which submits to the popular vote merely the question as to whether or not, in any given locality, liquor licenses shall be granted, *Savage v. Com.*, (Va.) 5 S. E. Rep. 568.

Leverett Bell, for appellants. *Boyle, Adams & McKeighan* and *H. T. Kent*, for respondents.

SHERWOOD, J. The cause comes here on the appeal of those who were respondents in the circuit court; that court having awarded against them a peremptory writ. The only ground upon which this court can take jurisdiction of this cause is the fact that a constitutional question is involved therein; but this being the case carries with it, under recent constitutional amendments, the necessity of and the jurisdiction for determining the whole case.

1. Before going into the merits of the case, however, a preliminary question must first be determined. It is this: whether the relators, being merely private citizens, are proper parties to this proceeding. In *State v. Hoblitzelle*, 85 Mo. 620, it was ruled that the relator, being a contestant for an office, had a right to have an inspection of the poll-books relating to his election; but in the minority opinion it was declared that where a public right is involved, and the object is to enforce a public duty, the people are regarded as the real party, and in such case the relator need not show any legal or special interest in the result. The fact that he is a citizen, and as such interested in the execution of the laws, is the sesame which unlocks the gates of mandatory authority whenever an officer whose functions are merely ministerial refuses to perform his office, and thereby causes detriment to the public interest. In the subsequent case of *State v. Railroad Co.*, 86 Mo. 13, the position of the minority was fully indorsed, some of the same authorities being cited in its support. The great weight of judicial decision supports this view. This point must therefore be ruled in favor of the relators.

2. The act of 1857, now to be considered, is entitled "An act confirming certain powers to the citizens of St. Louis county," and is as follows: "Be it enacted by the general assembly of the state of Missouri, as follows: Section 1. That the corporate authorities of the different cities in the county of St. Louis shall have the power, whenever a majority of the legal voters of the respective cities in said county authorize them so to do, to grant permission for opening of any establishment or establishments within the corporate limits of said cities for the sale of refreshments of any kind (distilled liquors excepted) on any day in the week. Sec. 2. Any person, who shall on a Sunday sell or offer for sale, within the corporate limits of said cities, any distilled liquors, or any composition of which distilled liquors form a part, shall be punished by a fine of not less than ten nor more than fifty dollars. Sec. 3. The provisions of the first section of this act shall not be construed as authorizing the sale of ardent spirits on any day mentioned, except as now by law allowed. Sec. 4. All acts and parts of acts conflicting with the provisions of this act are hereby repealed. This act to take effect from its passage. Approved March 4, 1857." Laws 1856-57, p. 673.

It is claimed that this act is unconstitutional, as being a delegation of legislative power. This contention cannot prevail, for the reason that the power which the legislature confers upon municipal corporations when granting them charters, with authority to pass ordinances, etc., for local self-government, has never been considered a delegation of legislative power, and does not make an exception to the rule that such legislative power, conferred upon the general assembly, is to be exercised by that body alone, and not to be delegated to others. *State v. Field*, 17 Mo. 529; 1 Dill. Mun. Corp. § 308, and cases cited; *Metcalf v. City*, 11 Mo. 103. And whenever the legislature has the power originally to confer upon a municipality authority to enact ordinances and by-laws, such power embraces within its scope the right by subsequent legislation to enlarge the chartered powers of a municipality, by enactments similar to those specified in the act under consideration, and to prescribe the methods in which such additional powers shall be exercised. The power being conceded, the mere method of its exercise becomes immaterial. *State*

v. *Cooke*, 24 Minn. 247; *State v. Noyes*, 30 Fost. (N. H.) 279; *Com. v. Bennett*, 108 Mass. 27. Of course, these remarks are subject to those restrictions contained in the organic law forbidding the legislature to pass "local or special laws," "regulating the affairs of counties, cities," etc., or "incorporating cities," etc., or "changing their charters." But, at the time the act of 1857 was passed, there were no such constitutional prohibitions in existence,—no such limitations on the free exercise of legislative power. It follows from the premises that the law in question is not obnoxious to any constitutional objection. It is proper to add here that no discussion of the constitutionality of that law has ever occurred in this court. In *State v. Winkelmeier*, 35 Mo. 103, any expression of opinion on the subject was expressly refused, and in the subsequent case of *State v. Binder*, 38 Mo. 450, notice was taken of such refusal in the former case, but still no judicial utterance was made concerning the matter.

3. The next point to be determined is whether the ordinance passed in pursuance of the law just discussed, and known as ordinance No. 4137, was adopted by the requisite number of votes. That ordinance, passed March 26, 1858, is as follows: "Be it ordained by the city council of the city of St. Louis: Section 1. That on the first Monday in April next, at an election to be held in St. Louis on that day, the legal voters of the city of St. Louis shall and may determine, by a vote, the question whether the city of St. Louis shall or may grant permission for the opening of any establishment or establishments, within the corporate limits of said city, for the sale of refreshments of any kind, (distilled liquors excepted,) on any day of the week, in accordance with the provisions of an act of the general assembly of the state of Missouri, entitled 'An act confirming certain powers upon the citizens of St. Louis county,' approved March 4, 1857. Sec. 2. That such votes shall be by ballot, and shall be in the following form, viz: 'For sale of refreshments,' and 'Against sale of refreshments.' Sec. 3. The mayor of the city shall, by proclamation, notify the voters of the city of St. Louis of the taking of such vote in the same manner as he notifies them of the election of city officers."

The rule established in *State v. Winkelmeier, supra*, is this: That when, by law, a vote is required or permitted to be taken, and a majority of the legal voters is mentioned in such law as being necessary to carry the proposed measure, that such majority must be a majority of all the legal voters entitled to vote at such election, and not a mere majority of those voting thereat. This rule, thus laid down, has since become firmly established in the jurisprudence of this state. *State v. Sutterfield*, 54 Mo. 392; *State v. Brassfield*, 67 Mo. 331; *State v. Mayor*, 73 Mo. 435. The case of *State v. Binder, supra*, is based upon its own peculiar facts, and is not, perhaps to be regarded as shaking the authority of *Winkelmeier's Case*, or of the other cases cited. And, even were it to be so regarded, the well-settled rule laid down in the latter cases referred to would still be followed as better, safer, and more sound. In *Winkelmeier's Case* the returns of the election, held in conformity to the ordinance mentioned, showed that at such election "that more than thirteen thousand voters participated in that election, and that only five thousand and thirty-five persons voted in favor of giving to the city authority to grant permission to open establishments for the sale of refreshments on Sunday, and two thousand and one persons voted against it." This quotation is made from the opinion of the court in that case, where it was ruled, upon the basis of fact thus presented, that the vote of five thousand out of thirteen thousand voters was not the vote of a majority; that no authority was given to the city, under the act quoted, to grant the permission; and that, therefore, it was unnecessary to examine whether the corporate authorities of the city attempted to grant such permission, as any such grant would be void. On the other hand, in *Binder's Case* a duly-certified copy of the returns of the same election was given in evidence, by which it appeared "that the whole num-

ber of votes cast at said election was seven thousand and eighty-five, of which five thousand and fifty-one were given in the affirmative, and two thousand and thirty-four in the negative of the proposition." And upon this basis of fact it was held that the permission contemplated by the law of 1857, and by ordinance 4137, had been sanctioned by the requisite vote. In the present instance all embarrassment as to the vote cast at that particular time is removed by reason of the following passage in the return of the respondents: "These respondents admit, as set out in said writ, that the then mayor of the city of St. Louis, on the ——— day of March, 1858, issued a proclamation for an election of city officers to be held on the 5th day of April, 1858, and also to vote to authorize the corporate authorities of said city to grant permission for the sale of refreshments in said city on the first day of the week, commonly called Sunday, as provided in said act of 1857, and said ordinance 4137; and that, at said election, there were cast for mayor of said city 13,021 votes, and for authorizing the said corporate authorities of said city to grant permission for the sale of refreshments as specified in said act of 1857, 5,051 votes, and against it 2,034 votes; but these respondents deny, as set out in said writ, that no authority was given by said vote to said corporate authorities to grant said permission. On the contrary, these respondents aver that, under the law of the land, it was only necessary to confer said authority that a majority of those voting at said election on said proposition referred to in said ordinance 4137 should vote to authorize said corporate authorities to grant said permission, and it was not necessary, as claimed or suggested in said writ, that a majority of all those voting at said election should vote for the granting of said permission." These admitted facts bring this case within the principle of the rule heretofore announced, and demonstrate that the corporate authorities of the city were never granted authority to pass any ordinance permitting the sale of fermented liquors on Sunday, and render needless any investigation as to the validity of any subsequent ordinance of the city permitting that to be done which had not been authorized to be done by the prerequisite majority vote. No discussion, therefore, will be entered upon relative to whether certain void ordinances, passed under the forms of law, but without any legal validity, were repealed or superseded by subsequent ordinances or revisions.

4. The act of March 4, 1857, was merely provisional in its character. It did not directly repeal, nor was it intended to repeal, the law which forbade the sale of fermented liquors on Sunday, and so this point has been heretofore ruled. *State v. Winkelmeier*, and *State v. Binder*, *supra*. This is easily proven: For, if the fourth section of that act accomplished the repeal of the statute forbidding the sale of fermented liquors on Sunday in the cities of St. Louis county, then no necessity existed for the permission to the city council to do, upon a majority vote taken, what had already been done by the fourth section of the law itself. This case is therefore freed from all necessity for investigating questions relating to the repeal of one law, and of the revival of the former law in consequence of such repeal, since, in the view already taken, no such question arises upon this record, as, in accordance with that view, the Sunday law in force when the law of 1857 was passed, remains still in force in the city of St. Louis, so far as concerns any action by the municipal authorities under that law, for the reason that the conditions pointed out in the first section of the act of 1857 were not performed. If this conclusion be correct, then it is wholly immaterial what force, effect, or operation be given to the Downing law of 1883, or the act passed March 25, 1887, which repeals the law of 1857.

5. And this conclusion is not in the least affected by the provisions of the charter of 1876, pleaded in the return of the respondents, as authorizing the municipal assembly of the city to regulate saloons, beer-houses, tippling-houses, dram-shops, etc., as no ordinance was passed pursuant to such provisions. If

such an ordinance had been passed prior or subsequently to the act of 1883, there might possibly be ground to consider whether the rule laid down in *State v. Clarke*, 54 Mo. 17; *State v. De Bar*, 58 Mo. 395, cited by respondents, would control in this case or not. *Schweitzer v. City of Liberty*, 82 Mo. 309, and cases cited. As the record stands, there is no room for discussion or determination of the point.

6. This conclusion brings to view the only remaining question requisite to be discussed, which is whether *mandamus* is the appropriate remedy to invoke in the case at bar. In discussing this point, it is proper to quote the language of the peremptory writ, showing just what it requires the respondents to do in the premises. It is as follows: "Whereupon it is by the court considered and adjudged that a peremptory *mandamus* be issued to the said respondents, directing and commanding them that they do enforce, within the limits of the city of St. Louis, the laws of the state of Missouri with reference to the prohibition of the sale of wine and beer, the same being fermented liquors, by licensed dram-shop keepers, on the first day of the week, commonly called Sunday, and that they, the said respondents, cause to be arrested and prosecuted for the violation of said laws, on the 10th day of July, 1887, the same being the first day of the week, commonly called Sunday, the following named persons: William Kessler, James Sweeney, Frank Mahon, and Joseph Schneider. And, further, that said respondents do make all needful and proper orders and directions to the police force of said city to prevent, within the said city of St. Louis, the violation of said laws by licensed dram-shop keepers in the sale of wine and beer on the first day of the week, commonly called Sunday, and that they do direct and order the arrest of all such offenders. And, further, that they, the said respondents, shall vacate their certain order heretofore, to-wit, on the 8th day of July, 1887, made by them, directing the chief of police of said city not to interfere with the sale of wine or beer on the first day of the week, commonly called Sunday." The duties of the respondents are thus set forth in the alternative writ: "They shall, at all times of the day and night, within the boundaries of the city of St. Louis, as well on water as on land, preserve the public peace; prevent crime, and arrest offenders; protect the rights of persons and property; guard the public health; preserve order at every public election, at all public meetings and places, and on all public occasions; prevent and remove nuisances on all streets, highways, waters, and other places; provide a proper police force at every fire for the protection of firemen and property; protect emigrants and travelers at steam-boat landings and railway stations; see that all laws relating to elections and the observance of Sunday, and regulating pawnbrokers, gamblers, intemperance, lotteries and lottery policies, vagrants, disorderly persons, and the public health, are enforced; that, to enable the said board to perform the duties imposed upon them, they are authorized and required to appoint, enroll, and employ a permanent police force for the city of St. Louis, and to equip and arm the same as they may judge necessary; that provision is made by law for a chief of police and subordinates, under the entire control of said board of police commissioners; that said board of commissioners are also required to divide the city into the needful number of police districts, and provide each of said districts with a station-house, with all things and attendants required for the same, and all such accommodations as may be required for the use of the police. It is also further provided by law that, if the said board shall deem it necessary, they shall have authority to call out such of the military force lawfully organized or existing in said city, or as they may see fit, to aid them in preventing threatened disorder or opposition to the laws, or in suppressing insurrection, riot and disorder, at all times. It is also provided that whenever the exigency or circumstances may, in their judgment, warrant it, said board shall have the power to assume the control and command of all the conservators of the peace of the city of St. Louis, whether sheriff, constable,

policeman, or others; and they shall act under the orders of said board, and not otherwise." In the extensive range of duties thus laid out by the provisions of the charter for the respondents to perform, it seems very plain that elements of discretion enter into the performance of some of them; and, whenever this is the case, the rule is that, while the mandatory authority will be used to put public officers in motion, yet it will not dictate the terms in which such discretion is to be exercised. *State v. Gregory*, 83 Mo. 123; High, Extr. Rem. §§ 24, 43, 44, and cases cited. In regard to the duties of respondents respecting the observance of Sunday, this element of discretion is very noticeable. They are to "see that all laws relating to the observance of Sunday are enforced." How is this purpose to be accomplished? It may be done in a variety of ways,—either by a direct arrest of the offender, or by closing a saloon if kept open on Sunday, if that is the nature of the offense; or by setting on foot other suitable criminal proceedings, and by warrant or by a summons a person may be brought before the court of criminal correction to answer for any misdemeanor. 2 Rev. St. p. 1514, § 19. In order that a writ of *mandamus* may issue,—it being an extraordinary remedy,—two prerequisites must exist. It must appear—*First*, that the relator has a clear legal right to the performance of a particular act or duty; and, *second*, that the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty which it is sought to coerce. High, Extr. Rem. § 10. In the case at bar it will be observed that the peremptory writ, not confining itself to the performance of a particular act, commands that several particular acts be done by respondents, among them that four persons be arrested and prosecuted for past offenses, and that a particular order made by respondents, directing the chief of police not to interfere with the sale of wine or beer on the first day of the week, commonly called Sunday, be vacated. In addition to these particular acts, the writ commands the performance of several acts in general. It is needless to say that there is no warrant for a peremptory writ so broad in its terms and so various in its commands. Again, on the mere admission of the respondents that four citizens have done certain acts, the latter are to be arrested and prosecuted without affidavit and without warrant. This is further, it seems to me, than the mandatory authority of a court extends. Indeed, I have found no precedent for a *mandamus* for the arrest of any one. It is the duty of a sheriff, as a conservator of the peace, to cause all offenders against law in his view to enter into recognizance with surety to keep the peace, etc. 1 Rev. St. § 3889. It is also his duty to quell and suppress assaults and batteries, riots, affrays, and insurrections; to apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority. Id. § 3891. And yet it is believed that no instance can be found where a *mandamus* has issued commanding a sheriff to quell a riot or to arrest a criminal. The fact that no such precedent can be found argues very strongly against the exercise of such authority. It is very easy to see that, if the process of *mandamus* could be employed in this ordinary way, that extraordinary writ would soon descend from its high plane, and become very commonplace. But, notwithstanding what has been said, it does not thence follow that relators are not entitled to any redress in this proceeding. And it does not follow, because the respondents have some margin of discretion in the performance of their duty in respect to all laws relating to the observance of Sunday, that, therefore, they are at liberty to refuse to take any action in the premises, and to foreclose themselves or their subordinates from the performance of an obvious duty, as was attempted in the order aforesaid. In so far as that particular order is concerned, the relators are entitled to the remedy they seek.

The judgment will be reversed, and the cause remanded, with directions to allow suitable amendments to be made in the alternative and peremptory writs, in conformity with this opinion. High, Extr. Rem. § 519; 1 Rev. St. § 3585;

School-District v. Landerbaugh, 80 Mo. 190. When such amendments have been made, the circuit court will issue its peremptory writ, commanding that respondents vacate the order heretofore mentioned.

RAY, J., absent. The other judges concur.

NORTON, C. J., (*concurring*.) I concur in the above opinion, not only for the reason that, under the facts stated in regard to the vote taken in 1868 as to whether the sale of fermented liquors on Sunday should be permitted in the city of St. Louis, such vote did not authorize the passage of the ordinance in question,—and this was expressly so held in the case of *State v. Winkelmeier*, 35 Mo. 103;—but for the additional reason that, inasmuch as the Downing law contains a provision expressly repealing all acts or parts of acts inconsistent with it, and the act of 1857 being repugnant to and irreconcilably inconsistent with the Downing law, is by necessary implication repealed. But whatever doubts, if any, might exist as to the correctness of the position last stated, such doubts are entirely removed by the act of 1887, which in express terms repeals said act of 1857.

BLACK, J., (*concurring*.) In the view I take of this case, it is unnecessary to express any opinion upon the question whether the vote taken under the act of 1857 gave the corporate authorities of St. Louis power to pass ordinance No. 4869, or any ordinance on the subject. I am satisfied the legislature intended by the act of March 24, 1883, to make the dram-shop law apply to all cities in the state, St. Louis not excepted, and that the repealing section accomplished that purpose. This being so, the act of 1857 was thereby repealed, and the dram-shop law, as amended by the act of 1883, became the law in St. Louis, as elsewhere throughout the state. With this conclusion, I agree as to what is said in the opinion just filed in respect of the remedy by the writ of *mandamus*.

STATE v. DOWD *et al.*

(*Supreme Court of Missouri. May 7, 1888.*)

FALSE PRETENSES—INDICTMENT—SUFFICIENCY—REV. ST. MO. § 1561.

Under Rev. St. Mo. § 1561, providing that a person who, with intent to defraud, shall obtain the property of another by means of deception, shall be guilty of a felony, an indictment, charging that a deed belonging to certain parties was fraudulently obtained from them by the accused, yet alleging that such parties had executed and delivered the deed to a third person, fails to state a cause of action against the accused, as the deed is the property of the third person and he alone can be defrauded.

Error to circuit court, Phelps county; C. C. BLAND, Judge.

F. E. Dowd, John St. Elmer, and Arthur Corse were indicted for obtaining goods under false pretenses. The indictment was quashed on motion of defendants, and the state brings error.

Atty. Gen. B. G. Boone, for plaintiff in error. *J. F. Parker*, for defendants in error.

SHERWOOD, J. The indictment in this case is as follows:

“STATE OF MISSOURI, COUNTY OF PHELPS.

“*In the Circuit Court, February Term, 1888.*

“The grand jurors for the state of Missouri, summoned from the body of Phelps county, impaneled, charged, and sworn, upon their oaths present that F. E. Dowd, John St. Elmer, Arthur Corse, late of the county aforesaid, on the 19th day of July, 1887, at the county of Phelps and state aforesaid, did feloniously and designedly, with intent to cheat and defraud Minnie Lupberger and her husband, Wilhelm Lupberger, obtain a general warranty deed of

and from the said Minnie Lupberger and Wilhelm Lupberger, dated on the 15th day of July, 1887, executed, signed, sealed, acknowledged, and delivered in due form and manner of law, on the 19th day of July, 1887, whereby the said deed purports to convey, in consideration of the sum of three hundred dollars to them, the said Minnie Lupberger and Wilhelm Lupberger, paid by Ludwig Gebhart, all the right, interest, and title of the said Minnie and Wilhelm Lupberger unto the said Ludwig Gebhart, and to his heirs and assigns, forever; and covenanted to warrant and defend of and to the following described real estate: The south half of the south-east quarter section thirty-four, township thirty-eight, range seven, situate in Phelps county, state of Missouri, (said deed and real estate are of the value of fifteen hundred dollars, the property of the said Minnie Lupberger and Wilhelm Lupberger,)—with the intent them then and there to cheat and defraud by means and by use of a cheat, and a fraud, and a false and fraudulent representation, and a false pretense, and a false and bogus check and instrument, with the intent them, the said Minnie Lupberger and Wilhelm Lupberger, then and there feloniously to cheat and defraud, contrary to the form of the state in such case made and provided, against the peace and dignity of the state. And the jurors aforesaid, upon their oaths aforesaid, do further present that Arthur Corse, before the said felony was committed in form and manner aforesaid, did feloniously incite, move, procure, aid, and counsel, hire, command the said F. E. Dowd, John St. Elmer, to do and feloniously commit the aforesaid offense, in manner and form aforesaid, against the peace and dignity of the state.

“J. B. HARRISON, Prosecuting Attorney.”

This indictment, on motion of defendants, was quashed by the court, and from the judgment thereupon rendered the state comes to this court on writ of error. Section 1561, upon which the indictment is supposably drawn, is as follows: “Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain, from any other person or persons, any money, property, or valuable thing whatever, by means or use of any trick or deception, or false and fraudulent representation or statement or pretense, * * * or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument, * * * shall be deemed guilty of a felony,” etc. The section in question further provides that “in every indictment under this section it shall be deemed and held a sufficient description of the offense to charge that the accused did, on ———, unlawfully and feloniously, obtain or attempt to obtain, (as the case may be,) from A. B. (here insert the name of the person defrauded) his or her money or property, by means and by use of a cheat, or fraud, or trick, or deception, or false and fraudulent representation or statement, or false pretense,” etc. It will be noticed that the indictment does not follow the language of the statute, nor is it good under section 1335, which the pleader seems also to have had in his mind. The indictment charges that the deed was the property of Minnie Lupberger and her husband, and yet distinctly alleges that the deed made by them was “executed, signed, sealed, acknowledged, and delivered, in due form and manner of law, on the 19th day of July, 1887.” If the deed was delivered, as stated, then it ceased to be the property of Minnie Lupberger and her husband when so delivered, and so it was impossible to have defrauded them by reason of obtaining what was the property of another. After a long *hiatus* the pleader begins again, “with intent them then and there to cheat and defraud by means,” etc., but does not state who had that intent. It is unnecessary to discuss the nondescript instrument any further. The judgment of the circuit court was clearly right, and it is hereby affirmed.

All concur.

RAY, J. absent.

LOHMAN v. STOCKE *et al.*

(Supreme Court of Missouri. May 7, 1888.)

1. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PROOF OF FRAUD.

In an action to set aside a deed of trust as in fraud of creditors, and for want of consideration, it appeared that at the date of the deed the grantor was insolvent; that the date of the acknowledgment and record was a year after the date of the deed, and only a few days prior to the judgment under which plaintiff claimed; that the notary had been requested to date the acknowledgment back to the date of the deed; that the person attempted to be secured was worth less than one-fifteenth the amount secured to him; and that defendant's testimony was evasive and contradictory. *Held* sufficient evidence to support a judgment setting aside such deed.

2. EXECUTION—AGAINST REAL ESTATE IN ANOTHER COUNTY—NOTICE TO DEBTOR.

Rev. St. Mo. § 2381, which requires notice to be given to defendant when his real estate, situated in a different county from that in which defendant resides, is sought to be sold under an execution, does not apply where the judgment was rendered, and the execution issued, in the county where the land is situated.

3. EVIDENCE—DEPOSITIONS IN FORMER SUIT—WHEN ADMISSIBLE IN SUBSEQUENT SUIT.

Depositions taken in a prior suit, and refiled in a subsequent suit between the same parties, involving the same subject of inquiry and dispute, may properly be read in evidence.

Error to circuit court, Morgan county; E. L. EDWARDS, Judge.

Action to declare void a note and deed of trust alleged to have been made in fraud of creditors, by Henry Lohman against Valentine Stocke and others. Judgment for plaintiff, and defendants bring error.

Fred Gottschalk and *J. D. Neilson*, for plaintiffs in error. *G. A. Wurde-man* and *A. W. Anthony*, for defendant in error.

NORTON, C. J. On the 7th of April, 1883, plaintiff, as a purchaser at execution sale, under judgments rendered against defendant Stocke, of certain land in Morgan county, instituted this suit. At the date of said sale the said land was incumbered by a deed of trust executed by defendant Stocke to defendant Traube, as trustee, to secure the payment to defendant Ruthman of an alleged note for \$3,100. Plaintiff in his petition alleges that said note and deed of trust were without consideration, and were executed for the purpose of defrauding and cheating the creditors of said Stocke, and prays the court to declare them to be void as to creditors, and to cancel the same. The answer of defendants denied all fraud. On the trial of this issue it was found for plaintiff, and a decree was entered as prayed for. From this decree defendants have prosecuted their writ of error to this court, assigning for error the action of the court in receiving evidence, and that the decree is against the weight of evidence.

On the trial defendants objected to the introduction of any evidence, stating as the ground of objection that it did not set forth a cause of action in that it did not appear that the notice required to be given by section 2381, Rev. St., where real estate is situated in a different county from that in which defendant in the execution owning such real estate resides, had been given. The objection was properly overruled, if for no other reason than that one of the executions on which the sale was made issued on a judgment which was rendered in the county where the land sold was situate. In *Harper v. Hopper*, 42 Mo. 124, it is said "that the provision of the statute which requires notice to be given to a defendant, where an execution is issued to a county other than that in which he resides, has been uniformly held to apply only to cases where the execution is sent to be levied on land in a county different from that in which the judgment was rendered, and execution issued." *Harris v. Chouteau*, 37 Mo. 165; *Buchanan v. Athison*, 39 Mo. 503.

It appears from the record that in January, 1878, defendant Stocke, being in failing circumstances, and largely in debt, executed a deed of trust convey-

ing the land in question to defendant Traube, who was his son-in-law, as trustee, to secure the payment of a note to one Heisel for \$3,500; that on the 5th of March, 1881, Traube, as trustee, sold the land, and Susanna Reithman, one of these defendants, and the sister of Stocke, became the purchaser, and received a deed from the trustee. Lohman, the plaintiff in this suit, as a creditor of said Stocke instituted a proceeding in equity returnable to the October term of the Morgan county circuit, assailing this deed, making said Heisel, Stocke, Traube, and Mrs. Reithman parties, and charging them with a fraudulent conspiracy in the execution of said deed of trust concerning the land, its sale, and the deed made to Mrs. Reithman, to defeat the creditors of said Stocke in the collection of their debts. All of the defendants in this suit were defendants in that, and all appeared and answered. Depositions were taken in said suit by each side, some of which were refiled in the present suit and read in evidence,—some by plaintiff, and some by defendant. In the suit above referred to the court found the fraud as alleged and canceled the deed made by Traube to Mrs. Reithman. It further appears that said Stocke made a second deed of trust, conveying the said land to said Traube, as trustee, to secure the payment of a note to Mrs. Reithman for the sum of \$3,100. This deed is dated October 19, 1879, but not acknowledged till the 5th of March, 1880, nor recorded till the 9th of March, 1880,—six days before the rendition of the judgment against Stocke; on which an execution issued, and under which plaintiff became a purchaser of said land at a sale made by the sheriff of Morgan county in April, 1883, and received a sheriff's deed, and instituted this suit to set aside said second deed of trust from Stocke to Traube, trustee, to secure the payment of said Stocke's note to Mrs. Reithman, making said Stocke, Traube, and Reithman defendants. On the trial the depositions of Traube, Heisel, Stocke, and Reithman taken in the first suit, and refiled in this, were read in evidence, over the objection of defendants, and the action of the court in this respect is complained of as error. Depositions taken in one suit between the same parties, and refiled in a subsequent suit between the same parties, involving the same subject of inquiry and dispute, may properly be read in evidence. *Priest v. Way*, 87 Mo. 16. Besides this the record shows that defendants also offered, and read in evidence, certain depositions taken in the same cause, and, having adopted the same course pursued by plaintiff, ought not now to be heard to complain.

The evidence shows that Stocke, who lived in St. Louis, was heavily embarrassed and insolvent; that Traube, the trustee, was his son-in-law; that Mrs. Reithman, who is the sister of Stocke, lived in a village in Illinois with a population of about 200 persons, and kept a boarding-house; that her husband had died some time previous, leaving an estate insufficient to pay his debts; that the value of Mrs. Reithman's personal property, goods, etc., from 1877 to 1881, was about \$200. It also shows that on the 5th of March, 1880, when Stocke acknowledged the deed of trust, he requested the notary to date the acknowledgment back to the date of the deed in 1879. Besides this the evidence of Mrs. Reithman, as well as that of Traube and Stocke taken in the first suit, as well as that given by them in the second suit in regard to these transactions, was evasive, unsatisfactory, and contradictory, and indicative of the fraudulent combination alleged, and which the court, having the witnesses before it, found to exist. After a careful examination of the evidence we find nothing in it to justify an interference with the judgment.

All concur, except RAY, J., absent.

DEGMAN v. ELLIOTT.

(Court of Appeals of Kentucky. March 29, 1883.)

1. BOUNDARIES—WATER-COURSES—SUDDEN CHANGE OF CHANNEL.

In an action between two adjoining owners to try title to land, it appeared that the north bank of a certain stream was the boundary line between the parties.

There was evidence that the parcel in controversy was an island during high water, but that the main channel had been on the south side of the island at the date of the deeds under which the parties claimed, but by a sudden freshet had since been diverted to the opposite side. *Held*, that the ownership of such island depended upon the location of the main channel at the time of the execution of the deeds describing the north bank as the boundary line, and was not to be affected by the shifting of the stream to the other channel.

2. SAME—ADVERSE POSSESSION BEYOND BOUNDARY—WHAT CONSTITUTES.

One of two proprietors of adjacent tracts claimed title beyond the boundary line by adverse possession; his occupancy consisting merely in occasionally cutting and removing timber, and in raising one crop of turnips, without having inclosed any of the parcel in controversy. *Held* not sufficient to acquire title.¹

Appeal from circuit court, Mason county.

Trespass by Lavinia A. Elliott against Charles C. Degman to try title to an island lying in a creek between their farms; the question being within whose boundary line the land is situated. The deeds under which each claims, fix the dividing line as beginning on the north bank of Cabin creek, and running thence up the creek, etc. Judgment for plaintiff, and defendant appeals.

Cochran & Son and *T. C. Campbell*, for appellant. *Whitaker & Robertson*, for appellee.

LEWIS, J. If the lower court erred in this case, it was in complicating with other questions, not proper or relevant, the main inquiry by the jury as to the true location of the boundary line between the two tracts of land owned, respectively, by the plaintiff, Lavinia Elliott, and Clarissa Sweet, by whose authority the alleged trespass was committed by the defendant, Degman. There is no controversy about the title of either owner of the two tracts. Mrs. Elliott claims under a deed made by one Bruce to her father in 1835; and Mrs. Sweet claims under a deed from Farrow, made to her in 1861, though he and those under whom he claimed had the title and possession for many years before. Nor is there any real difference in the calls of the deeds of the two owners in respect to the dividing line, which, as described, begins at a hickory on the north bank of Cabin creek, identified as a corner, running thence with the creek to another corner, also recognized. But the dispute is where the main channel of the creek is, or, more properly, was, at the dates of the original deeds,—whether north or south of the small parcel of land in contest, which has been and is at times of high water, and when not inundated itself, an island. If it was on the south side when the dividing line, which follows the north bank, was established, then the disputed land is inside the boundary of the tract of Mrs. Sweet; otherwise not. There is evidence tending to show it was formerly south of the island, and the present bed of the stream then had no running water in it except during a freshet. There is also evidence that the course of the creek was changed about the year 1875, at a time of very high water, and ever since the main channel has been north of the island; the old bed being so filled up that no water flows in it except during a freshet. In the first instruction the jury were told, in substance, that if the plaintiff was in possession of the land in contest, having a crop of turnips thereon, and she, and those under whom she claims, had been continuously in possession for over 15 years next before the alleged trespass, and the defendant entered, took and carried away her turnips, they must find damages, etc. In the second, that if, at the time of the sale and conveyance by Farrow to Mrs. Sweet, the father of the plaintiff was in possession of the land in contest, claiming it as his own, to a well-defined or marked boundary, the deed of Farrow conveyed no title to Mrs. Sweet, though the land was embraced by it. The third is as follows: "That if * * * the plaintiff and

¹As to what constitutes adverse possession, see *Bridges v. Johnson*, (Tex.) 7 S. W. Rep. 506, and note.

her father * * * were in possession of the land of which the land in contest forms a part, and adjoining it for more than fifteen years continuously, claiming it as their own, next previous to the alleged trespass, by using it in such manner as land, situated as it was, was capable of, and plaintiff was so in possession at the time of the alleged trespass, the jury will find for plaintiffs."

It appears that within a few years, probably since 1875, the land in dispute has been considerably elevated by alluvial deposit. But it was originally so sterile, by reason of the swift current over it during an overflow of water, as to be unfit for cultivation, and no one ever attempted to cultivate it until a short time before the commencement of this action, when the turnips were raised on it by direction of appellee; and the only other occupancy, or exercise of ownership of it by either appellee or her father at any time, consisted of occasional cutting and removal of timber from it. There being no claim of an elder and superior title by either appellee or Mrs. Sweet, nor any lap or interference of their surveys, we see nothing in this case to make it an exception to the well-settled rule of law that the proprietors and occupants of two adjacent tracts of land are considered as being, respectively, in the actual possession up to the boundary line, and that neither can acquire a possessory title beyond such line, without an actual inclosure, coupled with an adverse claim for 15 years. In the case of *Webbs v. Hynes*, 9 B. Mon. 388, the land in dispute was an island in the Ohio river, the possession of which was vacant at the time the pioneer patentee entered on it, and, being subject to overflow, could be neither fenced, nor used at all seasons of the year. It was there held that "if a fence was unnecessary to its enjoyment, and if it was used by the defendants in the way most appropriate, considering its nature and liability to be inundated, and that use was continuous whenever the condition of the land would permit, we entertain no doubt such use would constitute an adverse possession, which, if continued uninterruptedly for twenty [now fifteen] years before suit brought, would be sufficient to toll the right of entry of the elder patentee." But a distinction was made by the court between that case and those in which it had been decided that the occasional cutting of timber, or the occasional use of a sugar camp, was not such continued occupancy as would bar recovery, in the following language: "In the cases last mentioned, the mode of using the land was not the actual appropriation of the land itself, but rather of some of its incidents merely." There is, moreover, between the case cited and the one before us a material difference. In that, "the plaintiff, although invested with the legal title, had never entered on the land sued for, so that the possession was vacant when the defendant, claiming under the pioneer patent, entered, and took possession." In this case, Mrs. Sweet, and those under whom she claims, have, during the whole period of the alleged acts of ownership by appellee, and those under whom she claims, had the legal title, and been in the actual possession up to the dividing line, wherever it may be. Consequently no question of her right of entry on the disputed land, if it be on her side of the dividing line, can arise; nor was the sale and conveyance to her by Farrow in 1861 champertous, as indicated in the second instruction.

The court further instructed the jury that, although the creek may have run on the south side of the disputed land in 1861, yet if it gradually washed to the north, and, by gradual accretion on the other side, the channel has been changed to the present bed, leaving the land in contest south of the creek, "the land belonged to the ancestors of the plaintiff, and to plaintiff, owning land on the south side of the creek, as it runs at present." A fatal objection to that instruction is that, even if the proposition of law intended had been accurately stated, there is no evidence whatever in the record before us to sustain it. The rule attempted to be stated in that instruction applies when one side or bank of a water-course has gained by the gradual washing away of the opposite bank, but has no application at all when the stream

itself has shifted from one bed or channel to another, leaving the intervening land comparatively undisturbed. In the latter case, whether the change has been made gradually or suddenly by an unusual flood, there is neither a gain of soil to one or the other owner, nor a change of the boundary line between them. The evidence in this case tends to show that the change of the course of the creek was not made gradually, but suddenly. However, be that as it may, the land in dispute was not made by either the gradual or sudden wearing away of the bank on one side of the stream, and deposition of soil upon the other; but the stream has been changed from the original bed on the south side, which is yet definable, to another distinct bed on the north side of the land in contest, which now exists as it did before the change took place. It seems to us, as the record stands, the only question for the jury is where the boundary line runs according to the calls of the deeds, and it was error in the lower court to give any of the instructions we have referred to.

The judgment is reversed for a new trial, and further proceedings consistent with this opinion.

NETHERCUTT *et al.* v. HERRON *et al.*

(Court of Appeals of Kentucky. April 5, 1888.)

1. HOMESTEAD—ABANDONMENT—PROOF OF.

Defendant sold part of a tract of land owned by him, including his homestead, and then removed to a neighboring town, where he engaged in business. He also endeavored to sell the residue of the tract. *Held*, that these facts clearly showed an intention to abandon the homestead.¹

2. ATTACHMENT—LIEN—LEVY AFTER ASSIGNMENT FOR BENEFIT OF CREDITORS.

An attachment levied on defendant's land after an assignment of all his estate for the benefit of his creditors creates no lien as against the creditors.

Appeal from circuit court, Carter county.

Attachment by Stephen Nethercutt and others against George W. Herron and others. Judgment in favor of defendants, allowing him certain lands as a homestead. Plaintiffs appealed.

E. Dulin, Jas. D. Jones, E. B. Wilhoit, and R. D. Davis, for appellants.
L. T. Moore, for appellees.

BENNETT, J. The first question to be determined is whether the appellee George W. Herron is entitled to the 130 acres of land (not worth over \$1,000) in controversy, as a homestead. The facts are that in 1880 he purchased 280 acres of land, and in 1881 he sold 150 acres of this land, which included his homestead. And he in January, 1882, moved with his family to the town of Grayson, a distance of about six miles from the land, where he engaged in the hotel business, and operating a saw-mill about three miles from Grayson, in which business he continued until this action was commenced, in 1883. After moving from the land he tried often to sell the remaining 130 acres; also, after moving to Grayson, he contracted the debts that are now the subject of this action; also, in the fall of 1882, he, becoming insolvent, made a deed of assignment of all of his estate for the equal benefit of his creditors; in the deed of assignment he made no express reservation of this land; also, he deeded said land to his wife, "in order that she might have a home for herself and children;" also, after selling the 150 acres of land which included his homestead, he made no preparation to occupy the remaining 130 acres as a homestead, but almost immediately moved to Grayson, and embarked in the

¹In general, as to what constitutes an abandonment of a homestead, see *Newman v. Franklin*, (Iowa,) 28 N. W. Rep. 579, and note; *Newton v. Calhoun*, (Tex.) 4 S. W. Rep. 645; *McElroy v. Magoffin*, Id. 547; *Reece v. Renfro*, Id. 545; *Gates v. Steele*, (Ark.) Id. 53, and note; *Kaes v. Gross*, (Mo.) 3 S. W. Rep. 340; *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 304; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 392, and note; *Reppenn v. Davis*, (Iowa,) 34 N. W. Rep. 829; *Finley v. Saunders*, (N. C.) 4 S. E. Rep. 516.

business enterprises above indicated. These facts unexplained clearly show that he abandoned the 130 acres as a homestead. But do other facts show that he did not intend to abandon the 130 acres as a homestead? They are—*First*, that he rented out the land, and cultivated a part of it one year in a garden himself, (these facts are not inconsistent with an intention to abandon the land as a homestead;) *secondly*, he says, "When I left the place, I expected to return to it at a future time; the exact time I would return to it I did not know." This language and the additional facts relied on fail to show that he left the place for temporary purposes only, and he had a fixed and continuous purpose of returning to the place, and occupying it as a homestead. We think, therefore, that the lower court erred in allowing him said land as a homestead.

The deed of assignment, although the appellee and the assignee might have thought that the appellee was entitled to the land as a homestead, embraced it, and, as the appellee was not entitled to it as a homestead, it passed by the deed of assignment for the benefit of his creditors. The appellants' attachment was obtained after the deed of assignment was made, and as the land in controversy was in fact included in the deed of assignment, which passed the title for the benefit of appellee's creditors, the levy of the appellants' attachment upon the land created no lien thereon as against said creditors. The mortgage lien on said land is superior to that of the appellee's creditors.

The judgment of the lower court is reversed, with directions for further proceedings consistent with this opinion.

RUSSELL v. CARLISLE *et al.*

(Court of Appeals of Kentucky. April 5, 1888.)

TAXATION—EQUALIZATION—POWER OF BOARD.

Under act Ky. May 10, 1884, directing the state board of equalization to consider separately three classes of property in equalizing values, viz., personal property, lands, and town and city lots, and to equalize the assessed value of the personal property by means of a rate obtained from the aggregate value and the whole number of each kind of personal property enumerated, with discretion to add to or deduct from the value so obtained, and to perfect the result in such manner as they may deem best to reach a just equalization, *held*, that stores are properly classed as personal property, and the addition of 56 per cent. to the assessed value of the personal property in complainants' county is a proper exercise of the board's discretion, and chargeable upon complainants' store.

Appeal from circuit court, Marion county.

The complainants, Carlisle & Litsey, and others, have enjoined the defendant, A. K. Russell, sheriff, etc., from collection of taxes upon their store. The demurrer to the defendant's answer was sustained, and the defendant appeals.

Sam T. Spalding, for appellant. *Rowntree & Lisle*, for appellees.

HOLT, J. The state board for the equalization of taxes, created by the act of May 10, 1884, at its session for the year 1886 raised the assessed value of the personal property of Marion county 56 per cent. The appellees are merchants of that county, and have enjoined the collection of the state taxes upon this raised value of their stores. They aver in their petition that they in 1886, under oath, listed this property at its cash value as of the 1st day of April of that year, with the county assessor. This is denied by the answer, and, as the action was dismissed upon demurrer to the last-named pleading, it is to be taken, perhaps, as *pro confesso* that it was not listed at its cash value. We do not regard this as material, however, because perfect and exact equality in taxation is impossible. Individual hardships necessarily arise, which cannot be altogether obviated.

The constitutionality of the act creating the state board of equalization is now beyond question. It was settled in the late case of *Spalding v. Hill*, 7-

S. W. Rep. 27, February 11, 1888, and, upon reconsideration, we see no reason for not adhering to it. The construction of the law, and not its policy, is for judicial consideration. The act in question does not divest the county assessor, who is an officer recognized by the constitution, of any of his powers. His duty is primary. His action not final. He values the property, and this board equalizes the valuation. Boards of supervisors for towns and counties have always existed in our state without question as to their legality. They are boards of equalization upon a limited scale, and are to the tax-payers of the towns and counties what this board is to the different counties of the state, only the law has invested them with greater powers. It is urged, however, that neither the letter nor spirit of the law creating the state board authorizes it to act upon the assessments of stores in the various counties by way of equalizing them; that the legislature did not intend to embrace stores when it used the words "personal property," and that, in equalizing assessments for 1880, it (the state board) failed to take as a separate class the number and value of the stores in the different counties, or any of them, and, by comparison between the assessed value and a fixed value, arrive at a per cent. to be added or deducted, as to each county, to equalize the assessment. We fail to see any good reason why stores were not intended to be embraced in the equalization of personal property to be made by the board. They are unlike money, because it is the standard of value. They have no absolute, fixed worth. The county assessor must value them, and he is not bound to accept the statement of the tax-payer in this respect. A considerable portion of the wealth of the state is thus invested. Their value, like that of most kinds of property, is a matter of opinion, and, if its consideration cannot enter into the question of equalization, then it seems to us there can be none, and the matter is at an end. Stores are personal property, with no certain value fixed upon them by law, or the agreement of parties, and the reasons for not equalizing money and notes do not apply to them. The act creating the board expressly says, in general terms, that it shall consider "personal property." Sections 7, 8, and 10 provide: "Said board, in equalizing the valuation of property as listed and assessed in different counties, shall consider the following classes of property separately, viz., personal property, lands, and town and city lots, and upon such consideration determine such rates of addition to, or deduction from, the assessed valuation of each of said classes of property in each county, or to or from the aggregate assessed value of each of said classes in the state, as may be deemed by the board to be equitable and just, such rates being in all cases even." "In equalizing the value of personal property between the several counties, said board shall obtain, from the aggregate, footings of the number and value of each; and the value of the several kinds of enumerated property in each county, shall be obtained at those values; and the value of enumerated property thus obtained, as compared with the assessed value of such property in each county, shall be taken by said board to obtain a rate per cent. to be added to, or deducted from, the total assessed value of personal property in each county: provided, that whenever, in the opinion of the board, it is necessary, to a more just and equitable equalization of personal property, that a rate per cent. be added to, or deducted from, the value thus obtained in any one or more of the counties, said board shall have the right so to do, but the rate per cent. hereinbefore required shall first be obtained to form the basis upon which the equalization of personal property shall be made." "When said board shall have separately considered the several classes of property as hereinbefore required, the result shall be combined into one table, and the same shall be examined, compared, and perfected, in such manner as said board shall deem best to accomplish a just equalization of assessments throughout the state, preserving, however, the principle of separate rates for each class of property." It is manifest that the legislature intended to invest the board with large discretionary powers. It has the right to equalize from its

own knowledge. It may act with or without outside evidence. It is only limited by the purpose and spirit of the law. Indeed, it is the meaning of the law, and not the letter, that must govern. Considering its object and its entire provisions, and regarding the very necessity of the case, it could not have been intended that stores should not fall within the property to be considered by the board in arriving at the object intended. Perhaps it was found impossible, owing to want of uniformity in value, to compare them like other personal property. If so, then, regarding the spirit and purpose of the law, and all of its provisions, they had the right to perfect the equalization according to their best judgment. The last section above cited provides that after the different classes of property have been considered, and a result reached, it shall be "perfected" in such manner as they may deem best to reach a just equalization. The report of the board shows, however, that, in adding to or deducting a per cent. from the value of the personal property of each county, it added in each instance, and as to each county, to that value the assessed value of its stores as returned by its assessor. The same rule was applied to each county. We fail to see, therefore, how any inequality can result. It is true that in some cases property may thereby be assessed too high; but no system of taxation entirely free from such hardships can be devised, and if individual grievances, either supposed or real, founded merely upon opinion that property has been assessed too high, can furnish ground to stop by suit the collection of the state's revenue, then the public interests will necessarily suffer, because there will be no end of complaint, delay, and litigation.

Judgment reversed, with directions to sustain the demurrer to the petition, and dismiss the action.

ROGERS' ADM'R v. HUGHES.

(Court of Appeals of Kentucky. April 21, 1888.)

1. DEATH BY WRONGFUL ACT—COMPLAINT—SELLING LIQUOR TO DECEASED.

Under Gen. St. Ky. 1883, c. 57, § 3, giving a right of action to the personal representatives of one killed by the "willful neglect" of another, to recover punitive damages of the person guilty of such neglect, a complaint does not state a cause of action, alleging that the intestate was of feeble mind, and without will power to control his appetite for liquor, that defendant knew this, and carelessly and with willful neglect furnished and gave it to him, and tempted, induced, and caused him to drink to such excess as to die therefrom, but not alleging that the liquor was furnished in violation of law.

2. APPEAL—REVIEW—REJECTION OF AMENDED PETITION.

Where a demurrer is sustained, and two amended petitions, afterwards made a part of the bill of exceptions, are tendered and rejected, and the action then dismissed, the averments of both petition and amended petitions are to be taken as admitted on appeal.

Appeal from circuit court, Nicholas county.

Hanson Kennedy and Thos. Kennedy, for appellant. *John P. Norvell*, for appellee.

HOLT, J. The administrator of John Rogers seeks to recover damages of the appellee, John Hughes, under section 3 of chapter 57 of the General Statutes, which provides as follows: "If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid." A general demurrer to the petition was sustained. Two amended petitions, which were tendered and are a part of the record by a bill of exceptions, were rejected, and the action then dismissed. The averments of both the petition and the amended petitions must therefore be considered and taken as

admitted upon this appeal. They, in substance, state that the intestate was of feeble mind, and without will power to control his appetite for liquor; that the appellee knew this, and carelessly and with willful neglect furnished and gave it to him, and tempted, induced, and caused him to drink to such excess as to die therefrom in a few hours thereafter.

Do they constitute a cause of action under the statute? In an action for a personal injury resulting from willful negligence, it is not necessary, in order to show that it was so occasioned, to plead the particular circumstances attending it. It is sufficient to aver the extent of the injury, and the manner of its infliction. The facts constituting the willful neglect need not be stated. Thus, a petition stating that the defendant, through willful neglect, shot and killed the deceased, is sufficient. In this instance, however, although it is stated that the killing was through willful neglect, yet it is averred that the manner of it was by furnishing liquor to the deceased, and inducing and causing him to drink it to such an extent as to result in death. There is no averment that it was furnished in violation of law. Undoubtedly, the use of it is an evil, as is attested by the untimely death of thousands annually, but it is not dangerous *per se*, like a loaded weapon; and the presumption is that the appellee in this instance had the right, under the law, to give it to the deceased. It is unlike placing a loaded gun or a recognized deadly poison in the hands of a child. In such a case a fatal result might naturally be expected. Every reasonable person would look for it. Here, however, the death resulted from the immoderate use of an article which, while it is injurious to man, was not reasonably calculated to produce a deadly result. It could not reasonably be expected that it would be a proximate cause of death, and that it would probably result therefrom. If the statute is to be so extended as to embrace such a case, then it would be difficult to fix its limit. There are other articles of food and drink which are, to some extent, injurious to the human system, and the excessive use of which might sometimes result in death. Certainly the statute should not be so construed as to hold one responsible for willful neglect in furnishing them, although the party receiving them might so use them as to produce a fatal result. A standard of action must be applied which is reasonable, and suited to the ordinary judgment and business of life. It is urged, however, that the petition avers that the appellee "caused him to drink the same to excess," and it is suggested that it might be shown upon the trial that he forced him to do so by threat or otherwise. The averment is of an indefinite character; but, assuming that it means the employment of force even, then it would not be a case of neglect. Such conduct, resulting in death, might be of a criminal character, depending upon the circumstances of the case. It cannot avail, however, in this character of action, that the deceased was of feeble mind. The ground of it is willful neglect; and, as already stated, it could not be reasonably apprehended that even the immoderate use of the article furnished would result in death. Such a case is not embraced by the statute. Judgment affirmed.

McFARLAND v. GARNETT *et al.*

(Court of Appeals of Kentucky. April 28, 1888.)

MORTGAGES—FORECLOSURE—DIVIDING LAND—DUTY OF COURT.

Under Civil Code Ky. § 604, providing that, before ordering a sale of real property for the payment of a debt, the court must be satisfied by the pleadings, by an agreement of parties, by affidavits filed, or by a report of a commissioner, whether the property can be divided without materially injuring its value, it is not error to confirm, without any showing, a partition of a tract of 100 acres, part of which was sold under foreclosure, where the owner has made no showing that its value was materially injured, as *prima facie* such a tract can be divided without injury.

Appeal from circuit court, Russell county.

Hays & Stone, for appellant. *Montgomery & Jones*, for appellees.

BENNETT, J. The appellant executed to the appellee Garnett a mortgage on a tract of land lying in Russell county, Ky., containing 106 acres, to secure the payment of an indebtedness of \$2,834.10. The appellee Garnett having brought this action in equity in the Russell circuit court for the purpose of enforcing his mortgage lien on said land, that court at its May term, 1885, rendered a default judgment against the appellant for the amount of the mortgage debt, less certain credits, and for the sale of a sufficiency of said tract of land to pay said debt, interest, and cost. The court's commissioner, pursuant to the directions of the judgment, sold, in 1885, 101 acres of said tract of land, which satisfied said debt, interest, and cost, leaving five acres unsold. The sale was duly reported to court, and confirmed. The court at its May term, 1886, appointed commissioners to divide the said tract of land, and allot to the appellant said five acres, and to the appellee Snow, the assignee of the purchaser, the remainder of the tract. The commissioners were directed to take the appellant's five acres off of the lower end of the farm. The commissioners made the division and allotment, and reported the same to court, which report was confirmed. The appellant has appealed to this court.

The appellant contends, first, that the judgment ordering the sale of said land is erroneous because there is nothing in the pleadings, report of a commissioner, or proof showing that said tract of land could be divided without materially impairing its value. Section 694, Civil Code, which directs that, "before ordering a sale of real property for the payment of a debt, the court must be satisfied by the pleadings, by an agreement of parties, by affidavit filed, or by a report of a commissioner, * * * whether or not the property can be divided without materially impairing its value," etc., does not require an allegation in the pleadings to the effect that the property is divisible or indivisible. Nor is it indispensable that the fact as to the divisibility or indivisibility of the property should appear by agreement of the parties, by affidavits, or a report of a commissioner, before ordering a sale of the property; but the court may satisfy itself from the character of the boundary, or the number of acres in the tract, as described in the pleadings, that a division of the property can be had without materially impairing its value. This is all that is required. See *Sears v. Henry*, 13 Bush, 415. Undoubtedly a tract of land containing as many as 106 acres may be divided without materially impairing its value. *Prima facie* it is divisible without materially impairing its value, and the burden of proof is on the party contending contrariwise. Here the appellant neither pleaded nor offered any proof that the property could not be divided without materially impairing its value. The commissioner making the sale announced that the five acres of land unsold should be taken off the lower end of the tract. The appellant gave the commissioner no direction to sell the land off of any particular part of the tract. In the absence of such direction the commissioner had the right to designate what part of the tract he would offer for sale; and, the commissioner having done so, it devolved upon the appellant to show before confirmation that he was prejudiced by it, which he failed to do. The judgment of the lower court is affirmed.

CHESAPEAKE, O. & S. W. R. CO. v. McMANNON.

(Court of Appeals of Kentucky. April 26, 1888.)

MASTER AND SERVANT—INCOMPETENCY OF FELLOW-SERVANT—KNOWLEDGE OF MASTER.
In an action against a railroad company for personal injuries sustained by one of defendant's switchmen through the alleged incompetency of K., a fellow-switch-

man, the jury found that K. was incompetent; that this was known by defendant's agent who employed K.; but that it was not known to plaintiff, nor had he the means of knowing it. *Held*, that under these findings the company was liable.¹

Appeal from circuit court, Muhlenburg county.

Action for personal injuries by M. H. McMannon against the Chesapeake, Ohio & Southwestern Railroad Company. Judgment for plaintiff, and defendant appeals.

Holmes Cummins and *P. H. Darby*, for appellant. *R. C. Davis* and *Matt. O. Doherty*, for appellee.

PRYOR, C. J. This action was instituted in the court below to recover compensation for a personal injury received by the appellee by reason of the gross negligence of certain employes of the appellant, the one a switchman and the other an engineer. The appellee, while uncoupling cars in the capacity of switchman at Central City, on appellant's road, had his arm badly mashed between two freight cars, rendering amputation necessary; the arm having been taken off above the elbow. The injury was caused by the engineer moving the engine back in response to a signal given by one Kittenger, who was a fellow-switchman with the appellee in the same yard. The right of recovery for the neglect of Kittenger, who was in the same grade of employment, consists in his alleged incompetency for the position, and the further averment that his incompetency was known to the appellant. (2) That Campbell, the engineer, by the exercise of the slightest care, might have known the danger of the appellee at the time, and avoided the injury; that he was guilty of gross negligence. The appellant, after traversing the material facts alleged in the petition, pleaded that the injury was caused alone by want of proper care on the part of the appellee. Upon these issues the case went to the jury, and a verdict returned for \$5,750. A number of special interrogatories were propounded to the jury, 13 in number for the plaintiff, and 45 at the instance of the defendant.

In regard to the alleged negligence of a fellow-laborer by reason of his incompetency in the same grade of employment, it must appear, not only that the employe was incompetent, but that the principal knew he was incompetent, or by reasonable inquiry could have ascertained that fact. In other words, "he must at his peril exercise reasonable care in the selection of the appliances of his business and of co-servants; and, if he fail to do this, the employer will be responsible to the employe who is injured by the neglect of a fellow-servant while in his employment, although in the same grade of labor." *Wood, Mast. & Serv.* 825. This rule is qualified to the extent that, if the co-laborer, complaining of the neglect, knew, or had the same means of knowledge as to the incompetency that the employer had, then no recovery can be had. The jury, in response to interrogatory No. 1, find that Kittenger was an incompetent switchman; and, in response to No. 2, say that this incompetency was known to defendant's agent prior to and at the time

¹That an employer is not liable to a servant for any injury resulting from the negligence of a fellow-servant in the same line or department of employment, provided the employer exercised due care in the selection or retention of the negligent employe, see *Neubauer v. Railroad Co.*, (N. Y.) 4 N. E. Rep. 125, and note. If an employe knows that a co-employe is incompetent or habitually negligent, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, he will be presumed to have assumed the risk of such incompetence or negligence, and cannot recover for an injury resulting therefrom. *Hatt v. Nay*, (Mass.) 10 N. E. Rep. 607; *Railway Co. v. Stupak*, (Ind.) 8 N. E. Rep. 680, and note; *Railway Co. v. Dailey*, (Ind.) 10 N. E. Rep. 681; *Stock Co. v. Wilder*, (Ill.) 5 N. E. Rep. 92; *Staford v. Railroad Co.*, (Ill.) 3 N. E. Rep. 185; *Railroad Co. v. Peavey*, (Kan.) 8 Pac. Rep. 790, and note; *Keany v. Rolling-Mills*, (Mich.) 83 N. W. Rep. 896. As to who are fellow-servants within the rule exempting the master from liability to a servant for injuries resulting from the negligence of a fellow-servant, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note.

of the injury. They also find that McNair, the yard-master, knew that Kittenger was incompetent when he employed him. The appellant insists that these special findings are not sustained by the evidence, and therefore this judgment should be reversed. We have examined this record carefully, and the facts developed show a clear case of negligence on the part of these employees, by which this appellee lost his arm; and, while the alleged incompetency of Kittenger may be doubted from the testimony, it appears from the statements of McNair, who was, at the time, in the employ of the company as assistant yard-master, that he employed Kittenger under protest, and by reason alone of the direction of his superior. He knew of his unfitness for the place, and so informed his superior; and, although contradicted in those statements, it was with the jury to determine to which of the statements they would give credence; and this court will not interfere to say they should have decided otherwise, when Kittenger's own conduct shows a degree of neglect on his part that fully corroborates the statements made by McNair, and shows him unfit for the position assigned him. He seems never to have seen or heard the cars move the one way or the other at the time of the injury, although he was giving signals that resulted in this serious injury; and, while others standing near saw appellee's danger, those of the employees whose duty it was to exercise some skill and judgment to prevent such accidents failed to exercise the slightest caution. Appellee gave what is known as the "steady signal;" indicating to the engineer that he was about to uncouple the cars. This signal was reported by the fireman to the engineer, who stopped the cars, and the appellee went in to uncouple the cars when Kittenger gave the signal to back, which was done, and the appellee's arm crushed. The fireman had notified the engineer of the appellee's position, and knew, as he swears, that the injured man had not been given time sufficient to uncouple the cars, and avoid danger, from the time of the steady signal given by him to that of the fast signal given by Kittenger. The fireman called to the engineer to stop, but it was then too late, as it was then impossible to have prevented the accident. This court is not conversant with the manner in which these signals should be given; but, where the coupling and uncoupling of cars is of constant occurrence, it seems to us that the party entering and performing the task should give the signal of its completion, and not leave the signal to be given by those who might not even be aware, at the time, that any one was engaged in the act of uncoupling, as seems to have been the case here. We are not disposed to question the truth of the finding by the jury that the engineer was guilty of gross neglect; and, while his act is to be attributed to the incompetency of Kittenger, it seems to us that he should have been as well informed, at least, as the fireman. May, as to the dangerous position of the appellee when this fast signal was given by Kittenger.

We have devoted but little time to the consideration of the instructions given by the court, or those refused, because the findings of fact by the jury determine the right of recovery by the appellee. The general instruction No. 2, given for the plaintiff, embodied, in substance, the law of this case. The jury was told that, if Kittenger was incompetent to discharge the duties of yard-switchman in defendant's service, and that the defendant, or any of its agents, charged at the time with the duty of employing and discharging such employees, knew of, or by the exercise of ordinary care could have known of, such incompetency on the part of Kittenger, and, notwithstanding such knowledge or means of knowledge, retained him, and that said unfitness was unknown to the plaintiff, and the plaintiff, while in the discharge of his duty, and without any contributory fault on his part, was injured by reason of the incompetency of Kittenger, etc., they should find for the plaintiff. While this instruction may have omitted to convey the idea that, if the appellee had the same means of knowledge that the defendant had, and nevertheless con-

tinued in the service, they should find for the defendant, the jury has in effect said by their special finding that the appellee was ignorant of his incompetency, and had no means of ascertaining it, and therefore this omission could not have prejudiced the defendant in any manner. Besides, the jury was told, for the defendant, that, while it was the duty of the defendant to exercise reasonable care and judgment in the selection of its employes, it does not guaranty the competency or fitness of its employes; and, if it did exercise reasonable care in the employment of Kittenger, it is not liable to the plaintiff on account of said employment, although the jury may in fact believe he was unfit for the position. The jury was also told that, if the plaintiff and Kittenger were in the same grade of labor when the accident occurred, the law is for the defendant, unless they believe the defendant was guilty of negligence in employing and continuing Kittenger in its service. The jury was also instructed as to contributory neglect, if any, on the part of the plaintiff, and we find nothing in the record authorizing a reversal, unless this court could invade the province of the jury, and determine the issues upon the mere weight of the testimony, and then it could only be argued that a bare preponderance of the testimony established the competency of defendant's employe. The judgment, in our opinion, should be affirmed.

LITTLE ROCK, M. R. & T. RY. CO. v. IREDELL.

(*Supreme Court of Arkansas. April 14, 1888.*)

REMOVAL OF CAUSES—PETITION FOR—JURISDICTION OF STATE COURT.

When a petition and bond for the removal of a cause to the federal court are presented in apt time, and it appears on the face of the whole record that petitioner is entitled to removal, the state court loses jurisdiction; and, if it afterwards render judgment against petitioner, such judgment will be vacated on appeal, although the petitioner neither excepted to the refusal of the petition, nor protested against the subsequent proceedings, but filed an answer, and contested the case upon the merits.

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.
John N. Moore, for appellant. *N. T. White*, for appellee.

COCKRILL, C. J. The appellee sued the railway in the Jefferson circuit court, in the year 1885, to recover damages in the sum of \$10,000 for a personal injury sustained by her while a passenger on one of its trains. In apt time the defendant presented its petition for removal of the cause to the federal court, alleging that the plaintiff was then, and at the time the complaint was filed, a citizen of the state of Mississippi, and that the defendant was a citizen of the state of Arkansas, being a corporation organized under the laws of this state. A bond, with surety, conditioned as the act of congress requires in such cases, was filed and approved by the court. Proof was heard upon the question of citizenship presented by the petition for removal; and the court refused to relinquish control of the cause. The railway answered, and the cause proceeded to trial, resulting in a judgment for the plaintiff. The company has appealed.

Though the question for a time rested in some obscurity, it is now definitely settled that no issue of fact, upon a petition for the removal of a cause from a state to a federal court, can be tried in the state tribunal. *Railway v. Dunn*, 122 U. S. 514, 7 Sup. Ct. Rep. 1262. It is essential that one or the other of the courts should have exclusive jurisdiction to determine the issue, and that power is reserved for the federal court by the decisions of the supreme court of the United States, which is the final arbiter in all cases where a state court has denied a removal. The only question for the state tribunal, after the petition and bond for removal are filed, is whether, admitting the facts to be true, it appears on the face of the record (the whole record) that the petitioner is entitled to the removal. *Id.* The petitioner does not waive his right to the removal by contesting the suit upon its merits in the state court after his peti-

tion is there denied, (*Railroad Co. v. Hamersley*, 104 U. S. 5,) even though there was no exception saved to the ruling of the court according to the practice of the state courts, (*Kanouse v. Martin*, 15 How. 197,) and no protest made against the subsequent proceedings, (*Steam-Ship Co. v. Tugman*, 106 U. S. 123, 1 Sup. Ct. Rep. 58.) The judgment in the cause must be vacated.

PARR *et al.* v. MATTHEWS.

(Supreme Court of Arkansas. April 14, 1888.)

1. TAXATION—LEVY—REVOCATION OF AUTHORITY.

Act Ark. July 23, 1868, providing for the levy of taxes, by the county court, having been repealed April 8, 1869, except so far as it applied to the collection of taxes due for 1868, county courts had no authority to levy taxes in July, 1869, for the year 1868.

2. SAME—TAX DEED—ILLEGAL LEVY—PRESUMPTION.

Although a tax deed is, by statute, *prima facie* evidence of title, yet where the sale was made to collect a county tax of 1 per cent., and other taxes, and the records of the county court show an illegal levy of such a tax a few months before the sale, it will not, in the absence of further evidence, be presumed that the sale was based on any other levy, and the deed will be held void.

3. SAME—SALE UNDER ILLEGAL LEVY—LAPSE OF TIME.

Mere lapse of time does not validate a tax deed based on an illegal tax, when the purchaser does not take possession of the land, though the deed is good upon its face, and the purchaser has paid all subsequent taxes.

Appeal from circuit court, Lawrence county; R. H. POWELL, Judge.

W. R. Coody and John K. Gibson, for appellants. Butler & Neill, for appellee.

COCKRILL, C. J. This is a suit to quiet title. The complaint was filed by the Pairs to cancel a tax deed held by Matthews. The court found that the title to the land was in the plaintiffs unless it was divested by the tax deed; that the tax deed was good on its face, but void in fact; that the land was wild and unimproved; that the defendant, the purchaser at tax sale, had never been in possession; but had paid the taxes for the years subsequent to his purchase; and it was decreed that the adult plaintiffs were barred of their remedy, and that the plaintiff, who was a minor, should be permitted to redeem. The plaintiffs appealed.

The court's finding of facts is sustained by the proof. The land was sold in December, 1869, for the taxes of 1868. The tax proceedings were had under the act of February 19, 1869, an act passed in aid of the revenue law of July 23, 1868. *Pack v. Crawford*, 29 Ark. 492; *Cole v. Moore*, 34 Ark. 582; *Hickman v. Kempner*, 35 Ark. 505. The assessor caused his return of the assessment of real property to be filed by the county clerk on the 9th of June, 1869. The county court met within 15 days thereafter, as the act required, to equalize the assessments, and, after a series of adjournments, on the 15th of July, 1869, ordered that a tax of 1 per cent. for county purposes be laid upon the taxable property, presumably for the year 1868. There was no evidence of the levy of any other taxes for that year, but, as the act makes the tax deed *prima facie* evidence of title in the grantees, the presumption is indulged, in the absence of controverting evidence, that the taxes were laid according to law. The supplemental act of February 19, 1869, makes no provision for the levy of taxes. That power was governed at that time by the act of July 23, 1868. When the supplemental act was passed, it seems to have been taken for granted that the county courts had performed the duty of levying taxes as prescribed by the revenue law then in force, and the supplemental act was intended to authorize a subsequent assessment and collection of the taxes already levied. It was the policy of the revenue act of 1868 to cause the taxes to be laid before the property assessment was completed. The power to levy taxes for the year 1868 expired with that year by virtue of the

eighty-third and eighty-fourth sections of the act of July 23, 1868. Moreover, that act, and its supplement of 1869, were expressly repealed by the 159th section of the act of April 8, 1869, before the levy of the tax in question, but were continued in force for the sole purpose of collecting the taxes due for 1868. It follows that there was no legislative authority for the county court to lay taxes in July, 1869, for the year 1868. The county tax of 1 per cent. was therefore laid without authority of law, and was an illegal exaction. The land in question was sold to collect state, county, and other taxes. The county tax for which it was sold amounted to just 1 per cent. of its assessed value. In the absence of other evidence, we would indulge the presumption that this tax had been regularly laid by the proper authority, in the year 1868. But the record shows, as we have seen, that such a tax was levied in 1869 for 1868. It was the duty of the county court alone to perform this act, and, when it is proved to have been done on one date, there is no presumption that it was done on another. It will not be presumed that the fact is otherwise than as proved by the record of the court adduced in evidence. *Galpin v. Page*, 18 Wall. 364. The proof that the county tax, for the non-payment of which the land appears to have been sold, was illegally laid upon it rebutted the presumption of regularity raised by the deed, and cast upon the tax purchaser the *onus* of showing, if he could, that a similar tax was legally assessed. No effort was made to do so. It follows that the land was sold for an illegal tax. That vitiated the deed. The bare lapse of time, without possession, did not cure the defect. *Raddiffe v. Scruggs*, 46 Ark. —. The court should have canceled the tax deed upon the payment of the taxes, etc., legally assessed against the land, and the taxes subsequently paid by the purchaser.

Reverse the decree, and remand the cause, with instructions to enter such a decree.

BAKER v. STATE.

(Court of Appeals of Texas. February 3, 1888.)

1. ARSON—INDICTMENT—BURNING INSURED PROPERTY.

An indictment charging that defendant burned his own house, the said house being at the time insured, is sufficient, without alleging the facts in relation to the insurance.

2. SAME—INDICTMENT—ENDANGERING ADJACENT PROPERTY—ALLEGATION OF OWNERSHIP.

An indictment that defendant burned his own house, thereby endangering the safety of houses belonging to other persons, is sufficient without giving the names of such other persons.

3. SAME—INDICTMENT—LOCUS IN QUO OF PROPERTY.

In an indictment for arson, the *locus in quo* of the house burned is alleged sufficiently, the allegation being "a certain house then and there occupied, owned, and controlled by defendant;" "then and there" referring to the time and county previously stated.

4. CRIMINAL LAW—CONFESSIONS—CONVERSATION WITH DEFENDANT.

Testimony detailing a conversation which the witness had with defendant under arrest is inadmissible, unless for the purpose of showing a confession.

5. SAME—CONFESSION MADE WHILE UNDER ARREST—CAUTION.

Under Code Crim. Proc. Tex. art. 750, providing that a confession shall not be used if made while defendant was under arrest, "unless such confession be made in the voluntary statement of the accused taken before an examining court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him," a caution by the magistrate at the examination that defendant's written statement before the magistrate, if he should make one, would be used against him, is not such caution as to make admissible statements made by defendant to another person a few hours afterwards.

Appeal from district court, Grayson county; H. O. HEAD, Judge.

On indictment for arson the defendant, J. T. Baker, was convicted, and appeals. There was testimony upon the trial to the effect that defendant, a few hours after he had been arraigned before the examining court, offered an officer

certain considerations to permit his escape. Code Crim. Proc. art. 750, provides that a "confession shall not be used if, at the time it was made, the defendant was in jail, or other place of confinement, nor while he is in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him," etc.

Woods & Smith, Brown & Gunter, and Gilbert, Pasco & Russell, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. There are two counts in the indictment; the first charging that the defendant burned his own house, the said house being at the time insured; the second charging that he burned his own house, thereby endangering the safety of houses belonging to other persons. We are of the opinion that the indictment is substantially sufficient in both its counts, and that the defendant's exceptions thereto, and his motion in arrest of judgment were properly overruled.

The *locus in quo* of the house burned is alleged sufficiently; the allegation being "a certain house then and there occupied, owned, and controlled by him, the said Baker," the words "then and there" referring to the time and the county previously stated.

It was unnecessary to allege the amount of the insurance upon the house, the company in which it was insured, or other facts in relation to the insurance. It was only necessary to allege that, at the time the house was burned, it was insured. That portion of the first count in the indictment which states that "the amount of said insurance, and a further description of which is to the grand jurors unknown," is surplusage, and should have been treated as immaterial, and wholly disregarded on the trial.

With respect to the second count we do not think it was essential to allege who owned the houses which were endangered by the burning of defendant's house. Such an allegation is usual and proper, but not absolutely essential, as it is immaterial who owned the houses so endangered, if they were owned by other persons than the defendant.

We learn, from a statement made in the charge of the court, that the county attorney elected to try the defendant upon the first count in the indictment. This is all the information afforded by the record as to the election. There is no notice of it taken in the judgment entry, or in any other entry in the case. We must presume, therefore, from the statement made in the charge of the court, that the state voluntarily abandoned and dismissed the second count. It does not appear that such election was required by the court, nor do we think it could properly have been required. It is only when distinct felonies, not of the same character, are charged in different counts in the same indictment, that the state may be required to elect upon which count it will claim a conviction. *Lunn v. State*, 44 Tex. 85; *Boles v. State*, 13 Tex. App. 650; *Chester v. State*, 23 Tex. App. 577, 5 S. W. Rep. 125. In this case the same felony is charged in each count. But the state having elected to try the defendant upon the first count, and the court having sanctioned such election, that count alone should have been submitted to the jury, and the jury should have been explicitly instructed that they could not consider and could not convict upon the second count. In defining arson, the learned judge, in his charge to the jury, embraced both counts in the indictment; that is, burning an insured house, and burning a house, the burning of which endangered other houses not belonging to the defendant. That portion of the charge which embraced the arson charged in the second count is erroneous because it is not the law applicable to the case, and because it submitted to the jury an issue not in the case. This error in the charge, not having been excepted to, would not be reversible error unless it was calculated to injure the rights of

the defendant; and whether the error is of that character we do not determine, as it is unnecessary that we should do, there being another error for which the judgment must be set aside.

We are of the opinion that the court erred in admitting the testimony of the witness Pelfry, detailing a conversation which the defendant had with him at a time when the defendant was under arrest. This testimony was evidently introduced by the state as inculpatory; as a circumstance tending to prove defendant's guilt, as a *quasi* confession of guilt. If not introduced for this purpose, it was wholly irrelevant, and should for that reason have been rejected. If introduced as inculpatory evidence, it was inadmissible because the statements were made by the defendant while he was under arrest, and without being first cautioned that any statements he made might be used in evidence against him. The fact that, a few hours prior to the time of making said statements, he had been cautioned by the magistrate before whom the charge against him was being investigated that a voluntary statement, if he should make one, might be used in evidence against him, does not, we think, dispense with a caution with respect to statements subsequently made, on another occasion, to another party, and under entirely different circumstances. The caution given him by the magistrate related alone to a voluntary statement,—a judicial proceeding in the presence of the court,—a written statement to be signed by the defendant. It would be stretching the rule too much, we think, to apply a caution made under such circumstances to any and all statements made by the defendant on subsequent occasions. We do not agree to the rule as stated in *Barnes v. State*, 36 Tex. 356, that the caution must immediately precede the confession. That rule, we think, is too extreme, and in the subsequent case of *Maddox v. State*, 41 Tex. 205, it was not strictly adhered to. We think the true rule is that, if the defendant was properly cautioned that statements made by him might be used in evidence against him, and he thereafter, within a reasonable time, made statements reasonably coming within the scope of the caution given him, such statements would be admissible against him. But we do not think the statements made by the defendant in this instance come within this rule. They are not statements reasonably embraced within the caution given the defendant by the magistrate, for that caution was limited to a voluntary statement, and was not intended to, and could not, we think, apply to any other statement. This is a new question, as far as we are aware, and we have been unable to find any authority which has aided us in reaching a conclusion upon it. The conclusion we have arrived at is based alone upon what we conceive to be the spirit of the law regulating the admissibility in evidence of confessions. Confessions of persons in confinement, or in the custody of an officer, are only admissible under the conditions prescribed in the statute, and the caution required in the case of a voluntary statement is a distinct caution from that required in the case of other confessions, and is applicable alone to the statement made before the magistrate, reduced to writing and signed by the defendant. Code Crim. Proc. art. 750.

Other errors assigned and presented in the brief and argument of counsel for defendant have received our attention, but we are of the opinion that the only material errors are those which we have discussed, and because of the last named of which the judgment is reversed, and the cause is remanded.

GEORGE v. STATE.

(Court of Appeals of Texas. February 15, 1888.)

1. APPEAL—RECORD—STATEMENT OF FACTS—TIME OF FILING.

Under Rev. St. Tex. 1879, art. 1879, providing that the statement of facts shall be filed within the term, or 10 days thereafter, and the act of March 8, 1887, that a statement, although filed after such 10 days, will be considered on appeal if the party

tendering the same show that the delay was not due to fault or laches of his, and that such failure was the result of causes beyond his control, *held*, a statement sent by mail to the judge for approval 5 days after adjournment of the term, but not filed until 24 days thereafter, and 42 days after the trial, will not be considered, as there was clearly laches.

2. EXCEPTIONS, BILL OF—TIME OF FILING.

In Texas a bill of exceptions, not filed within the term, but after the court has adjourned, will not be considered on appeal.¹

3. CRIMINAL LAW—APPEAL—REVIEW.

On appeal from a conviction of manslaughter, error in a charge cannot be considered when there is no statement of facts.

Appeal from district court, Limestone county; S. R. Frost, Judge.

The defendant, W. R. George, was convicted of manslaughter, and appeals. The affidavits show that 10 days after the adjournment of the term was allowed for the filing of the statement of facts.

Kimbell & Kimbell and Herring & Kelley, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is a conviction for manslaughter, with the punishment fixed at three years in the penitentiary. Appellant was tried on October 31, 1887. Court adjourned November 18, 1887. Counsel for appellant presented to the district attorney for his approval a statement of facts on November 30, 1887, —12 days after the adjournment of the court. The statement of facts was received by the district clerk on December 12, 1887, and filed as of November 27, 1887. There was no order allowing the statement to be filed after adjournment. The law requires that the statement of facts shall be filed in term-time, or, under an order for the purpose, within 10 days after the adjournment of the court. But if not filed within the term, or within 10 days (an order having been entered for that purpose) after adjournment, still, by virtue of article 1379 a, "when a statement of facts is filed after these times, and the party tendering or filing the same shall, to the satisfaction of this court, show that he has used due diligence to obtain the approval and signature of the judge thereto, and to file the same within the time prescribed, to-wit, in term-time, or within 10 days after adjournment, and that his failure to file the same in said time is not due to the fault or laches of said party, or his attorney, and that such failure was the result of causes beyond his control, this court shall permit said statement of facts to remain as part of the record, and consider the same," etc., (approved March 8, 1887.) Now, it can hardly be contended that appellant, or his counsel, has complied with the provisions of this article. Instead of showing due diligence, laches clearly appear. Failing to use proper diligence to obtain the approval and signature of the judge to the statement of facts, and it having been filed after adjournment without an order to that effect, this court cannot lawfully consider this statement of facts, and hence the errors assigned must be considered as if no statement of facts appeared in the record.

¹ Bills of exceptions must be prepared and settled before the end of the term at which the cause was tried, *Sweet v. Perkins*, 24 Fed. Rep. 777; *Stave Co. v. Manufacturing Co.*, 32 Fed. Rep. 822; or within such time as the parties by their agreement, made part of the record, may stipulate, or within the time allowed by the court in its order to that effect, made in term-time and appearing in the record, *Hake v. Strubel*, (Ill.) 12 N. E. Rep. 676. A distinction is to be observed in this respect between the settling and allowance of a bill, which is an act judicial in its nature, and the act of signing and sealing the bill, which is merely ministerial. *Id.* The bill must be signed during term-time, unless authorized to be signed after adjournment by consent or agreement of counsel. *Markland v. Albes*, (Ala.) 2 South. Rep. 123; *State v. Smith*, (Kan.) 16 Pac. Rep. 254. Bills of exceptions filed more than 10 days after the expiration of the trial term of the court below will not be considered on appeal. *Stewart v. State*, (Tex.) 6 S. W. Rep. 817. But where one has done all in his power to procure the settlement of, and signature to, the bill, he cannot be prejudiced by the delay of the judge. *Davis v. Patrick*, 7 Sup. Ct. Rep. 1102; *Stave Co. v. Manufacturing Co.*, *supra*.

Appellant complains that, without fault on his part, he has been deprived of his bills of exceptions. If a party be dissatisfied with any ruling or action of the court upon the trial, he may except thereto at the time the same is made, and, at his request, he shall be given time to embody such exceptions in a written bill. Refusal by the court to grant such time is error, but such error must appear to have prejudiced some right of the party to constitute it reversible error. And, for the party to have such error revised by this court, he must, at the time, reserve his bill to the action of the court in refusing him time to prepare his exceptions to the supposed erroneous ruling, action or opinion. If this bill is not allowed by the court, then he must appeal to the by-standers. Quite a number of bills of exception appear in this record. None, however, were reserved at the time, or in term-time, all being filed after court adjourned. We cannot, under the circumstances, consider these bills, and the errors assigned must be considered without them.

This record is therefore before us without bills of exceptions, or a statement of facts, and we are to look alone to the sufficiency of the indictment, and charge of the court. Testing the charge by the allegations in the indictment, and assuming that there was evidence calling for every theory of the case presented by the charge, we must hold that, the indictment being sufficient, and there being no statement of facts, the charge is not obnoxious to any radical error, and the judgment must be and is affirmed.

ON MOTION FOR REHEARING.

HURT, J. We were mistaken in the first opinion in this case in stating that there was no order for filing the statement of facts after the adjournment of the court. This mistake, however, was immaterial, because the statement was not filed within 10 days.

In their brief on the motion for rehearing, counsel for the appellant insist that there was error in the charge of the court relating to manslaughter, and, as the court charged upon this grade of the offense, it is to be presumed that the evidence required the charge. If courts never charged abstract law, the presumption claimed would be reasonable.

The judge's notes were tendered to the district attorney by counsel for appellant as a correct statement of facts, which were refused. It was then the plain duty of counsel for appellant to prepare from the notes, or any other source, a statement of facts, present the same to the district attorney, and, if he failed to agree, then present it to the judge, etc.

Again, no move towards obtaining a statement of facts was made until five days after court adjourned, when counsel for appellant prepared, and sent by mail to the judge at Corsicana, a statement of facts. The statement being filed after the 10 days allowed had expired, still it will be considered by this court if appellant has shown that he has used due diligence to have it approved and signed by the judge in proper time, and that his failure was the result of causes beyond his control. Act of March 8, 1837. This is the rule directly applicable to the state of case presented by the record. The statement was not filed in 10 days. Has appellant shown such diligence as is required by this act? Let us suppose that counsel for appellant had prepared the statement by the second day after adjournment, and had gone in person to Corsicana to the judge with it, and then insisted upon his approval and signature. It is very probable that these efforts would have been successful; but, if after these endeavors he had failed, he would then be in a better position to rely upon the act last cited. The plain, simple truth is that, instead of showing compliance with the statute upon this subject, the affidavits filed by appellant present a clear case of laches. The motion for rehearing is overruled.

MOORE v. MOORE.

(Supreme Court of Texas. March 13, 1883.)

1. COSTS—PRIMARY LIABILITY OF PARTIES—INJUNCTION TO RESTRAIN COLLECTION.

Rev. St. Tex. arts. 1420, 1420a, enact that each party to any suit shall be responsible to the officers of the court for costs incurred by him, and that it shall be lawful for the clerks of the district and county courts and justices of the peace to demand payment of all costs in each and every case pending in their courts up to the adjournment of each term of said courts. Therefore no injunction to restrain a district clerk from collecting appeal costs can be sustained, as appellant is primarily liable for the costs, though successful on his appeal.

2. SAME—RECOVERY DURING PROGRESS OF SUIT—PROCEEDINGS.

On suit to restrain execution for costs of appeal, where it appeared that complainant, the defendant in another action, obtained on appeal a reversal of judgment, and on another appeal by plaintiff it was again reversed and remanded, and that, during the progress of the suit, execution was issued for the costs of complainant's successful appeal, complainant made the plaintiff in the original action a defendant to the injunction suit. *Held*, that the plaintiff was not a necessary party to such proceedings, and the complainant, having a judgment already against her for the costs of his appeal, could only proceed against her during the pendency of the original action by motion to the district court to have the costs between the parties adjusted.

Commissioners' decision. Appeal from district court, Houston county; ANSON RAINY, Judge.

H. W. Moore, the defendant in the suit of *Moore v. Moore*, brought suit to restrain F. H. Bayne, sheriff, and I. C. English, district clerk, and Susan Moore, plaintiff in the above suit, from levying execution for costs of his successful appeal during the pendency of the original suit, and for judgment against Susan Moore for the amount of same. The injunction was dissolved as to F. H. Bayne and I. C. English, but judgment was given against Susan Moore. Both H. W. Moore and Susan Moore appeal.

Nunn & Denny, for Susan Moore. *Cooper & Moore*, for H. W. Moore.

COLLARD, J. The litigation in the case at bar grew out of a suit, No. 1,896, brought for land in Houston county, by Jane Rice against H. W. Moore and others, in which George F. Moore intervened. As an effect of orders and judgments, George F. Moore became the only plaintiff in the suit. There was a judgment in favor of George F. Moore in the district court, from which the defendant, H. W. Moore, appealed to the supreme court apparently in the latter part of the year 1877. The clerk of the district court, J. C. English, under the law in force at the time (Pasch. Dig. art. 1494) made a record of the proceedings of the case, and a certified transcript of such record to be filed in the supreme court by H. W. Moore in the appeal. The cost of the record was \$94.40, and of the transcript \$94.40. H. W. Moore was successful in the appeal; the supreme court reversing and remanding the cause for a new trial. The case was afterwards appealed by George F. Moore, and a reversal was obtained, and the cause is now pending on another appeal in the supreme court. George F. Moore having died testate, his widow, Susan Moore, as executrix, took his place in the suit as plaintiff. After the case was tried in the district court on the 16th day of October, 1884, to-wit, on the 2d November, 1885, at the instance of J. C. English, former clerk of the court, an execution was sued out for his costs against H. W. Moore; the items of cost commencing March 13, 1876, and ending September 7, 1880, including the cost of the record and the transcript occasioned by his appeal, the whole bill amounting to \$211.45, credited by \$96.95 paid by H. W. Moore, leaving a balance of \$114.50 due. H. W. Moore sued out injunction to restrain the collection of the bill; because he says he is not liable for the items charged for the record of the proceedings and the transcript made in his appeal resulting in a reversal in his favor. He made Mrs. Moore, executrix, a party to the suit, and asked that, if he be held liable to English for the costs,

he have judgment over against Mrs. Moore for the amount \$188.80. The injunction was dissolved as to English and the sheriff holding the execution for collection. Judgment was rendered against Mrs. Moore for the \$188.80. H. W. Moore appealed from the judgment in favor of the officers, and Mrs. Moore appealed from the judgment against her. The court below sustained the exceptions of English to the petition for want of equity in the bill, and overruled the same as to Mrs. Moore. Plaintiff filed a trial amendment, alleging that the execution is void, because the items show they are not for cost of judgment rendered in supreme court on the 23d June, 1885, and that the supreme court reversed the judgment of the district court rendered October 16, 1884, alleged to be the same on which the execution issued; that the supreme court dismissed the case without prejudice to either party in other proceedings; and, further, that the supreme court, in 1879, rendered judgment against Susan Moore for the two items of cost. A further explanation will be necessary in order to understand the trial amendment. Before this injunction was obtained, H. W. Moore had sued out injunction to restrain the collection of execution issued in the original cause for all the costs due, and the costs that had been paid by George F. Moore, \$213.20; the whole bill amounting to \$369.11, H. W. Moore being credited with the \$96.95 paid by him. On the 16th of October that suit was tried, the injunction dissolved in part, the case was appealed to the supreme court, and on the 23d day of June, 1885, the judgment was reversed, and the case dismissed; the costs of both courts being taxed against H. W. Moore. It is not clear, but it seems the trial amendment assumes that the execution enjoined at the case at bar was issued before the judgment in the injunction suit. Such is not the case. The execution is attached to plaintiff's original petition, and made a part of the same. It recites that whereas, on the 16th day of October, 1884, Susan Moore recovered a judgment in the district court of Houston county against H. W. Moore for all costs of suit, wherein she, as executrix of George F. Moore, deceased, was plaintiff, and H. W. Moore was defendant, No. 1,896, and whereas, execution was issued on the 14th day of May, 1885, and returned on the 7th day of June, 1885, "not satisfied," the sheriff having been served with a writ of injunction; and whereas, on the 11th of August a mandate of the supreme court was filed dissolving the injunction; wherefore, etc., the sheriff is ordered to collect the costs as in attached bill. On the same day that the district court tried the first injunction suit of H. W. Moore, No. 8,183, a judgment was rendered for Mrs. Moore in suit No. 1,896 for one undivided half of the land in controversy. The execution enjoined in this case, while it evidently contains inaccuracies of date, distinctly states the style and number of the original suit for the land. It sets out the judgment therein in favor of Mrs. Moore, plaintiff, against H. W. Moore, defendant, in suit No. 1,896, and refers to former injunction suit, and its final result, by mandate of the supreme court of date the 11th of August, to show that there was no obstacle in the way of the collection of the cost at the time the execution issued. There can be no mistake of the suit in which the execution issued. The original petition clearly is to enjoin the collection of execution in suit No. 1,896, two items of which are for costs of appeal by H. W. Moore, and the trial amendment reiterates the allegation that he recovered in the supreme court the costs of the appeal against George F. Moore, and prays as in original petition. The defendants repeated their exceptions, and claimed that the amendment did not cure the defects of the original petition. The court overruled the exceptions, and defendants excepted. We are of opinion that the exceptions should have been sustained, and the cause dismissed.

It was the duty of the clerk, upon appeal by H. W. Moore, under the law in force at the time, (Pasch. Dig. art. 1490,) to make a complete record of all the proceedings of the case, and, upon application by the appellant, to deliver him a transcript of the same, to be filed in the supreme court. The costs of the

record and the transcript were incurred by the appellant in such appeal, and he was primarily liable for the same. The clerk was authorized by statute to issue execution against each party, respectively, for the costs by him incurred at the end of each term before final disposition of the case. Rev. St. arts. 1420, 1420a. Plaintiff, in stating his case, shows that the costs enjoined were incurred by him in prosecuting his appeal. He only objects to the two items in the bill charging him with the costs of the record and the transcript. In such case the clerk properly issued the execution. No injunction would lie to restrain its collection. The officer was entitled to his costs and his execution. Mrs. Moore did not sue out the execution. Plaintiff could not join her in a suit, improperly brought, in order to obtain a judgment over against her in case he lost as against the officers. He already had a judgment of the supreme court reversing the judgment in favor of her testator and predecessor in the suit, the effect of which was to make her liable to him for the costs of the appeal. The costs of the appeal, upon final determination of the suit, would, of course, be taxed against her. The judgment of reversal was, as to costs of appeal, final. *Farquhar v. Hendley*, 24 Tex. 300. He (H. W. Moore) needed no other judgment against her, and had no further rights against her until he had paid the costs. Had he paid the bill, he might, by motion in the district court, have obtained an execution against her, if the court, upon adjustment of the costs paid by each party, should find he had paid more than had been finally adjudged against him, and Mrs. Moore had paid less. His execution would have been awarded for the balance or difference in his favor. But he certainly would have no right to proceed against her, during the pendency of the suit, until he had himself paid the cost. No suit against her was required to establish his rights, even had he paid the costs. The district court has the power, upon proper motion, to determine all matters of cost due by the parties to each other during the pendency of the suit. If the practice of bringing separate suits in such cases were tolerated, it would result in a multiplicity of suits growing out of the principal suit. Such litigation would be vexatious. Rights so arising should be determined in the court where the suit is pending, and in that suit. Where a right to injunction arises in vacation, and there is no immediate remedy at law, the writ will be granted. In this case the officer was entitled to his execution against H. W. Moore for the costs incurred at his instance. Mrs. Moore was not interested in the matter at all, was not interfering with plaintiff in any way, or depriving him of any right, and no suit could be maintained against her. We therefore conclude the court below should have sustained the exceptions to plaintiff's original petition and trial amendment, and dismissed the cause. It is therefore ordered that the cause be reversed and dismissed from the district court, and that H. W. Moore pay all costs of this appeal, and of the district court in this injunction proceeding. We so report the case.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and dismissed from district court, at costs of H. W. Moore.

DODGE *et al.* v. RICHARDSON *et al.*

(Supreme Court of Texas. March 18, 1888.)

I. TRESPASS TO TRY TITLE—DISCLAIMER—FORM OF JUDGMENT.

In trespass to try title, where defendants disclaim as to all the land save that which they lay claim to by metes and bounds in their answer, and it is found that they are entitled to the land claimed, the judgment should be that the defendants recover so much of the land as they claim, and that plaintiffs recover the residue of the land sued for.

2. COSTS—UNNECESSARY APPEAL.

Where a plaintiff can have a judgment, entered in an improper form, corrected in the lower court, but, instead of making application for such correction, appeals, the costs in both courts should be paid by him.

Commissioners' decision. Appeal from district court, Jasper county; W. H. FORD, Judge.

L. J. Dodge and others brought this suit of trespass to try title, against Amos Richardson and Wesley McKee, for the south half (describing it) of the John D. Johnson league of land, situated in Jasper county. Defendants answered separately. Defendant Richardson filed his answer, disclaiming any interest in the land sued for, except as to such part of 900 acres, consisting of three several tracts, two of 200 acres each, and one of 500 acres, all described in said answer by metes and bounds, as may, upon a survey thereof, prove to be upon the south half of said league; pleading not guilty as to such part of said 900 acres, if any, as shall be upon the lower or south half of said league claimed by plaintiffs in this suit. On March 6, 1884, defendant Richardson filed his affidavit, wherein he stated that he believes the deed on file in this cause, purporting to have been executed by John D. Johnson to Edwin O. Legrand, on the 4th day of November, 1844, to be forged. Defendant McKee filed his answer, disclaiming any interest in the land sued for, except such part of 2,286½ acres of said league, in two tracts, one of 1,864 acres, the other 922 acres, both described in his answer by metes and bounds, as may upon a survey thereof be found upon the lower or south half of the league; as to such part of said 2,286½, if any, as shall be upon the lower or south half of the league pleading not guilty. The cause came to trial. A jury was waived, and the law and facts submitted to the court. Judgment for defendants. Plaintiffs appealed.

W. W. Blake and L. Norvell, for appellants. *T. W. Ford*, for appellees.

COLLARD, J. Plaintiffs (appellants) sued in trespass to try title to recover of defendants the south half of the John D. Johnson league. Defendants disclaimed all the land sued for, except such part thereof as might, upon survey, be included in the tracts claimed by them, which were described in their answers by metes and bounds. As to the land claimed, they pleaded not guilty, and one of the defendants, Amos Richardson, filed affidavit impeaching as a forgery the deed from John D. Johnson to E. O. Legrand dated the 4th day of November, 1844, under which plaintiffs deraign title. The trial judge found as a fact that the deed was a forgery, and rendered a general judgment that plaintiffs take nothing by their suit, and that defendants go hence without day, and recover their costs. The plaintiffs complain that, by such judgment, a recovery was decreed in favor of defendants for all the land sued for, whether embraced in their field-notes or not. After the disclaimer, there was no issue between the parties as to the land disclaimed. The disclaimer conceded the title to such part to be in plaintiffs, and there was nothing to try as to that. The effect of the decision was to limit the right of recovery by the defendants to the land claimed by them. It was an estoppel of record binding upon them. *Jordan v. Stevens*, 55 Mo. 361. The proper form of the judgment, after the court concluded that the deed of Johnson to Legrand was a forgery, should have been that the defendants recover the land claimed by them by metes and bounds, and that plaintiffs recover the remainder of the south half of the league sued for and described in the petition. Plaintiffs were entitled to such a recovery, so as to have a writ of possession against defendants in case they, or either of them, were in possession of the land disclaimed, without the necessity of a second suit for possession. Plaintiffs should have called the attention of the court to the informality of the judgment. Had they done so, doubtless the court would have entered the judgment in their favor, and saved the necessity of this appeal. It is true, the judgment would be construed by the

pleadings so far as defendants were concerned, and, so construed, the recovery by defendants would not include any part of the land disclaimed; but plaintiffs, as against defendants, were entitled to recover the land disclaimed, and a writ of possession, so as to obviate the necessity of another suit to dispossess defendants of any of the disclaimed land that they might be in possession of. The court, upon sufficient evidence, found the deed was a forgery. We see no reason why we should disturb the finding. We therefore conclude the court below should have given judgment for defendants for the land respectively claimed by them, and described in their answers, and in favor of plaintiffs for the residue of the land sued for and described in the petition; and, finding that plaintiffs could have had the judgment so entered by applying to the lower court, without appeal, they (the plaintiffs) should pay the costs of this appeal and of the lower court. The judgment should be reformed, and rendered in accordance with the above conclusions.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reformed and rendered.

PENNINGTON v. SCHWARTZ.

(*Supreme Court of Texas. March 13, 1883.*)

1. NEGOTIABLE INSTRUMENTS—ACTIONS ON—PLEADING—ALLEGATION OF MATURITY.

In an action on a promissory note, a petition alleging the date of the note, and that it bore interest from date, and further that defendant, though often requested, had never paid said note, or any part thereof, except \$35 heretofore mentioned, but the same remains still due and unpaid, sufficiently alleges that the debt is due, as against a general demurrer.

2. EVIDENCE—BEST AND SECONDARY—DEEDS—CERTIFIED COPIES.

Under Rev. St. Tex. art. 2857, providing that whenever a party to a suit shall file an affidavit that an original deed, duly recorded, can not be procured, a certified copy shall be admitted in evidence, a petition averring that defendant had the original deed, notifying him to produce it, or that secondary evidence of its contents would be introduced, together with a certified copy thereof, filed with such petition six months or more prior to the trial, is sufficient to render the certified copy admissible.

Error from district court, Waller county; W. H. BURKHART, Judge.

T. S. Reese, for plaintiff in error. Harvey & Browne, for defendant in error.

GAINES, J. This was a suit by the appellee against appellant to recover the amount of a promissory note, and to enforce a vendor's lien upon a tract of land for which it was alleged to have been given.

The first assignment of error is to the action of the court in overruling a general demurrer to the petition. It is here insisted that it is nowhere alleged that the note was due at the time of filing the petition. The date of the instrument is averred, and that it bore interest from date, but the time of its maturity is not stated. It is, however, alleged "that said Pennington, though often requested, has never paid said note or any part thereof, except \$35 heretofore mentioned, but the same remains still due and unpaid." Upon general demurrer every reasonable intendment must be indulged in favor of the petition. Rules of District Courts No. 17. The averment that a balance on the note was "still due" at the time of filing the petition is equivalent to saying directly that it was then due, and impliedly that it had previously fallen due. It would have been regular to have alleged the time of the maturity of the instrument sued on, and, if a special exception has been interposed pointing out the defect, it should have been sustained. But we think the petition good upon general demurrer. It being alleged that the note bore interest from date, its date, amount, credits, and rate of interest being stated, and it being also averred that it was due, it was sufficiently described to

identify it, and to enable the court to enter a judgment for the exact amount due upon it.

During the progress of the trial the plaintiff offered in evidence a certified copy of a deed from one Pressler, the payee of the note, to the defendant, which showed upon its face that the note was given for the purchase money of the land described in the petition. This copy was objected to by the defendant, but was admitted by the court. In this there was no error. The petition alleged that the original deed was in the possession of the defendant, and gave him notice to produce it upon the trial, or that secondary evidence of its contents would be offered. The certified copy was filed with the petition, but was not referred to therein. The petition was filed on the — of February, 1887, and the cause was tried on the 9th of September. The certified copy was only admissible by force of the statute, (Rev. St. art. 2257,) but we think the statute was substantially complied with. The defendant was the proper custodian of the deed, and he had notice to produce it. It was not necessary that plaintiff should make affidavit that he could not procure it. *Trotti v. Hobby*, 42 Tex. 352. The copy was filed among the papers more than six months before it was offered. Under such circumstances it is reasonable to presume that the attorney of record must have known of the filing of the copy, and that it was the purpose of the plaintiff to offer it in evidence in the event the original was not produced. *Fulton v. Bayne*, 18 Tex. 50. All the conditions of the statute which were intended to guard the rights of the opposite party having been substantially complied with, the plaintiff was entitled to its benefit.

A calculation of the interest due upon the note, and a proper deduction of the credit, shows that the judgment is excessive to the amount of about \$27.65. This was a mere mistake of calculation, and was not called to the attention of the court below. The appellee confesses the error, and remits the excess. Their being no other error, the judgment as reduced by the *remittitur* will be affirmed, at the costs of appellant. *Hoffman v. Bowen*, 17 Tex. 507.

GRIMES *et al.* v. SMITH.

(Supreme Court of Texas. March 18, 1888.)

1. WILLS—RIGHTS OF DEVISEES—TRESPASS TO TRY TITLE—TITLE TO MAINTAIN ACTION.

In trespass to try title to real estate by one claiming as residuary legatee in a will, plaintiff's title is made out by showing ownership of testator, a will devising "the balance of my estate" to a certain person, and plaintiff's identity with the person intended; the words "balance of my estate" conveying both personality and realty, and it is immaterial that the executors failed to comply with a provision of the will requiring them to sell the land and invest the proceeds in securities.

2. SAME—PAYMENT OF SPECIFIC LEGACIES—PRESUMPTION.

In trespass to try title, brought in 1884 by one claiming title to land under a will devising the land after payment of specific legacies, the facts that the will was probated in 1888, and that the last act appearing in the administration was in 1853, are sufficient to raise the presumption that the specific legacies have been paid, and the administration closed.

3. SAME—CONTRACTS OF EXECUTOR—PUBLIC LANDS—LOCATING CERTIFICATE.

In trespass to try title by one claiming as devisee of a league of land, a contract entered into by S., claiming to be executor, and a third party, for the location, by such third party, at his own expense, of a certificate covering the land in question, and a subsequent location and grant by such executor to the third party of the land in question, is not admissible in evidence; it not having been shown that S. had ever qualified as executor, and the will itself showing that, if he had qualified, he had no authority to sell the land.

4. SAME—EVIDENCE—DOCUMENTARY—AUTHENTICATION.

A certificate and copy of his record, given by a probate judge of another state concerning an administration within his jurisdiction, are inadmissible as evidence in Texas, unless offered as an examined copy produced by a witness, or accredited, as described in Rev. St. U. S. §§ 905, 906, by attestation of the clerk under seal of the court duly certified by the judge, or, in the case of records, by attestation, under seal of their keeper, duly certified by one of the officers designated by the statute.

5. SAME—RECEIPT OF EXECUTOR.

A receipt and account current dated in New York purporting to pass between an executor having administration in Connecticut and the executor having administration in Texas, is not legal evidence as to the then pendency of the administration in Connecticut.

Appeal from district court, Matagorda county; P. E. PEARSON, Special Judge.

Mott & Ballinger, for appellants.

WALKER, J. Appellee, as plaintiff in the court below, brought suit on October 8, 1884, in the ordinary form of trespass to try title, against B. R. Grimes, John Moore, D. E. E. Braman, and Y. J. Poole, to recover possession of an undivided half of one-third of a league in Matagorda county, patented to Rufus R. Smith, assignee of John H. Updike, on February 23, 1875, and on December 11, 1885, filed amended original petition describing the land more accurately, but making no other change in the suit. Appellants (defendants below) presented the following issues by their answers: (1) General demurrer; (2) plea of not guilty. The judge of the district, being related to one of the defendants, excused himself, and P. E. PEARSON was selected and qualified as special judge to try the case. A jury was waived, and the cause submitted to the court, who rendered judgment in favor of the plaintiff, and filed conclusions of fact and law. Trial was June 8, 1887. Defendants filed appeal-bond, assigned errors, and brought the case into this court by appeal. The findings of facts by the judge are as follows: "(1) The will of Smith, probated in 1838, in Matagorda, Tex., directs his executors in Texas to sell all his Texas property, and pay the money to his executors in Connecticut. The latter were directed to sell all his property in the United States, and to invest the proceeds, along with the money received from the Texas executors, in bonds and mortgages secured by real estate in New York. The Connecticut executors were directed to pay over the interest arising from such securities to the testator's mother during her life, and then to pay several small special legacies, and, after the payment of these special legacies, to pay over the balance of the estate, one-half to each, the plaintiff and Annie Smith. Plaintiff's testimony was that he never received anything from the estate in Texas. Will was probated in Matagorda county, in November, 1838. The executors in Texas qualified, and upon the inventory appears a certificate for one-third of a league issued to John H. Updike. The administration in Texas continued for 15 years or more; most of the property being sold, and the money remitted to Stephen Smith, who receipted therefor as executor of the testator in Norwalk, Conn. It does not appear that said certificate of one-third of a league was sold by the Texas executors. In 1875, a patent was issued on a duplicate of said certificate to Rufus R. Smith, assignee of John H. Updike, it having been located in Matagorda county. From these matters of fact the further conclusions of fact are presumed, to-wit: (1) That the original certificate was lost, and was never sold by the executors of Rufus R. Smith, in Texas; and (2) that, considering the great lapse of time, the special legacies had been satisfied; and (3) that the administration in Texas had been virtually closed, and the estate left vacant." These findings are not excepted to, though in argument appellants challenge their correctness to some extent.

The plaintiff's case was made out by the facts of (1) ownership, by the testator, of the Updike third league certificate, under which the land was patented; (2) the will devising "the balance of his estate," one-half to plaintiff; (3) his identity with the person of same name in the will as such devisee being shown. The words of the will "the balance of my estate" are exhaustive, passing real and personal property. It was contemplated by the testator that his executors in Texas would promptly convert all his estate in Texas into money. That they failed to do so could not defeat the clearly expressed intent

as to the disposition of the residue of the estate after satisfying the specific legacies.

The trial was had nearly 49 years after the probate of the will, and the last act appearing in evidence in the administration of the testator's estate was in November, 1853. These periods are long enough to compel the presumption that the specific legacies had been satisfied, and that administration had closed. 1 Greenl. Ev. § 39. The case of *Acklin v. Paschal*, 48 Tex. 147, in no way controverts the right of a devisee, under these facts, from asserting his rights in suit. In the case cited, a holder of a money legacy was refused the privilege of intervening in a suit by the heirs of the testator to recover property lapsed by the extinction of the corporation in taking under the will.

The matters of defense may be treated together, and their legal effect examined. The defendants offered a certificate from one George A. Davenport, purporting to be judge of the court of probate of district of Norwalk, Conn., giving a copy from his records of the admission to probate of the will, June 24, 1842, and further certifying that, at the time of giving the certificate, no other had been appointed to the administration, and that Stephen Smith had qualified and bonded as executor. The certificate is dated August 4, 1853. As offered, it was not an examined copy produced by a witness, (1 Greenl. Ev. § 508;) nor was it certified as required for authenticating records and judicial proceedings under the acts of congress, (Rev. St. U. S. §§ 905, 906.) In connection was offered a receipt dated at New York, September 1, 1853, by Stephen Smith, executor, etc., for \$456.91, from S. B. Brigham, the executor, acting in the Matagorda county court, together with an "account current" of said Brigham showing items of debits and credits, and, among the latter, the item paid to Stephen Smith, executor, etc. These were excluded by the trial judge save only as a voucher for the payment of the money. It cannot be contended that these documents were legal evidence of the pendency of the administration at Norwalk.

The defendants then offered D. E. E. Braman, one of defendants, to prove that he, under contract with Stephen Smith for an interest of one-half, had obtained duplicate certificates for two one-third league certificates owned by the estate, one of which was the Updike certificate; had, at his own expense and personal labor, had them located, and obtained patents; and, in further execution of such contract, he and Smith had made partition, by which Braman took the Updike survey, (in controversy,) and Smith, executor, the other,—producing Smith's deed for the tract in suit, signed by him as executor, and as one of the heirs of the testator. This testimony was all excluded; the certificate of the Connecticut probate judge as incompetent, and the contract for location, etc., for want of authority in Smith to make the contract. The contract for locative interest depended upon whether the locator dealt with the owner or under his authority. It was not in evidence that Smith was the qualified executor; but, had it been proved, a like want of authority to sell was in the will limiting his powers, and placing the power and duty to sell in the Texas executors. Of this want of authority, Braman, taking under an executor, was charged with, from the terms of the will. Braman then stands in the attitude of a mere locator, without a contract affecting the ownership of the certificate. It is not an open question that the equities of the locator of a land certificate, without contract with the owner, do not extend to fixing a right in the land secured by the location, or even to a lien upon it for his compensation. In *Sypert v. McCouen*, 28 Tex. 641, the rule of decision is stated by SMITH, J.: "It has been settled by this court that the locator could acquire no interest in the land simply by having located the certificate and having it surveyed. The custom of the country to give what is called a locative interest in the land to the person who located it, as compensation for his services, cannot create or furnish the terms of a contract to bind the owner of the certificate." The owner would be liable to the locator

to pay the reasonable value of the services rendered, and to pay the money expended, with interest. These equities, however great, do not affect the question of title to the land; and would not defeat the owner in an action for the land against the locator. The testimony of the defendant was properly excluded. The plaintiff having exhibited title to the half interest in the land sued for, which would not have been defeated even had the testimony offered by the defendants been admitted, the defendants have suffered no damage by its exclusion.

It is noticed that in the judgment there is an order for partition. It is probable that all the parties interested are not before the court. There being no error in the judgment, it is affirmed.

HOUSTON WATER-WORKS CO. v. KENNEDY.

(Supreme Court of Texas. March 16, 1888.)

1. CORPORATIONS—ACTIONS AGAINST—PLEADING.

Under Acts Tex. 1888, c. 101, p. 108, relating to the impleading of corporations, an allegation in the petition that "defendant is a private corporation" is sufficient without alleging by what authority it was incorporated.

2. DAMAGES—ACTIONS FOR—PLEADING—AVERMENT OF INJURY.

In an action for damages to property caused by the cutting away of an arch to make room for laying a water-pipe, the allegation that defendant "cut away a portion of the arch aforesaid to make way through same for defendant's water-pipe, and in so doing removed the support theretofore afforded to said east corner of said building, causing thereby said building to settle in the ground, away from the other portions of said building, and the walls of said building to crack and burst open in several different places, thus occasioning to plaintiff's property serious injury and damage," followed by an averment of the amount of damages, is sufficient.

3. SAME—LIMITATION OF ACTIONS—RUNNING OF STATUTE.

Where the injury complained of results from an illegal invasion of plaintiff's rights by defendant's agent, the cause of action accrues at, and the statute of limitation runs from, the date of such wrongful act, and the fact that the extent of the resulting damage does not become at once apparent is immaterial.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

Petition by John Kennedy against the Houston Water-Works Company for injury to the walls of a building caused by defendant's agent, more than two years before this suit, cutting through a supporting arch to lay water-pipe for plaintiff's tenant of an adjoining building. The injury to the walls became manifest less than two years before this suit, and defendant refused to repair it, and on trial pleaded general denial, authority for the act, and limitation. Trial without jury, and judgment for plaintiff. Motion for new trial overruled. Appeal by defendant.

E. P. Hamblen, for appellant. *Frank S. Burke* and *Henry F. Fisher*, for appellee.

STAYTON, C. J. This action was brought by the appellee to recover damages alleged to have resulted from injury to a house owned by him, which he claimed was caused by the cutting of an arch by the appellant in placing a water-pipe in the building.

The appellant was alleged to be a corporation, but how incorporated was not stated. The sufficiency of the petition in this respect was questioned by a special exception, as follows: "Because it (the petition) fails to state by what authority this defendant was incorporated, or that it was incorporated by any authorized power." The exception was properly overruled. This matter is regulated by statute, which does not require, when a corporation is defendant, that the petition should set out the charter, or allege by what authority the defendant was incorporated. Gen. Laws 1883, p. 108.

It is claimed that the injury was not sufficiently stated in the petition. The allegations were as follows: That appellant "cut away a portion of the

arch aforesaid to make way through same for defendant's water-pipe, and in so doing removed the support theretofore afforded to said east corner of said building, causing thereby said building to settle in the ground, away from the other portions of said building, and the walls of said building to crack and burst open in several different places, thus occasioning to plaintiff's property serious injury and damage." This was followed by an averment of the amount of damages resulting from the injury alleged. The averments were sufficient.

The arch was cut on July 24, 1884, and this action was not brought until September 21, 1887, but it was brought within two years after the settling of the corner of the house and cracking of the walls. The cutting of the arch and placing of the water-pipe was done at the request of a tenant of the appellee, and was at a place not open to view and was unknown to appellee until inquiry was made as to the cause of injury to the walls. It is urged that the cause of action accrued at the time the arch was cut, and that the plea of limitation presented a good defense. The cause was tried without a jury, and the defense presented by the plea of limitation was disposed of upon the facts. If it be true that the cause of action accrued at the time the arch was cut, then the action was barred. The action was one that would be barred in two years after the cause of action accrued, and the inquiry is, when did the cause of action accrue? The arch and house alleged to have been injured were the property of the appellee at the time the arch was cut. This was an act wrongful towards the owner of the property, for which an action might have been maintained as soon as the tort was committed. When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon, the act, it is held that the cause of action does not accrue until the injury is sustained. This is well illustrated by the case of *Backhouse v. Bonomi*, 9 H. L. Cas. 503, decided in the house of lords in 1861. In that case it appeared that the plaintiff was the owner of a house, under which the defendant owned and worked a mine, as he did under contiguous lands. While working the mine under the contiguous lands, the defendant removed the pillars which supported the earth above that land, in consequence of which the lands began to sink, and so continued to do during several years, until it affected the lands on which the plaintiff's house stood in the same manner. More than six years after the acts which led to the injury to plaintiff's house occurred, but within six years after his house was injured, he brought an action to recover damages, and it was held that no cause of action accrued until the plaintiff sustained injury. This rule has been asserted in many cases. If, however, the act of which the injury was the natural sequence was a legal injury,—by which is meant an injury giving cause of action by reason of its being an invasion of a plaintiff's right,—then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar. *Bank v. Waterman*, 26 Conn. 324; *Betts v. Norris*, 21 Me. 327; *Kerns v. Schoonmaker*, 4 Ohio, 331; *Gustin v. Jefferson*, 15 Iowa, 159; 2 Greenl. Ev. §§ 433, 434; 2 Add. Torts, § 1301; Wood, Lim. 178; 1 Sedg. Dam. 193 *et seq.* The notes to the elementary authorities here cited give reference to many cases illustrating the rule. The appellee's action is based on the act of the agent of the appellant through which the property of the former is alleged and proved to have been injured in July, 1884. For the injury then done to the arch the appellee could have maintained an action at once, and, having failed to do so for a period longer than two years, his action is barred. The fact that the extent of the damages he would have been entitled to recover was not so easily and clearly shown, at the time the cause of action accrued, as was this after the walls of his house were cracked, furnishes no reason why the statutory bar should not be enforced. It has been held, in cases where there was fraudulent concealment of a cause of action,

that the statutes of limitation would operate until the facts became known, or by the exercise of ordinary diligence might have been known. This rule, so far as we know, has never been applied to cases such as the one now before us; but, on the contrary, it has been steadily held that a mere want of knowledge by the owner of injury to his property does not prevent the running of the statute. 2 Greenl. Ev. § 433; 2 Add. Torts, 600; *Bank v. Waterman*, 26 Conn. 329; *Kerns v. Schoonmaker*, 4 Ohio, 331.

There being no controversy as to the facts bearing on the defense of limitation, the court below should have rendered a judgment for the appellant; and, this question being conclusive of the rights of the parties, it becomes unnecessary to consider the remaining assignments. The judgment of the district court will be reversed, and here rendered for the appellant. It is so ordered.

BYRNE *et al.* v. CASEY *et al.*

(Supreme Court of Texas. March 20, 1888.)

INSURANCE—MUTUAL BENEFIT—CHANGE OF BY-LAW—RIGHTS OF BENEFICIARY.

Where the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a benefit certificate, resulting from the insured's membership therein, who is not a member of the society, cannot complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the certificate, and receive a new one, with the consent of the beneficiary, was amended so as to omit the consent of the beneficiary; the beneficiary having no vested rights in such certificate, not being a party to the contract; nor can he recover on the original certificate, it having been surrendered, and a new one issued.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Hunter, Stewart & Dunklin, for appellants. *Templeton & Carter*, for appellees.

WALKER, J. June 10, 1887, suit was filed by the Supreme Council Catholic Knights of America against Margaret and Patrick Byrne, widow and son of Henry Byrne, and the appellees, Casey & Swasey. The object of the suit was to compel the said Margaret Byrne and the said Casey & Swasey to interplead, in order that it be determined who was owner of \$2,000, the proceeds of a certain benefit certificate or certificate of membership issued by plaintiff to Henry Byrne. No question is made upon the pleadings. Margaret Byrne claimed as the beneficiary named in the original benefit certificate, No. 6,252, issued March 3, 1882. The parties Casey & Swasey claimed under benefit certificate No. 18,648, issued September 29, 1885, direct to Henry Byrne, in lieu of his original, No. 6,252, which had been surrendered under the rules of the order. The findings of fact and law made by the trial judge supply the statement of facts. It appears that the plaintiff is a corporation under act of legislature of Kentucky. In its charter it has power "to establish and maintain a benefit fund, from which a sum not to exceed two thousand dollars shall be paid at the death of each member to his family, or be disposed of as he may direct." Article 1 of its constitution is as follows: "Section 1 This body shall be known as the Supreme Council Catholic Knights of America, with power to make its own constitution, laws, and rules of discipline, and general laws for the government of the entire order." Article 12 of the constitution of the order, in force when the first certificate was issued, is as follows: "Art. 12, § 1. This constitution and these laws may be amended, at any regular meeting of this supreme council, by a vote of two-thirds of its members present, but all amendments must be presented in writing, signed by three or more members, and presented to the secretary, who will forward them to the supreme president three months previous to the biennial meeting of the supreme council." In the face of the benefit certificate in which appellant is beneficiary, which was issued June 3, 1882, is

found the following stated provisions: "Said Supreme Council Catholic Knights of America agrees to pay to Mrs. Margaret Byrne, designated by said Henry Byrne in his application, or to the beneficiary or beneficiaries that he may hereafter have a certificate made in favor of on surrendering this certificate;" and "said Henry Byrne shall have the right, during his membership in the order, to surrender this certificate, and receive a new one, and may substitute another beneficiary or beneficiaries therein, if he so desires, by complying with the laws of the order on the subject." And there is also found there the following declaration or stipulation: "And it is expressly understood that this is a contract between the Supreme Council Catholic Knights of America and Henry Byrne alone, and not a contract between said council and the beneficiaries therein named." The law of the order upon the subject of surrendering, etc., was, at the time the benefit certificate under which appellant claims was made and delivered, as follows: "Each member may enter upon his application the name or names of the member or members of his family, or those to whom he desires his benefit paid, subject to such future disposal of the benefit as the member may thereafter direct in accordance with the laws of this order, and they shall be entered in the benefit certificate according to said direction. A member may, at any time when in good standing, with the consent of his beneficiary indorsed thereon, surrender his benefit certificate, which, with directions to whom a new certificate shall be made payable, and a fee of fifty cents, shall be forwarded by the secretary of his branch, under seal, to the supreme secretary, who shall thereupon cancel the old certificate, and cause a new certificate to be issued to such member, payable as he shall have directed." It appeared that July 1, 1885, this by-law was changed, by omitting the words "with the consent of his beneficiary indorsed thereon," and by adding: "Provided, however, that the proposition of the member applying for such change shall first be submitted at a regular meeting of his branch, and receive the approval of a two-thirds vote thereof." Margaret Byrne never was a member of the association. Appellee Casey and Henry Byrne were members, and at the same time. On receiving the original benefit certificate, Henry Byrne gave it to his wife, who kept it about one year, paying several assessments; then handed it, with other deeds, etc., to defendant Casey for safe-keeping. It was withdrawn from Casey's possession by her husband, without her knowledge or consent, and the change in the new certificate in the beneficiary was not known to her until after her husband's death. The new certificate was transferred to Casey & Swasey upon a *bona fide* indebtedness to them, and without fraud on their part. Henry Byrne died December 9, 1886. Proof of death, etc., was made. The company deposited the money in court, subject to the orders of the court upon ascertaining the ownership. Appellant insists that she had a vested right to the benefit secured by her husband's membership, by reason of the gift of it by her husband, as well as by the terms of the certificate and the by-laws in force at the date of the accrual of her rights; and that the alteration of the rules of the association could not divest or destroy her contract rights.

In *Splawn v. Chew*, 60 Tex. 584, the nature of these benefit certificates was discussed. The insurance results from membership. Each member insures his fellows, and is insured by them, by the terms of membership. Each member is charged with a knowledge of its constitution and by-laws, and is entitled to the rights and privileges conferred by them. It was a contest between the parents of a member, beneficiaries in the benefit certificate, and the children claiming under the will of the member. The court held that the beneficiaries named have no perfect or vested rights in the certificate; that the rules, as to change of the beneficiary, were for the protection of the order; and that the member, under the by-laws, could determine the course of the benefit fund against those named as beneficiaries in the certificate. See cases

cited. Also, *Manning v. Ancient Order, etc.*, 5 S. W. Rep. 385; *Society v. McVey*, 92 Pa. St. 510; *Hirschl, Fraternities and Societies*. If it be conceded, as in the case cited, "that the rules of law for the construction of ordinary policies of insurance, so far as they relate to the indefeasible rights of beneficiaries accruing previous to the death of the insured, have no application to cases" of mutual benefit companies, where it is otherwise stipulated in the contract of insurance, (60 Tex. 536,) it appearing on the face of the benefit certificate under which the appellant claims that she is not recognized as a party to the contract, and that it is subject to be surrendered under the laws of the company; that the by-laws of the company were duly amended so as to allow of the surrender of the certificate without the consent of the beneficiary, and upon other conditions; that, after such change, the original benefit certificate was surrendered, and another issued instead, and to the member himself; that, before his death, the member assigned the new certificate upon full consideration, and without fraud in the assignee taking it,—then it would follow of necessity that the original beneficiary was thereby deprived of no legal right. Nor is the result affected by her ignorance and want of assent to the surrender of the original; for, under its terms, she was deprived of contract rights, and the right to change the beneficiary by complying with the laws of the order were reserved. In making those laws, she could not participate nor exercise a veto upon the application of them to her husband's rights under his membership. In short, the company had the right to make and alter its constitution and by-laws as allowed by its charter. The rights of the members were controlled by the laws of membership, of which they are charged with notice. Much more would they limit the rights of those whose relations with the company excluded in terms the existence of any contract with the order. In determining this case, the decision in 60 Tex., above cited, is adhered to, and held, when applied to the facts of this case, to conclude the beneficiary named in the original benefit certificate. No error is found in the record, and the judgment is affirmed.

STEVENS' EX'RS v. LEE.

(*Supreme Court of Texas. March 20, 1888.*)

1. WILLS—CONTRACT TO MAKE, IN CONSIDERATION OF SERVICES—QUANTUM MERUIT.

Under an oral agreement that defendant should have certain lands at the owner's death in consideration of services to be rendered to the owner, defendant continued to perform services for eight years, when, without his fault or consent, the owner renounced the contract. *Held*, that the value of such services may be recovered on a *quantum meruit*, though the contract was within the statute of frauds, and could not have been enforced.

2. SAME—CONTRACT TO MAKE, IN CONSIDERATION OF SERVICES—QUANTUM MERUIT—ACCRUAL OF ACTION.

On a *quantum meruit* for services rendered under a parol contract that defendant should have certain lands in consideration of certain services to be rendered to the owner, where, without claimant's fault or consent, the owner renounced the contract, the value of the services for the entire period may be recovered, no cause of action having accrued until the renunciation.

3. EXECUTORS AND ADMINISTRATORS—BOARD GIVEN BY TESTATOR TO ANOTHER—RIGHT TO RECOVER FOR.

Where a testator had boarded a person free of charge, which was intended as a gratuity, the executors cannot revoke the gift, and recover the amount of such board for the estate.

4. PLEADING—FAILURE TO ACT UPON PLEA IN ABATEMENT—ABANDONMENT.

Failure to have the court to act upon a plea in abatement, when the case is called for trial, is a waiver of the plea, and it cannot afterwards be reviewed, nor can there be error in the ruling of a court upon such abandoned pleading.

5. JUDGMENT—IN EXCESS OF VERDICT—CORRECTION.

A judgment entered for a sum in excess of what the verdict authorized, should be reformed so as to bring it within the verdict.

Commissioners' decision. Appeal from district court, Grimes county; N. G. KITTRELL, Judge.

Originally, this was a suit in trespass to try title, brought June 1, 1878, in the district court of Grimes county, by Henry Lowell and his wife, Carrie Lowell, against B. F. Lee, as the party in possession, for the recovery of 56½ acres of improved land in that county, conveyed to plaintiffs by Mrs. Elizabeth L. Stevens, by deed bearing date April 30, 1878. On November 8, 1878, Lee answered, specially alleging, by way of cross-bill, after defenses to plaintiffs' action, a parol agreement by Mrs. E. L. Stevens that defendant should have certain lands of Mrs. Stevens after her death, in consideration of services to be rendered by Lee; that Stevens had renounced the contract, without his fault or consent, by conveying the land to plaintiffs; and prayed that Mrs. Stevens be made party defendant, and for judgment against her for the value of such services as he had rendered, in case the land be adjudged to plaintiffs. Mrs. Stevens was made party defendant, and filed her answer, denying allegations of defendant, Lee. Judgment was entered for plaintiffs that they have the land, and in favor of Lee for the value of his services. From the judgment for Lee, Mrs. Stevens appealed; the judgment was reversed, and the cause remanded. Stevens having died pending the appeal, her executors, J. T. Harcourt and J. N. Callaway, were thereupon substituted in her place. Verdict was again rendered for Lee, and defendants, the executors, appeal.

Gresham, Jones & Spencer, for appellants. *Hutcheson & Carrington*, for appellee.

ACKER, J. This is the second appeal in this case; the first, by Mrs. E. L. Stevens, who died pending the appeal, and this by her executors. The opinions delivered by the commission of appeals, and by the supreme court on motion for rehearing on the former appeal, have not been published, but we find them with the record. On the former trial, Mrs. Stevens interposed a plea in abatement to the cross-bill of appellee, which plea was also interposed by appellants on the last trial. It appears from the opinions, as well as the record on the former appeal, that the court did not act on the plea in abatement at the first trial. On the last trial the court overruled the plea, and this ruling is complained of as error. Appellee claimed the land under an agreement between him and Mrs. Stevens. She repudiated the agreement, and conveyed the land to Lowell, who brought suit to recover it. Lee answered, alleging a fraudulent combination and conspiracy between Lowell and Mrs. Stevens to deprive him of the land, and asking that Mrs. Stevens be made a party to the suit, which was done. The failure of Mrs. Stevens to have the court act upon the plea in abatement on the first trial was an abandonment or waiver of the plea, and appellants could not afterwards renew it. There can be no error in the ruling of a court upon an abandoned pleading. Rev. St. art. 1291. But, if this were not so, we think the allegations of the cross-bill were sufficient to give the court jurisdiction of the person of Mrs. Stevens, notwithstanding her residence in Galveston county. *Batly v. Trammell*, 27 Tex. 326.

After the judgment rendered on the first trial was reversed, and the cause remanded, appellee filed an amended answer and cross-bill setting out the agreement between him and Mrs. Stevens under which he claimed the land, alleging performance upon his part, and renunciation of the agreement by her, without his fault or consent, and praying for judgment against her for the value of his services rendered under the agreement, in the event the land should be adjudged to Lowell. Appellee offered the testimony of several witnesses to prove the agreement between him and Mrs. Stevens, to which appellants objected, upon the ground that the agreement was a contract for sale of the land, was within the statute of frauds, and could not be established by parol. The objection was overruled, and the evidence admitted, which ruling

is also complained of as error. Conceding that the agreement was simply a contract to convey land, and, being in parol, could not, therefore, support an action for specific performance, does it necessarily follow that Lee could not recover the value of his services rendered in performing his part of the agreement, as damages sustained by him in consequence of Mrs. Stevens' renunciation and disregard of the agreement? We think not. While it is laid down by high authority that a parol contract to convey land for certain services is within the statute of frauds, the same authorities hold that a *quantum meruit* will lie for the value of the services. 3 Pars. Cont. 35; *King v. Brown*, 2 Hill, 485. If the value of the land had been fixed by the agreement, the recovery could be had only for that amount, with interest. *Browne*, St. Frauds, § 126; *King v. Brown*, *supra*. But such is not the case here. It seems that no value was fixed on the property by the agreement, and the value of the services must, in such case, be established by extraneous evidence. We understand appellee's cross-bill to be an action for a *quantum meruit*, and it was evidently so considered by the trial court, for it was tried as such.

It is contended that, if appellee was entitled to recover at all, he could recover for only the services rendered within the two years next before the filing of his cross-bill, and that the court erred in refusing to give the special instruction asked to that effect, and in charging the converse of the proposition. The action to recover the value of services was filed within a few months after the renunciation of the agreement by Mrs. Stevens, and about eight years after appellee began the performance of the services for which, by the terms of the agreement, he was to receive the property. It seems that he had no cause to suspect that Mrs. Stevens would disregard the agreement until he was informed of her act of renunciation. He was in the enjoyment of the property under the agreement, and had no cause of action until her renunciation. Having continued for eight years to render the services and perform the duties, in consideration of which, by the terms of the agreement, he was to acquire title to the property, we think there is no rule of law that denies him the right of recovery for three-fourths of the services so rendered, when he had no right of action for the value of such services at the time they were rendered.

We think the court did not err in charging the jury that if they found from the evidence that Mrs. Stevens permitted Lee and his family to board with her, free of charge, and that it was intended by her as a gratuity, they should not allow her estate anything for such board. The evidence tends strongly to show that Mrs. Stevens furnished supplies for Lee and his family for over seven years, and there was nothing proven tending to show that she ever claimed or expected any compensation therefor, other than such service as Lee was rendering, and we think the jury might well find that it was intended by her as a gratuity. If so, her executors certainly could not revoke the gratuity, and recover for the estate that which their testatrix had bestowed as a gift.

Our attention is called to an error apparent of record, which consists in this: that the jury returned the verdict on the 21st day of April, 1886, for \$3,500, with interest at 8 per cent. per annum from the 9th day of June, 1879, upon which the judgment was rendered for \$5,505.60. It is insisted that the judgment was entered for \$82.95 in excess of the amount authorized by the verdict. On investigation, we find that the judgment is for \$182.95 in excess of what the verdict authorizes, and we think it should be reformed to that extent. Other assignments of error relate to the sufficiency of the evidence. The verdict seems to us to be supported by a preponderance of the evidence, and in such case this court will not disturb it. We are of opinion that the judgment of the court below should be reformed, and the amount fixed at \$5,322.65, with interest at 8 per cent. per annum from the 21st day of April, 1886, and that in all other respects it should be affirmed. As the attention of

the court below was not called to the error in the amount for which the judgment was rendered, we are of opinion that appellants should pay the costs of this appeal.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, judgment reformed and affirmed.

CUNDIFF v. McLEAN *et al.*

(*Supreme Court of Texas. March 20, 1888.*)

NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—AGREEMENT FOR NOVATION.

Defendant was indebted to W.'s estate, and the latter was indebted to S. W.'s administrator agreed with defendant that, if he procured S.'s claim against the estate, the amount thereof would be credited on the claim of the estate against defendant. Defendant thereupon gave his note to S. for \$610, who agreed that, if the note was equal to his claim against W.'s estate, the claim was to be delivered up to defendant, or, if less, to credit the amount of the note on the claim, and gave defendant an order on his lawyer for the claim. Defendant presented the order to the lawyer, who promised to deliver the claim as soon as he found it. Defendant then showed the order to the administrator, who credited the amount of the note on W.'s claim against defendant. Afterwards W.'s widow, in the absence of the administrator in the army, paid in full the amount of S.'s claim. *Held*, that there was a total failure of consideration in the note of defendant to S.

Commissioners' decision. Appeal from district court, Houston county; FELIX J. McCORD, Judge.

Action by W. H. Cundiff against William McLean and another on a note executed by defendants to Sorley, Smith & Co., who indorsed it to plaintiff. Judgment for defendants, and plaintiff appeals.

W. A. Stewart and J. R. Burnett & Hanscom, for appellant. D. A. Nunn, for appellees.

MALTBIE, J. The appellee William McLean was indebted to the estate of C. L. Wall, while the estate of C. L. Wall was indebted to Sorley, Smith & Co. James McLean was the administrator of the estate of C. L. Wall, and suggested to William McLean that, if he would procure the claim of Sorley, Smith & Co. against the Wall estate, that it should be credited on the claim that the estate held against him. William McLean, being in Galveston on 10th day of June, 1861, called on Sorley, Smith & Co. at their place of business, and entered into an agreement with them, according to the terms of which he executed his promissory note to them of that date, payable one day after date, for the sum of \$610, with John C. Miller as surety. In consideration of which, Sorley, Smith & Co. agreed with McLean that, if the note was equal in amount to their claim on the estate of C. L. Wall, they would deliver it to him, but, if their claim exceeded in amount the note that McLean had given them, they would credit the claim with the amount of the note. The claim of Sorley, Smith & Co. on the estate of Wall was then in the hands of their attorneys, Taylor & Moore, at Crockett, Houston county, for collection, and Sorley, Smith & Co., for the purpose of carrying out their agreement, executed and delivered to McLean a written order to their attorneys to complete the agreement with him. A few days afterwards McLean delivered the order to Moore, of the firm of Taylor & Moore, who made search for the claim on Wall's estate, but failed to find it. Moore promised that when Taylor, who was then absent, should return, he would again search for the claim, and carry the order of Sorley, Smith & Co. into effect. William McLean exhibited to James McLean the order from Sorley, Smith & Co. to their attorneys, and James McLean, without any request from William McLean, credited the amount of William McLean's note to Sorley, Smith & Co. on the claim that the estate of C. L. Wall held on him, but did not notify William of this fact, nor does it appear that he was ever informed of it. Soon after William Mc-

Lean called on Moore, he and James McLean went to the army, and did not return until after the war was over. William McLean made no other demand of the attorneys of Sorley, Smith & Co. for the claim on Wall's estate. James McLean before leaving for the war instructed the widow of Wall to pay off any claims against the estate that she might have an opportunity to pay. In the year 1863 Mrs. Wall, for the administrator, paid Taylor, of the firm of Taylor & Moore, as the attorney of Sorley, Smith & Co., their claim against the Wall estate. The payment was in Confederate money, and the claim receipted in full. When McLean learned this fact, he applied to Taylor for the note that he had executed to Sorley, Smith & Co., and was informed by Taylor that he did not have it. He also applied in 1865 or 1866, at the place of business of Sorley, Smith & Co., to some member of the firm, for the note, who, after looking through the papers, said it was not there. After this, William McLean paid to the Wall estate the claim that it held against him, and never in any way received any consideration or advantage on account of his note to Sorley, Smith & Co. Smith, a member of the firm, testified that Taylor was not authorized to receive Confederate money in payment of this claim, and there was no testimony to the contrary, Moore having died during the war, and Taylor in the year 1871. The facts in reference to the application of the claim of Sorley, Smith & Co. on Wall's estate to the payment of the debt of that estate against William McLean are different from what appears on the former appeal of this case, (*Cundiff v. McLean*, 40 Tex. 392;) and differ also in regard to William McLean's acquiescence, and his supposed satisfaction, in the disposition that Moore made of the matter. As the facts now appear we think it is clear that Sorley, Smith & Co. failed to perform their agreement with William McLean in reference to delivering the claim held by their attorneys on the Wall estate, or crediting the amount of McLean's note on such claim. William McLean could not have insisted that the claim held by the Wall estate against himself should be credited by the amount of the claim of Sorley, Smith & Co. against the Wall estate, such claim never having been surrendered to the administrator of the Wall estate. Nor would the Wall estate be bound by a credit entered by James McLean, the administrator, without the surrender of the claim, or any request to that effect having been made by William McLean; but, having been inadvertently entered, it would be a nullity. Nor do we think that William McLean, under the circumstances of this case, was bound to make any other or further demand for the delivery of the claim on Wall's estate that Sorley, Smith & Co. agreed should be transferred to him. The failure to do so resulted probably from the fact either that Taylor had never been informed of the transaction, or had forgotten it. Be this as it may, he was the attorney of Sorley, Smith & Co., and having accepted Confederate money from Mrs. Wall in payment of the claim, and surrendered it to the estate, such action would amount to a repudiation of the contract of Sorley, Smith & Co. with William McLean, or at least such a failure to perform their part of it as would authorize McLean to treat it as rescinded. It follows that the consideration of the note has wholly failed, without fault or negligence on the part of William McLean, and it can make no difference whether Taylor was authorized to receive Confederate money on this claim or not, or whether he sent the money that he received to Sorley, Smith & Co. Under the facts as contained in the record, we are of opinion that the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, judgment affirmed.

FIRST NAT. BANK OF HOUSTON v. ACKERMAN *et al.*

(Supreme Court of Texas. March 20, 1888.)

1. VENDOR AND VENDEE—VENDOR'S LIEN—RELEASE—SUBROGATION.

Upon sale of land on which a vendor's lien existed, the lienholder released the land from his lien by deed poll. The consideration for the sale was paid to the owner of the land; who promised to pay it to the lienholder, but failed to do so. Upon suit by a judgment creditor of such owner, whose judgment was recorded in the county where the land lay at the time the vendor's lien was created, to subject this land to the lien of his judgment, *held*, that the purchaser had become subrogated to the rights of the lienholder, and that, if the property was sold under said judgment, the proceeds should first be applied to repay him the purchase price that he gave for the land.

2. SAME.

In such case, the purchaser's intention in paying for the land being to acquire good title thereto, equity will consider that as having been done by the other party which ought to have been done, and give the purchaser the same rights as though the money had been actually applied in payment of the lien debt.¹

Commissioners' decision. Error from district court, Grimes county.

Suit by the First National Bank of Houston against Catherine Ackerman and Fanny L. Thomas, as administratrix of the estate of Hamp Thomas, deceased. Plaintiff brings error.

Goldthwaite & Ewing and *O. A. Norwood*, for plaintiff in error. *Boone & Cobbs*, for defendant in error.

MALTBIE, J. The First National Bank of Houston on 2d of April, 1880, recovered a judgment against Hamp Thomas for \$3,116.42, an execution issued within less than 12 months from the rendition of the judgment, and an abstract was duly recorded in the records of Grimes county on 12th of July, 1882. On 18th of December, 1882, J. H. Owen sold and conveyed to Thomas a tract of land of 318 acres, situated in Grimes county, for the sum of \$3,848, evidenced by their notes for \$1,282.66 each, payable in one, two, and three years, with 10 per cent. interest from date until paid, expressly reserving a lien in that deed to secure their payment. Mrs. Catherine Ackerman, one of the defendants in error, desired to purchase 56 acres out of the 318-acre tract, but would not do so unless Owen would release his lien. On 7th day of June, 1884, Owen agreed with Mrs. Ackerman that if she would pay to Thomas the sum of \$950, the purchase price of the land to be paid to him, (Owen,) that he would release his lien on the 56 acres. In pursuance of this agreement Mrs. Ackerman paid Thomas the \$950 for the land, who on the same day paid it to Owen; but Owen, under some arrangement with Thomas, allowed him to retain the money. There was no agreement between Ackerman and Owen as to how the latter should apply the money paid to Thomas. Owen, in consideration of \$950, released all of his right, title, and interest in the 56 acres sold by Thomas to Mrs. Ackerman, by an instrument in writing; and Thomas at the same time, and on the same sheet of paper, in consideration of the same sum of money, conveyed the land to Catherine Ackerman. Only one of the three notes given by Thomas for the purchase of the lease was ever paid, nor was the \$950 that Owen allowed Thomas to retain ever paid. Soon after the transfer of the land, Thomas died, and on 27th of February, 1885, Fannie L. Thomas was appointed administratrix of his estate. Subsequently, Owen made application to the county court of Grimes county for an order to sell the 318 acres of land, less the 56 acres sold to Mrs. Ackerman, for the purpose of paying the two notes executed by Thomas to secure the payment of the purchase money of the land. The order was granted, the land sold, bid in by Owen at \$2,000, and the sale duly confirmed, Owen crediting his bid on the

¹Respecting the doctrine of subrogation and its application, see *Dowdy v. Blake*, (Ark.) 6 S. W. Rep. 897, and note.

notes. The \$950 paid by Mrs. Ackerman was never credited on either note. On March 8, 1886, appellant presented to Fanny L. Thomas, for allowance, the judgment recovered by it against Hamp Thomas, and she, as administratrix of the estate of Thomas, on the same day rejected it. This suit was brought to establish the judgment against the estate of Thomas, and to foreclose its lien on the 56 acres purchased by Mrs. Ackerman. The district court established the claim as a just demand against the estate of Thomas, foreclosed its judgment lien and ordered the land to be sold as under execution, but directed that the proceeds of the sale be first paid to Ackerman to the extent of \$950,—the amount paid Thomas for the land,—and the balance, if any, be paid on appellant's demand. The release executed by Owen is as follows: "*The State of Texas, Grimes County*: Know all men by these presents that I, John H. Owen, have this day, for and in consideration of the sum of nine hundred and fifty dollars to me in hand paid or secured by Hamp Thomas, have this day released all right, title, or claim, by vendor's lien or otherwise, to the certain tract or parcel of land conveyed by Hamp Thomas this day to Mrs. Catherine Ackerman, by warranty deed herewith attached, (for further description of said tract of land reference is here made to said hereto attached deed,) this 7th day of June, A. D. 1884. JOHN OWEN." It will be observed that there is no grantee or releasee named in this instrument, but Owen knew, at the time of its execution, that Mrs. Ackerman had furnished the identical money that was paid to him, and that the intent and purpose on her part was to obtain a good title to the land; and all of the attending facts and circumstances show that the intention of the parties was not that the superior title to the land should vest in Thomas, but that it should vest in Mrs. Ackerman, upon payment of the purchase money to Owen, who held the superior title to the land for the purpose of securing the payment of the notes executed by Thomas; and immediately upon the payment of the price of the 56 acres, the release from Owen and the deed from Thomas, were delivered to Mrs. Ackerman. It was clearly the intention of all the parties, that the transfer or release—by whatever name called—from Owen should not take effect until the money was paid, and that it then should inure to the benefit of Mrs. Ackerman.

And we are of opinion that, under the facts of this case, that there never was an instant of time in which the superior title to the 56 acres was vested in Hamp Thomas, but that the release from Owen was in abeyance until the money was paid, when the right thereby conveyed vested in Mrs. Ackerman at once in accordance with the interest of the parties. As before stated, the money paid by Mrs. Ackerman was never applied by Owen to the payment of either of the notes that Thomas had given for the land, nor did she make any agreement with Owen to that effect; but, her intention in paying the money to Owen being to acquire title to the land, equity will consider that as having been done which ought to have been done in regard to the application of the money as a payment on the Thomas notes; and, if to the advantage of Mrs. Ackerman as against Owen, the payment of the money will be regarded as having been made upon the notes. 1 Story, Eq. Jur. § 64g. Appellant's lien attached to such title as Thomas had in the land, and to such title only. *Jemison v. Halbert*, 47 Tex. 181. Thomas held the land subject to Owen's superior lien to secure the purchase money. If there had been no transfer of any part of the land, appellant could have had it sold, under his judgment lien, subject to Owen's lien for the purchase money; and so it could, notwithstanding the sale to Mrs. Ackerman, have caused the entire 318 acres to be sold, subject only to Owen's lien, and to such lien as may have been assigned to Mrs. Ackerman, or to which she may have become subrogated by reason of her transaction with Thomas and Owen. It is objected that Mrs. Ackerman cannot be subrogated to the lien of Owen because no security was assigned or paid off. It is true there was no actual application of the money paid by

Mrs. Ackerman to the payments of the notes, but we think that the \$950 paid by her must be regarded as a payment on the notes unless the application of such payment would prejudice the rights of appellant; and there is no allegation or proof that the 56 acres purchased by Mrs. Ackerman was of greater value than the price paid for it, and, therefore, if applied to the payment of Owen's notes, his lien on the balance of the tract would be diminished to this extent, and the sale could work no injury to appellant. In the civil law subrogation is defined to be that change by which another person has been put in the place of a creditor, and which makes the rights of the creditor, and any securities that he holds, pass to the person who, by being subrogated to him, enters into his right. It is said to be a legal fiction by force of which an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as constituting one and the same person with the creditor whom he succeeds. These definitions have been generally adopted and followed by the courts. *Sheld. Sub. 2, 3.* In accord with these liberal principles, the fairness and justness of which commend them to the enlightened sense of all correct thinking men, Judge PARKER, in the case of *Robinson v. Leavitt*, 7 N. H. 100, 101, makes the following lucid exposition of the doctrine of equitable assignments and the right of subrogation: "The true principle," said he, "is that, when money due on a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice, and the just intent of the parties. *Starr v. Ellis*, 6 Johns. Ch. 395. Many cases state the rule in equity to be that the incumbrance shall be kept on foot, or considered extinguished or merged, according to the intent or the interest of the party paying the money; but the decisions, it is believed, will generally be found in accordance with the principle above stated. *Gardner v. Astor*, 3 Johns. Ch. 53; *James v. Johnson*, 2 Cow. 246; *Lansing v. M'Pherson*, 3 Johns. Ch. 425; *Burnet v. Denniston*, 5 Johns. Ch. 41; *Mills v. Comstock*, Id. 220; *Freeman v. Paul*, 3 Greenl. 260; *Thompson v. Chandler*, 7 Greenl. 377; *Harvey v. Hurlbert*, 3 Vt. 561; *Marshall v. Wood*, 5 Vt. 250; *Lockwood v. Sturdevant*, 6 Conn. 374; *Kirkham v. Smith*, 1 Ves. Sr. 258; *Shrewsbury v. Shrewsbury*, 1 Ves. Jr. 233; *Lord Comp-ton v. Oxenden*, 2 Ves. Jr. 264; *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186. And it makes no difference, in either of these cases, whether the party, on the payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made, and the evidence of the debt canceled. *Snow v. Stevens*, 15 Mass. 278; *Baldwin v. Norton*, 2 Conn. 165; *Barker v. Parker*, 4 Pick. 505; *Kirkham v. Smith*, 1 Ves. Sr. 258; *Wade v. Howard*, 6 Pick. 498. The debt itself may be held still to subsist in him who paid the money as assignee, so far as it ought to subsist in the nature of a lien on the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it as if it had actually been assigned. *Pratt v. Law*, 9 Cranch, 456-498. Justice has been effected between parties in this mode by overlooking the form of the transaction." The result of the authorities is stated to the same effect in 3 Pom. Eq. Jur. § 1211. And we think that Mrs. Ackerman, by reason of the transactions hereinbefore detailed, became substituted to all the rights of John H. Owen in the 56 acres of land purchased by her; and that appellant cannot be heard to complain unless it has sustained some injury on account of the purchase; that Owen and Thomas combined could not make a transfer of the land to the prejudice of the bank after it acquired a judgment lien on the land; and that appellant could have had the equities between Owen, Ackerman, and itself adjusted, and asserted its right to the same extent as if none of the land had been transferred. But this was not done, and,

if it had been, would not have benefited appellant, the court having found that at the time of the trial the land was not worth exceeding eight dollars per acre, so the entire tract would not have sold for enough to pay off Owen's two notes.

There being no error of which the appellant can complain, and the justice of the case having been attained, we are of opinion that the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, judgment affirmed.

HEFLIN v. BURNS *et al.*

(*Supreme Court of Texas. March 23, 1886.*)

1. PLEADING—AMENDMENT—AFTER TRIAL CLOSED.

Under Rev. St. Tex. art. 1192, providing that pleadings may be amended, under leave of court, before the parties announce themselves ready for trial, and not thereafter, a refusal of the court to allow plaintiff to file a replication to a plea of limitation in trespass to try title to land, showing that plaintiff's grantor was a married woman, whose coverture had continued long enough to prevent the bar, after counsel had closed their argument to the jury, was proper.

2. APPEAL—REVIEW—EVIDENCE ON POINTS NOT IN ISSUE.

In trespass to try title to land, where there was a plea of limitation, and the answer showed coverture in plaintiff's grantor before the period of limitation, and discoverture at a time within the period, not stating when the coverture ceased, there being no replication as to that fact, no benefit can follow to plaintiff on appeal from testimony in relation thereto.

3. LIMITATION OF ACTIONS—ADVERSE POSSESSION—TACKING—PRIVITY.

Where A. conveyed land to B., who bought for C., and the same day conveyed to him, C. having negotiated the purchase, and received possession from A., and there was continuous possession, under the successive parties, of a tenant of A., there is privity of title and continuity of possession, and the statute of limitations runs from the commencement of A.'s possession.

4. TRESPASS TO TRY TITLE—DEFENSE OF ADVERSE POSSESSION—INSTRUCTIONS.

In trespass to try title, where there is a plea of limitation, it is proper to charge that the deeds under which defendants claim were duly filed and recorded on certain days, stating also the date of the commencement of the action, although there is no controversy about such facts.

5. SAME—ISSUES AND FINDINGS.

In trespass to try title, where the defense was limitation and that plaintiff's conveyance was fraudulent, and the court submitted special issues, whether defendant, and those under whom he claims, had had peaceable and adverse possession for the period of limitation prior to the commencement of this action, and whether plaintiff's deed was made under a mistaken impression as to its object, produced by his agents, both of which were answered in the affirmative, such findings are sufficient, and a further general charge by the court on limitation and fraud, verdict being rendered thereon for defendant, though irregular, is not ground of reversal.

Appeal from district court, Galveston county; W. H. STEWART, Judge.

Action of trespass to try title, by Thomas S. Heflin against Thomas Burns and others. Judgment for defendants, and plaintiff appeals.

Albert N. Mills, (of counsel,) for appellant. Wheeler & Rhodes, for appellees.

WALKER, J. This is an action of trespass to try title, filed January 25, 1886, by Heflin against Burns, and his tenant, Fidelli, for a fractional part of lot 3, in block 506, in city of Galveston. The defendant Fidelli pleaded not guilty. Burns made his warrantor, Grempeynski, a party, who called into the case his own warrantor, Mrs. Iriena A. Strickland. These parties pleaded separately. Mrs. Strickland alleged that the title under which plaintiff claimed had been obtained from her sister, Mrs. Nancy J. Wells, by fraud, setting out at great length the alleged details. The substance was that she had bought the property in 1865, and that her title was defective from an imperfect privy acknowledgment of said Mrs. Nancy J. Wells, then the wife of Jackson Wells;

and that, when she made the deed to plaintiff, she did so under the false impression made by plaintiff and his agents to her, that she was curing the defect in her deed to her sister Mrs. Strickland. Burns, by second amended answer, pleaded statute of limitation of five years, and repeated the specific charges of fraud in the title of plaintiff made by Mrs. Strickland. Touching the coverture of Nancy J. Wells, this amended answer of Burns alleged that she was the wife of Jackson Wells in 1865, and that in 1885 she was a widow. The answer did not state when her coverture ceased. There was no replication of coverture by the plaintiff to the plea of limitation. On the trial special issues were submitted to the jury, with a general charge. A general verdict for the defendants was rendered. Answers to special issues supported the plea of five-years limitation, and, of the alleged fraud, that it had been participated in by the plaintiff.

The first complaint urged is that the court below refused to allow plaintiff to file his replication to the plea of limitation. The judgment entry in which the transaction is recorded shows: "The plaintiff now (March 7, 1887) asks the court leave to file an amendment or replication to set up coverture of Nancy J. Wells continuously to the 18th of June, 1884, to avoid defendant's plea of limitation; but the court, at this stage of the cause, refused to allow plaintiff now to file said amendment, because all the evidence of all the parties closed on the 4th of March, and the plaintiff's counsel made and closed his opening speech to the court and jury on afternoon of March 4th, and on morning of the 5th of March defendant's counsel commenced argument, and closed about 1 o'clock P. M. of the 5th, and now, on the morning of the 7th March, the plaintiff's counsel asks leave to file said amendment, which the court refuses," etc. This refusal was authorized, and perhaps required, by the statutory rule, (Rev. St. art. 1192:) "The pleadings may be amended, under leave of the court, upon such terms as the court may prescribe, before the parties announce themselves ready for trial, and not thereafter." Nor were the necessary facts constituting a replication to be found in the pleadings of the defendant, as the duration of the coverture, shown to have been in 1865, and to have ceased prior to 1885, is nowhere stated; nor are allegations to be found from which such fact may be enforced. No benefit can follow to parties from testimony to facts not alleged in the pleadings.

The second assignment of error attacks the charge of the court upon the plea of five-years limitation. The record shows that Strickland and wife conveyed the lot to Grempeynski, December 16, 1878. The attached certificate to the deed shows that it was duly recorded January 4, 1879. January 30, 1883, Grempeynski conveyed it to the Galveston Real Estate & Loan Company of Galveston, by deed which was duly filed for record January 31, and was recorded February 12, 1883. On January 30, 1883, the Galveston Real Estate & Loan Company, by deed, conveyed the lot to defendant Burns. This deed was filed for record February 2, and duly recorded February 12, 1883. The defendant Fidelli was a tenant under Grempeynski under an unexpired lease at the time of the sale, and he has held possession continuously after, until after suit was brought. It also appeared that the loan company bought the lot for Burns, and that Burns took possession from Grempeynski. The deed from Grempeynski to the loan company, and from it to Burns, were made the same day; Fidelli remaining in possession under the several owners. The testimony further showed adverse and continuous possession from December 16, 1878, to the institution of the suit. Payment of taxes was proved. Upon this condition of the testimony, the court charged: "If the jury believe, from the evidence, the defendant Burns, and the Galveston Real Estate & Loan Company and Grempeynski, under whom Burns claims, have been in actual, peaceable, and adverse possession of the property in controversy in person, or by his or their tenants, using and enjoying the same, paying all taxes thereon, and claiming under deed or deeds duly registered, for five consecutive years

next before the filing of plaintiff's claim, he would be barred," etc. The error complained of in this charge is "that no evidence was offered on the trial showing, or tending to show, that the Galveston Real Estate & Loan Company, under which Burns claimed, had been in possession of the property either in person or by tenant," etc. In this defense (article 3193, Rev. St.) the continuity of possession and privity in the title are both requisite, with the other conditions of hostile claims. The rule is concisely given in *Brownson v. Scanlan*, 59 Tex. 228: "Where possession is claimed under different titles, and the requisite term of occupancy has elapsed under neither, but the possession under one title must be tacked to that under another in order to make out the five years, a privity must be shown between the various titles under which possession is claimed, or its continuity will be broken, and the statute will not avail the defendant." It is shown that the loan company bought for Burns, and that the deeds to and from the loan company were of same date; that Burns negotiated the purchase from Grempeynski, and received possession from him; and the continuous possession of Fidelli under a lease was a tenancy under the several holders of title during his term. These facts show both the requisites of privity of title and continuity of possession. The charge of the court was therefore proper under the facts.

Complaint is made that the charge of the court called attention to certain documentary evidence about which there was no conflict. The clause objected to is as follows: "The limitation only begins to run from the time that Grempeynski occupied the premises under his recorded deed, if the fact be that Grempeynski did occupy the premises either in person or by his tenants under his deed from Strickland and wife. The deed from Strickland and wife to Grempeynski was duly registered on 4th January, 1879, and the deed from Grempeynski to the Galveston Real Estate & Loan Company was filed for record on 31st day of January, 1883, and was duly recorded on 12th February, 1883, and the deed from the Galveston Real Estate & Loan Company to Burns was filed for record on the 2d February, 1883, and duly recorded February 14, 1883." The charge also stated the date of the filing of the suit, January 9, 1886. Upon this act of the judge below it may be replied, citing from *Teal v. Terrell*, 58 Tex. 261, touching a like charge: "The propriety has been too frequently sustained by this court to require further comment." *Cook v. Dennis*, 61 Tex. 249.

The fifth and sixth assignments of error relate to the manner of submitting the special defenses to the jury. Counsel for plaintiff, before the court prepared its charges, requested it to so frame them as to enable the jury to find specifically upon each issue,—upon limitation and fraud. This was in effect complied with in the special issues which were submitted. Again, the charge was upon the entire cause, and required a general verdict, while it also submitted the special issues. Appellant insists that this was error, and that it devolved upon the court to require one or the other and not both forms of verdict or verdicts. While this practice is irregular, it is not cause of reversal unless injury probably followed. The special issues complained of are: "*Question No. 6.* Has Burns, and those under whom he claims by deed from the Galveston Real Estate & Loan Company and from Grempeynski, had peaceable and adverse possession of the premises, using and enjoying the same, and paying all taxes thereon, if any, and claiming under a deed or deeds, duly registered, for five years continuously next before the 9th of January, 1886? *Answer.* They have. * * * *Q. No. 14.* Was Mrs. Wells, when she made the deed to Hefin, under the belief that the purpose and object of the deed was to cure the defect in her old deed of 1865? *A.* She was. *Q. No. 15.* Was such belief of Mrs. Wells as to the object of her deed to Hefin caused by the acts or representations of Hefin's agents? *A.* It was." There was a general verdict, also, for the defendants, under the general charge on limitation and alleged fraud. Whether the general verdict will furnish any aid to the

court in supplying any fact necessary to the judgment need not be discussed in this case. The questions and answers above cited furnish grounds for the judgment either of which is sufficient. The general verdict not being needed to support the judgment, its having been rendered can do no injury, even if it was irregular practice. There is no well-defined practice as to the mode of forming and submitting special issues. It is not material whether prepared by counsel and sanctioned by the court, or whether formulated by the judge at request of counsel, or from his own motion determined by the wants of the particular case and for the furtherance of justice. Our courts uniformly hold that, when a special verdict is rendered, no other facts can be looked to in aid of the judgment. Rev. St. arts. 1329-1333, give the general outlines of the practice, and a substantial compliance with these rules will be sufficient. Sayles, Pr. Act, 95, 96, and cases cited. Also, *Jackson v. State*, 21 Tex. 675; *Darden v. Mathews*, 22 Tex. 325; *Raines v. Calloway*, 27 Tex. 685; *Collins v. Cook*, 40 Tex. 238; *Newcomb v. Walton*, 41 Tex. 318; *Yeary v. Smith*, 45 Tex. 71; *Levy v. McDowell*, Id. 224. It is not necessary that the judgment should declare upon what part of the verdict it was based. The facts of limitation and of fraud, as alleged in the pleadings, and with reference to which the verdict must be taken, are ascertained by the verdict. The judgment for defendants would follow upon either or both. There was no obscurity in the verdict. Taken with reference to the pleadings, it denoted distinct and fully-defined defenses to the action.

It was not necessary to the judgment that the date at which limitation began to run be ascertained, after it had been found that the statute had been running for five consecutive years next before the filing of the suit. So of the findings upon the charge of fraud. Referring to the pleadings, the detailed transaction found by the jury is fully known. The statutes of limitation have been construed and interpreted by our courts as curative, and as conferring rights in property which are as much entitled to protection as any other. There has been no tendency to obstruct the beneficial work of the statute by any technical strictness. Nothing is exacted but a compliance with the various requisites prescribed, to be shown as other facts under investigation. It is not necessary to the decision of this case to pass upon the sufficiency of the testimony upon the issue of fraud, as it is held that the defense of limitation of five years was satisfactorily established. The testimony of Mrs. Wells, her son, and of Leigh, the agent of plaintiff, is sufficient to show under what impression she signed the deed to plaintiff, and of his connection with it; but we do not pass upon this testimony, and the evidence introduced by the plaintiff contradicting it. The motion for a new trial only called in review the action of the court, the charge, the practice, and the verdict. The record shows no material error, or any to the injury of plaintiff. The judgment is affirmed.

WOOD v. SUTOR.

(Supreme Court of Texas. March 23, 1888.)

1. MALICIOUS PROSECUTION—EVIDENCE OF PROSECUTION—RECORD OF COURT HAVING NO JURISDICTION.

In an action for malicious prosecution, the exclusion of the transcript of the proceedings in the prosecution sued for, showing the affidavit of defendant, return of criminal information thereon, and verdict of the jury, on the ground that the court before which such proceedings were had had no jurisdiction, is improper, as the defendant is not relieved from liability by such fact.

2. SAME—TRANSCRIPT—OMISSIONS IN CERTIFICATE.

In an action for malicious prosecution upon a criminal information, where a transcript of the record of the court in which the alleged prosecution was had is introduced in evidence, an omission of the clerk to certify that the affidavit upon which the information was filed was made by defendant, and to state the officer before whom it was made, is unimportant, as the certificate is not evidence of such facts.

Edward P. Kirby.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

Action for malicious prosecution, by George W. Wood against John R. Sutor, who made affidavit before the United States commissioner that plaintiff had unlawfully taken a letter of defendant's from the post-office, upon which criminal information was returned by the United States district attorney into the United States circuit court, and plaintiff was acquitted. He introduced a certified transcript of the proceedings in the United States circuit court, which was excluded. The certificate of the clerk to the transcript stated that the affidavit therein was a true copy of the affidavit attached to the criminal information, omitting to state that it was made by defendant before the United States commissioner. Judgment for defendant, and plaintiff appeals.

Hutchison, Carrington & Sears, for appellant. *Chas. E. Dwyer*, for appellee.

WALKER, J. The questions of practice raised by appellee are not well taken. The bill of exceptions shows the precise grounds of the ruling of the court in excluding the certified copy from the United States circuit court, viz.: "That the United States circuit court had no jurisdiction, (*Ex parte Wilson*, 114 U. S. 429, 5 Sup. Ct. Rep. 935;) that the proceeding was a nullity, and the evidence offered was not competent for any purpose in this cause." The petition setting out these proceedings as cause of action, it is manifest that, without evidence of them, the plaintiff must necessarily fail; nor could the defect have been cured by any testimony whatever. The ruling of error was necessarily injurious to the plaintiff.

As to the failure of the clerk to certify that the copy was of an affidavit by defendant, etc., the failure was unimportant, unless the certificate to these matters would have been testimony. The custodian of judicial records, in giving copies, only sets them out as they appear, and so certifies. The record and the copies of affidavit and verdict speak for themselves.

Upon the effect of the excluded testimony, authorities are conflicting. Following the preponderance in them, and giving due regard to the rights of individuals suffering personal injury, we hold that one maliciously and without probable cause putting into operation the machinery of judicial proceedings, resulting in the arrest and trial of the accused, thereby incurs liability, from which, when sued for malicious prosecution, he is not relieved by the fact that the subsequent proceedings in the prosecution so begun, and in a court having jurisdiction of the subject-matter, were so irregular that, had a conviction resulted, the judgment would have been a nullity. 2 Greenl. Ev. § 449; 1 Amer. Lead. Cas. 209; 1 Wait, Act. & Def. 338, 339; *Morris v. Scott*, 21 Wend. 281; *Bauer v. Clay*, 8 Kan. 583; *Stone v. Stevens*, 12 Conn. 225; *Sweet v. Negus*, 30 Mich. 406; *Bixby v. Brundige*, 2 Gray, 129; *Hays v. Younglove*, 7 B. Mon. 545; *Turpin v. Remy*, 3 Blackf. 215; *Allen v. Greenlee*, 2 Dev. 371.

For the error in excluding the certified transcript of the proceedings in the United States circuit court, the judgment below is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. DONNELLY.

(*Supreme Court of Texas*. March 27, 1888.)

MASTER AND SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECTS—FAILURE TO REPAIR ON REQUEST.

While a section foreman on a railroad was returning from his work, on a hand car, his foot was caught by a broken tie, which had bulged or sprung up in the middle of the road, and he was thrown from the car, and injured. It appeared that he had a short time previously, in discharge of his duty to the company, reported the bad condition of his section of the road, (but did not do so through any fear of injury or accident to himself in the course of his employment,) and had demanded materials for necessary repairs, which were promised, but never furnished. Rely-

ing on such promises, he continued in the company's employ up to the time of the injury. *Held*, that this will not preclude his recovery for the injuries sustained, in the absence of any contributory negligence.¹

Commissioners' decision. Appeal from district court, Galveston county; W. H. STEWART, Judge.

Action by John Donnelly against the Gulf, Colorado & Santa Fe Railway Company for personal injuries. Plaintiff was a section foreman in defendant's employment at the time of the injury, on February 4, 1885, and had been so employed since January 2 of the same year. He first learned of the bad condition of the section after taking charge of the work. On January 18th plaintiff called the attention of the road-master, his immediate superior, to the need of ties to repair that portion of the road near the section-house, and he promised to furnish material for necessary repairs as soon as possible. On February 1st plaintiff reported to defendant that 1,000 new ties were needed for repairs on each mile of his section. Plaintiff's evidence tended to show that there were seven or eight defective ties to the rail throughout his entire section of ten miles. Plaintiff was only furnished with seven men to make repairs, and keep the section in order, which the evidence shows was an insufficient force. February 9th the road-master brought three car-loads of ties, and was requested by plaintiff to unload them at the section-house, but they were thrown off at the end of the section, the road-master saying he did not have time to move them. At noon of February 14th the road-master told plaintiff that a great deal of material would be furnished soon. On the evening of that day, as plaintiff was returning from his work to the section-house, riding on the front of the hand car, and while the car was moving slowly, and approaching the section-house, in attempting to turn around to get hold on the brake, his foot was caught by a splinter projecting from a broken tie, which had bulged or sprung up in the middle of the road, and he was thrown from the car, and sustained the injuries complained of. Plaintiff was looking out in front of him at the time, but did not see the tie, nor had he ever noticed it before. The evidence tended to show that the ties on either side of the broken tie were defective and rotten, and that the broken tie had probably been put in stiff, so as to take the pressure off of the bad ties on either side. A heavy train had passed over the road during the day, and the weight and jar of the passing train probably caused it to bulge and splinter. The evidence further shows that plaintiff was diligent and skillful in putting in material as it was furnished him, and that he relied upon the promise of the road-master to furnish needed material as soon as possible. It appeared that the track was not unsafe for use on it of a hand-car, nor that a hand car could have caused the tie to bulge and splinter. Verdict for plaintiff, and defendant appeals, assigning as errors the following charges given and refused:

The court instructed the jury as follows: "All persons engaging themselves in any employment assume and take upon themselves the ordinary risk and danger incident to the place and duties which they have undertaken to discharge, and the employer is not a guarantor of the safety of the employee; yet where an employee receives injuries in such employment by the negligence of the employer, without negligence on the part of the employee, he is entitled to recover damages for such injury; and in such case the items to be considered in measuring the damage would be pain, and medicines, and medical bills, and lost time, and lessened ability." "If you believe, from the evidence, that the plaintiff's injuries were caused by his own negligence, then he cannot recover any damages, and then the verdict should be for the defendant.

¹That an employee who knows that the materials with which he works are defective, and continues his work without objection, and without being induced by his employer to believe that a change will be made, will be deemed to have assumed the risks of such defects, see *Railway Co. v. Peavey*, (Kan.) 8 Pac. Rep. 780; *Worden v. Railroad Co.*, (Iowa,) 38 N. W. Rep. 629; *Barkdoll v. Railroad Co.*, (Pa.) 13 Atl. Rep. 82.

If you believe, from the evidence, that plaintiff's injuries were caused by the negligence of defendant, without any contributory negligence on the part of the plaintiff, then the plaintiff would be entitled to your verdict for damages for his injuries. But if you believe, from the evidence, that the plaintiff by his negligence contributed to his injuries, then he would not be entitled to any damages, even if the defendant were also guilty of negligence, and would require the verdict to be for the defendant." "Negligence is the absence of such care and prudence as persons of ordinary care and prudence exercise under similar circumstances. Negligence is a question of fact, to be determined by you from the evidence just as you determine any other fact." The foregoing charges are assigned as error because not applicable to the facts of the case, and tended to mislead the jury. The charge of the court continued as follows: "If you believe, from the evidence, that the plaintiff was injured by a defective tie on his section, and that it was his duty to repair the defects in that section, and to ascertain such defects, and repair them, and that he knew there were many defective ties in said section, and that he had been acting as such section boss on the section sufficiently long to have become acquainted with the dangers incident to said service in which he was engaged, then he must be held to have assumed the dangers and risks incident to his employment, and would defeat any recovery for his injuries, unless you believe, from the evidence, that the company's servant promised the plaintiff to furnish sufficient ties to repair the road, and that the defendant was guilty of negligence in furnishing the ties, and that such negligence in furnishing the ties was the cause of the plaintiff's injuries." This instruction is assigned as error, because it was a question of fact for the jury whether plaintiff was guilty of contributory negligence in continuing in the employment, knowing the dangerous condition of the track,—whether he, as a prudent man, should have continued under faith of the promise alleged to have been made to him,—and the charge withdrew from the jury the question of contributory negligence; and because the charge fails to state that plaintiff could only continue in the employment, under the faith of the promise made him, without assuming risks, for a reasonable length of time, and it was question for the jury to say what was such reasonable length of time; and because no such promises were testified to as authorized the charge. The court's charge continued: "If you believe, from the evidence, that the defendant failed to furnish ties, and that such failure was negligence, and that plaintiff's injuries were caused by such negligence, and that plaintiff by his own negligence did not contribute to his injuries, then plaintiff would be entitled to recover for his injuries. If you believe, from the evidence, that the plaintiff was riding on the front end of the hand car, with his feet hanging down near the ties, and that the putting himself in that position was an act of negligence, and contributed to his injuries, this would require the verdict to be for the defendant. You must not suffer your verdict to be influenced by bias or sympathy, but you should find your verdict from the evidence, under the law as given you by the court. The burden of proof is on the plaintiff to show that he was injured by negligence of defendant, without any contributory negligence on his part, and, unless the plaintiff has so shown by a preponderance of the evidence, your verdict should be for the defendant." Appellant also says the court erred in refusing special charge asked by defendant, because the same is a correct statement of the law, and would have supplied the omission in the court's charge to the effect that plaintiff could only continue in the employment under the faith of the promise made him, without assuming the risks, for a reasonable length of time. The special charge was as follows: "Even if promises were made to the plaintiff by the road-master, the plaintiff was only authorized to rely on such promises, and continue in the employment, for a reasonable length of time, and if you believe, from the evidence, that he continued in the employment longer than such reasonable length of

time, you will find for the defendant." The appellant also assigns as error the refusal of the court to the seventh instruction asked, because under no circumstances could plaintiff continue in the employment without assuming the risks, unless a reasonably prudent man would have relied on the promise. The seventh charge refused is: "If you believe, from the evidence, that after, as testified by the plaintiff, the road-master had failed to perform his promises previously made, a reasonably prudent man would not have longer relied on such promises, you will find for the defendant." Appellee also says: "The court erred in refusing to give the fourth special charge requested by defendant, because, under the facts of this case, the promises testified to by plaintiff were not sufficient to relieve him of the rule imposing the known risks and dangers of the employment upon him. The fourth charge refused is: "You are charged that the promises testified to by plaintiff to furnish material, made by the road-master, are not of such nature as to relieve plaintiff of the rule of law placing upon him the risks and dangers of the employment as defined in the charges of the court, and in finding your verdict you will disregard such promises." Appellee also complains that the court erred in refusing to give the third special charge, because plaintiff, having undertaken to repair this section of the road, which he testifies was in an unsafe and dangerous condition, he assumes the risk of such danger until such time as he could, with the number of men allowed him, and with all necessary material furnished, have placed such road in a safe condition, and could not recover on the faith of the promises unless, with the promises complied with, he could have repaired the track, and removed the danger before the time when he was injured. The third charge refused is: "If you believe, from the evidence, that plaintiff knew that the track was in a dangerous condition, and he undertook as section foreman to take charge of it, and repair such track, and that he knew, with the number of men allowed him, and with all necessary material, it would require him some time to place such track in good condition, and remove such danger, then plaintiff assumed the risk of such danger until such time as the track could have been so repaired, and such danger removed; and, if he was injured during such period of time, he cannot recover." Appellant says the court erred in refusing to give the fifth special charge asked by the defendant, because the same announces the correct rule of law requiring a party to exercise greater care where there is greater known danger. The fifth charge refused is: "If you believe, from the evidence, that the plaintiff knew of the dangerous condition of the track on his section near the section-house, and that part of the section was particularly dangerous, then, in going over such portion of the track on the hand car, he should have exercised care commensurate with the increased danger; and if you believe, from the evidence, that he failed to use such care as a reasonably prudent man would have used to look out for, and guard against, such increased danger, and that such failure contributed to his injury, you will find for the defendant."

The verdict of the jury is against the evidence, and defendant specified the following particulars in which the verdict is against and unsupported by the evidence: (1) The evidence shows that the plaintiff was fully aware of the condition of the track, and assumed all the risks and dangers therefrom; and there were no such promises testified to by plaintiff as would under the facts of the case relieve him of the assumption of the risks. (2) Plaintiff's evidence shows that the defendant had not promised him material and men for the rapid repair of such track, but, on the contrary, on the very day of the injury he was ordered to reduce his force one man. (3) The evidence of the plaintiff shows that defendant did not promise him material for the repair of the particular part of the track where he was injured, but, on the contrary, had refused to supply him with material for such portion of the track. (4) The evidence shows that plaintiff, knowing the particular danger, was not in the exercise of proper and reasonable care commensurate with such danger. (5)

The evidence shows that, had all the promises testified to by plaintiff been strictly complied with, it would have taken him several months longer than the date of the accident to have repaired the track and removed the danger.

J. W. Terry, for appellant. *W. B. Denson* and *J. R. Burnett*, for appellee.

COLLARD, J., (*after stating the facts substantially as above.*) There is a principle of law in the text-books, well supported by authority, and especially in this state by the opinion of Justice STAYTON in the *Drew Case*, 59 Tex. 12, that where an employe remains in the service of the employer after discovery of anything in the machinery, or appliances connected with the service, affecting his safety, and rendering his employment more than ordinarily dangerous, he must inform the employer, as otherwise he assumes all the risk of increased danger; and, if the employer promises to repair in a reasonable time, the servant will not be held to have waived the defects, or assumed the risks, until a reasonable time has elapsed after the promise. Beach, Contrib. Neg. 372; Shear & R. Neg. § 96. The principle is a modification of the severity of the rule that holds employes to assume all danger from defects known to them, or which might have been known by the use of ordinary care, while in the service of the employer, the general rule being that he cannot remain in the employment without assuming the risks. The appellant says that no definite promise was made to appellee to furnish material for repairing the road; that, if there was, the appellee could not remain in the service of the company longer than a reasonable time after such promise without assuming the risks known to exist; and that he should be held to have assumed the risks, under the evidence. He complains that the court refused to charge the jury, upon request of appellant, upon those phases of the case. We do not think the court should have charged the jury as requested. The law contained in the refused charges was not applicable to the case. It does not appear from the case as made that plaintiff applied for material to repair the road, or complained to the road-master of the bad condition of the road, on account of increased danger to himself in his employment as section foreman. As such employe he had charge of the track in his section. It was his duty to keep it in repair as well as he could with the material and force furnished. He was responsible for the condition of the road on his section. Finding it in bad condition,—from five to seven rotten ties to the rail that ought to have been taken out and replaced with sound ties,—he reported the facts to his superior, whose duty it was to furnish material and men to make repairs. He reported the unsafe condition of the road, and demanded necessary material to discharge his duties to the company and the public. It does not appear that he did this because he was himself in danger of being injured by the defects in the road, but because it was his duty to so report to make the road safe for trains, and to prevent wrecks of freight and passenger trains. He was only using a hand car in the discharge of his duties. It is not shown that the road was dangerous for hand cars. It is shown that a hand car could not have broken the tie. A passenger train had passed over the road while he was at work on another part of the road, and the broken tie was attributed to the passenger train. Because the plaintiff was in the discharge of his duty as a faithful servant of the company, and so ascertained the unsafe condition of the road to trains, and the liability of wrecks, and reported the facts to his superior, should he be required to quit the service of the company to avoid remote risks to himself not anticipated. Because plaintiff reasonably anticipated the happening of one event does not require him to foresee that that event will be the cause of another that might result in his injury. Shear. & R. Neg. §§ 9, 10; Beach, Contrib. Neg. § 11. If the track was in bad condition on account of the failure of defendant to furnish plaintiff with material to keep it in repairs, plaintiff would be exonerated from all responsibility for its unsafe condition. If such was the case, and the road was broken up by a

passing train, and plaintiff knew nothing of it, it having been recent, and he being at work on another portion of the road at the time, and, in passing over the place in a hand car the first time after the tie was broken, he was exercising due care, and, without fault or contributory negligence on his part, he was injured, the defendant would be liable. The evidence makes such a case, according to our own view of it. The court instructed the jury that the employe assumed all risks incident to the nature and character of his employment, and also correctly charged the law of contributory negligence as applicable to the case, and the law of defendant's liability. We do not believe that there was any occasion to give the charges asked by defendant, and refused by the court.

We conclude the verdict should not be disturbed, and there being no error in refusing charges asked by defendant, or in the charge of the court, we are of opinion the case should be affirmed.

STATTON, C. J. Report of commission of appeals examined, opinion adopted, judgment affirmed.

GULF, C. & S. F. RY. CO. v. MCGOWAN.

(*Supreme Court of Texas. March 27, 1888.*)

1. RAILROAD COMPANIES—CONSTRUCTION OF ROAD—DIVERSION OF STREAMS—PLEADING AND PROOF.

In an action against a railroad company for negligence in so constructing its road-bed as to dam up and pond water upon plaintiff's land, which lay between defendant's road and a river, causing the destruction of plaintiff's crops, the petition alleged that the crops were cultivated by plaintiff and his tenant. On the trial plaintiff was permitted, over defendant's objections, to prove the destruction of crops in which the tenant was not interested, and had no connection with the planting or cultivation of. *Held* error. The averments as to the cultivation of the destroyed crops by plaintiff and his tenant were descriptive of the cause of action, and limited the evidence to such crops only.

2. SAME.

The court also erred in permitting plaintiff to prove that defendant's road-bed was negligently constructed at a point six or seven miles above plaintiff's farm, which caused the water to flow back across the channel of the river, and on plaintiff's land, the specific acts alleged in the petition being the negligent construction of the road-bed adjoining the lands upon which the crops were growing.

Commissioners' decision. Appeal from district court, Galveston county; W. H. STEWART, Judge.

J. W. Terry, for appellant. W. B. Denson and Burnett & Hanscom, for appellee.

ACKER, J. This suit was brought by appellee to recover damages for the destruction of crops planted, cultivated, and owned, at the time of the destruction, by him and his tenant, George Moore, he having obtained by transfer Moore's claim for damages prior to bringing the suit. The crops are alleged to have been destroyed in the years 1884 and 1885, in consequence of the fault, carelessness, gross negligence, wrongful acts, and omissions of appellant in so constructing its road-bed, it being below and on the lower side of said land, as to obstruct the natural flow of the water according to the lay of the land, and to dam it up and throw it back and hold it upon said land; and had defendant provided said road-bed at that point with sufficient culverts and drains, the overflows and destruction of crops would not have occurred. It is alleged that 172 acres of crops of various kinds were destroyed in 1884, and that 145 acres of various crops were destroyed in 1885.

It appears from the testimony of appellee that the crops cultivated and owned by appellee in connection with his tenant, Moore, were, in 1884, about 70 acres, and in 1885 about 100 acres. On the trial appellee was permitted to prove, over objections of appellant, the destruction of crops by overflow in

the years 1884 and 1885, in which the tenant, George Moore, was not interested, and had no connection with the planting or cultivation of, and this is complained of as error, "because the petition did not warrant the introduction of such evidence, the petition alleging that the crops were cultivated by plaintiff in connection with his tenant, George Moore, and that at the dates of the respective overflows plaintiff and his said tenant had in cultivation the different crops mentioned in the petition, including all of them; and such allegations being descriptive of the cause of action, evidence only of crops that were cultivated by plaintiff and George Moore was admissible." It is an elementary principle that the allegations in pleadings must be sufficiently broad to admit the proof necessary to sustain the action, and evidence unsupported by the allegations cannot sustain a judgment. The proof must be according to the allegations, and if it goes beyond, the court cannot act upon and give judgment upon that evidence which goes beyond the allegations. The case made by the petition is the case that the defendant is cited to answer, and the one which, presumably, he comes prepared to answer. We find in the petition no averment indicating a purpose to charge appellant with the destruction of crops other than those cultivated by appellee in connection with his tenant, Moore. It is reasonably clear to us that the averments are descriptive of the cause of action, and that the evidence should have been limited thereto. 1 Greenl. Ev. § 68; *Hall v. Jackson*, 3 Tex. 309; *Young v. Lewis*, 9 Tex. 77; *Chrisman v. Miller*, 15 Tex. 160; *Denison v. League*, 16 Tex. 408; *Parker v. Beavers*, 19 Tex. 410; *Stachel v. Peirce*, 28 Tex. 384; *White v. Moseley*, 5 Pick. 230; *Shaw v. Wrigley*, 2 East, 500. But if there was doubt upon that point, it should be resolved against appellee, for, construing the allegations most strongly against him, it certainly does not appear that the cause of action embraces any crops not cultivated in connection with the tenant, Moore.

It is contended that the court erred in permitting appellee to prove, over objections of appellant, that the road-bed was negligently constructed, and without sufficient culverts, at a point six or seven miles above appellee's farms, which caused the water to flow back across the channel of the river and onto the land upon which the crops were growing, because the specific acts of negligence alleged in the petition were the negligent construction of the road-bed and embankment south of and adjoining the lands on which the crops were growing, and the failure to construct sufficient culverts and drains at that point. We think the evidence should have been confined to the negligent acts and omissions alleged, proof of which would have been sufficient, for we think it immaterial how the water came upon the land, if, as alleged, the crops were destroyed by the water being dammed, backed up, and held upon the land, and it was so dammed, backed up, and held in consequence of the negligent construction of the road-bed south of the land on which the crops were. The evidence was improperly admitted, and may have influenced the jury. *Price v. Railroad Co.*, 8 Amer. & Eng. R. Cas. 865; *Batterson v. Railway Co.*, 13 N. W. Rep. 508; *Waldhite v. Railroad Co.*, 71 Mo. 514.

Because of the errors indicated, we are of opinion that the judgment of the court below should be reversed and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, judgment reversed, and cause remanded.

DAVIS *et al.* v. HARWOOD.

(Supreme Court of Texas. February 21, 1888.)

EXECUTORS AND ADMINISTRATORS—INVENTORY AFTER WITHDRAWAL OF ESTATE FROM ADMINISTRATION.

In an action brought by the heirs against the administrator of the administrator of their intestate to recover on a promissory note alleged to have been given by the

administrator to the deceased, and never accounted for, proof that the estate was withdrawn from administration and turned over to the heirs; that two years afterwards the probate court ordered the administrator to file an account to include the note, which was not done, is not sufficient to establish the indebtedness, the court having no authority to order an inventory after the estate had been withdrawn from administration, though no formal order of discharge had been entered.

Commissioners' decision. Appeal from district court, Gonzales county; GEORGE MCCORMICK, Judge.

L. H. Planck, for appellants. *Harwood & Harwood*, for appellee.

ACKER, J. Appellants, heirs of G. W. Davis, deceased, brought this suit against appellee, administrator of the estate of William McCullough, to establish a note for \$1,400 as a claim against said estate. McCullough had been administrator of the estate of G. W. Davis, in De Witt county. On application of the heirs of G. W. Davis to withdraw his estate from administration, McCullough filed his final exhibit and report of said administration, which was approved by the probate court of De Witt county at the November term, 1881, and the estate then in hands of the administrator was partitioned among the heirs, except a small sum retained to pay costs. In July 1883, appellant, James Davis, filed a petition in the probate court of De Witt county to compel McCullough to file an additional inventory of the estate of G. W. Davis to include a note for \$1,400, which, it was alleged, was due by McCullough to G. W. Davis at the time of his death. At the November term, 1883, the court entered an order requiring McCullough to file the inventory of the note. This order was never complied with. McCullough died in May, 1884, and appellee qualified as administrator of his estate. It is alleged in the petition in this case that the \$1,400 note was executed and delivered by McCullough to G. W. Davis on the 31st of December, 1879, and was due one day after day of date; that McCullough became possessed of the note by virtue of his office as administrator of the estate of G. W. Davis, and mutilated it by tearing his signature therefrom; that the money due on the note had never been paid to Davis, or his estate, or to appellants. There was attached to the petition as an exhibit a certified copy of the order of the probate court of De Witt county, requiring McCullough to inventory as assets of the Davis estate a note of the description given in the petition, to which certified copy there was attached a note of that description, from which the signature had been torn. The rejection of the claim by appellee as administrator of McCullough's estate was indorsed upon the exhibit. The only evidence offered to prove the execution and non-payment of the note by McCullough was the exhibit attached to the petition, and the transcript from the probate court of De Witt county of all proceedings had in the administration of the estate of G. W. Davis. The court filed the following conclusion: "The only conclusion arrived at by the court from hearing the foregoing evidence was that the fact of the indebtedness was not proved." The three assignments of error insisted upon by appellants present the only question in the case, viz.: Did the court below err in the conclusion filed?

It is contended that the order of the probate court of De Witt county, requiring McCullough to inventory the note as assets of the estate of G. W. Davis, conclusively established his indebtedness to the estate for the amount of the note. Two years before this order was made, McCullough had been required, on application of the Davis heirs, to file his final exhibit and report of the administration of the Davis estate, and the estate was then withdrawn from administration, and the assets partitioned among the heirs. After the estate was withdrawn from administration, the probate court had no authority to require the administrator to file an additional inventory, and its order to that effect was void. If the administrator was indebted to the estate in any way for assets not reported or accounted for by him in his administration, he was liable to the heirs for such indebtedness, and they might have recovered the same

in a direct suit for that purpose. It is not alleged in the petition that appellants did not know of the alleged indebtedness of McCullough to their ancestor's estate prior to the withdrawal of the estate from administration, nor is any reason given why they did not bring their suit against him to recover the alleged indebtedness, instead of making their application to the probate court to require him to inventory the note and reopen the administration, two years after the estate had been withdrawn from administration. That such order, when made under circumstances authorizing it, is not conclusive, seems to be settled. "It appears by our statute that the inventory is not intended to be conclusive, and no distinction is made between an inventory voluntarily made and one returned under the judgment of the court as to its effect in evidence. Neither the one nor the other is conclusive. *White v. Shepperd*, 16 Tex. 168. We are of the opinion that there is no error in the judgment of the court below, and that it should be affirmed.

WILLIE, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

ROWE v. SPENCER *et al.*

(Supreme Court of Texas. February 21, 1888.)

PRACTICE IN CIVIL CASES—FILING PLEADINGS—RETURN-DAY.

Plaintiff, on the fifth day of the term, moved for judgment by default, when an attorney stated that he had been retained in the case, and asked leave to file an answer forthwith, which was refused, and plaintiffs' motion was granted. Held, that under Rev. St. Tex. arts. 1263, 1280-1282, he was entitled to the whole of the fifth day in which to file his answer, and that the judgment was erroneously entered. *Railway Co. v. Scott*, 66 Tex. 565, 1 S. W. Rep. 668, followed.

Appeal from district court, Brazoria county; W. H. BURKHART, Judge. J. Adriance Balloue, for appellant.

WILLIE, C. J. The appellees brought this suit against the appellant to recover an amount claimed to be due upon a promissory note, and to foreclose a vendor's lien upon a lot in the town of Brazoria. On the fifth day of the term to which the suit was returnable, the plaintiffs below applied for a judgment by default, no answer having been filed by the defendant. Thereupon an attorney of the court stated that he had just been employed to defend the suit, and asked leave to file forthwith an answer in the cause. The court refused the request, and entered a judgment by default for the amount due upon the note, and enforcing the vendor's lien. The appellant reserved a bill of exceptions to the action of the court in allowing the judgment by default to be taken; and, his motion for a new trial having been overruled, he appealed to this court. In *Railway Co. v. Scott*, 66 Tex. 565, 1 S. W. Rep. 668, this court, construing articles 1263, 1280, 1281, and 1282 of our Revised Statutes, held that if, upon the call of the appearance docket on the fifth day, no answer is filed, and the defendant does not ask further time, a judgment by default shall be rendered against him; but if the defendant be present in person or by attorney, and ask the remainder of the day to answer, it shall be allowed him. This construction was adopted as the only one by which the apparently conflicting provisions of these articles could be reconciled; and a session of the legislature having occurred since the decision was made, without any change in these articles being enacted, we must infer that this construction is that which the legislature intends they shall receive in the future. That case is decisive of the present. The appellant was entitled to the whole appearance-day to file his answer, if he so requested. He asked leave to file it immediately, which was denied him; and this is an error for which the judgment must be reversed. The qualification appended to the bill of exceptions does not justify the action of the court. Leave to file the answer at the proper

time, and when its filing would have prevented a judgment by default, having been refused, the defendant was not bound to attempt to file it at an improper time, and when it could have accomplished no purpose, the judgment having been already entered.

It is also assigned as error that the petition seeks foreclosure of a lien on a lot in Columbia, and the judgment forecloses a lien on a lot in Brazoria. The prayer as to the lot in Columbia is doubtless a clerical error, which can be remedied by amendment before another hearing of the cause takes place, and the assignment need not to be further considered.

For the error pointed out, the judgment will be reversed, and the cause remanded.

SHELDON v. MARTIN.

(Supreme Court of Texas. March 27, 1888.)

.. EVIDENCE—PAROL TO VARY WRITINGS—HARMLESS ERROR.

In an action where a judgment in a former suit is sought to be set off, it is no ground for reversal that parol evidence was introduced to contradict the recitals of the judgment, it having been found that the judgment had been fully satisfied.

2. INTEREST—ON JUDGMENT—RATE.

Under Rev. St. Tex. art. 2960, providing that all judgments shall bear 8 per cent. interest, except when the contract upon which they are founded bear a specified rate greater than 8 per cent., but less than the highest rate allowed by law, in which case the judgment shall bear the rate specified in the contract, it is not error, when the contract provides for 5 per cent., to render judgment on such contract for 5 per cent. until date of judgment, and 8 per cent. thereafter.

Commissioners' decision. Appeal from district court, Webb county; JOHN C. RUSSELL, Judge.

Action on a promissory note by Raymond Martin, assignee of Foudard & Yglesias, who assigned for the benefit of creditors, against Thomas C. Sheldon, who admitted execution of the note, but claimed a set-off of the balance of a judgment formerly obtained against plaintiff as assignee. On a trial to the court, the following conclusions of facts and law were found:

"(1) The defendant executed and delivered the note sued on in consideration of goods sold and delivered to him by the plaintiff, as the assignee of the estate of Foudard & Yglesias, which goods were not subject to defendant's lien, and the plaintiff is now the owner and holder of said note as assignee. (2) The defendant is the owner of a judgment foreclosing a lien on certain goods held by plaintiff as assignee of said estate, which lien was to be satisfied by sale under execution of said goods. (3) That the lien was created on property consisting of wines, liquors, and cigars, and bar-room furniture and fixtures, in possession of defendant and E. S. Foudard, each owning a half-interest; and that defendant and Foudard, in the course of trade, during a period of about ten months, disposed of a part of the goods on which the lien existed. (4) The defendant sold his interest in the property to E. Yglesias for cash, and Foudard and Yglesias continued the business together, and that for a period of about seven months, in the course of trade, they disposed of a part of the goods on which the lien existed. (5) That the plaintiff ran the business for about two months after the assignment. (6) That there are assets in plaintiff's hands, besides the note sued on, the sum of two hundred and fifty dollars; the evidence not disclosing whence the \$250 arose, whether from goods on which defendant had a lien or from other property. (7) That Foudard's interest in the goods delivered by plaintiff to defendant, on which the lien existed, amounted to \$666.62. (8) That about 3d day of December, 1883, plaintiff delivered to defendant all the property then in his possession on which defendant's lien existed."

"Conclusions of law: (1) The plaintiff should recover from defendant the full amount of the note sued on, and interest from date thereof at 5 per cent.

per annum, and interest on the judgment at the legal rate, and all costs of suit. (2) The defendant is not entitled to recover on his plea in reconvention; it not appearing that any of the goods or property on which defendant holds a lien, or any proceeds thereof, came to the hands of the creditors of the assignment."

The following assignment of errors is insisted on by defendant: "(1) The court erred in allowing the following questions to be propounded to plaintiff by his attorneys, and in allowing plaintiff to answer the same over objection of defendants, viz.: 'Did all the goods mentioned in the judgment of *Thos. C. Sheldon vs. Raymond Martin, Assignee of Foudard & Yglesias*, ever come into your possession as assignee of said firm?' To which question defendant excepted,—*First*, because plaintiff was estopped to deny said judgment; *second*, because plaintiff was, by such question and answer thereto, attempting to attack the judgment collaterally; *third*, that there were no pleadings in the cause which would authorize plaintiff to introduce any evidence denying the recitals of said judgment as to the goods which came into the hands of the plaintiff as assignee. The court overruled all of said objections, and the plaintiff answered that 'only a part of the goods and property mentioned in said judgment came into my possession as such assignee,' as shown by bill of exceptions No. 1. (2) The court erred in allowing plaintiff to introduce and read in evidence, over the objections of defendant, the deed of assignment of Foudard and Yglesias, together with its list of creditors of said firm and inventory of the property assigned, as shown by defendant's bill of exceptions No. 2. (3) The court erred in the following third and seventh conclusions of fact, viz.: '*Third*, that the lien was created on property consisting of wines, liquors, and cigars, and bar-room furniture and fixtures, in possession of the defendant and E. S. Foudard, each owning a half-interest; and that defendant and Foudard, in the course of trade, during a period of about ten months, disposed of a part of the goods on which the lien existed;' and, *seventh*, that Foudard's interest in the goods delivered by plaintiff to defendant, on which the lien existed, amounted to \$666.62;' and the conclusion of law thereof, viz.: '*Second*, the defendant is not entitled to recover on his plea in reconvention, it not appearing that any of the goods or property on which defendant holds a lien, or any proceeds thereof, came to the hands of the creditor of the assignment,'—because the evidence shows that Sheldon sold the property to Foudard on credit, retaining a vendor's lien thereon, which said lien covered all of said goods and property, and whatever interest Foudard had therein was subordinate to Sheldon's lien, and, said lien having been established by judgment against Martin, Sheldon was entitled to recover on his plea in reconvention to the value of said goods and property as disclosed by the evidence. (4) The court erred in the sixth conclusion of fact, viz.: 'That there are assets in plaintiff's hands, besides the note sued on, the sum of \$250, the evidence not disclosing whence the \$250 arose, whether from goods on which defendant had a lien, or from other property,'—because the evidence shows that a part, if not all, of said \$250 were the proceeds of the goods upon which defendant's lien was foreclosed by said judgment. (5) The court erred in the third, fourth, sixth, and seventh conclusions of fact, the same being contrary to the evidence, in this, viz.: The evidence shows that whatever interest Foudard had in said goods and property was subordinate to Sheldon, and cannot be set up by plaintiff against Sheldon under the issues made by the pleadings in this case, because the oral testimony, as well as the judgment, shows that a large amount of goods upon which defendant had a vendor's lien went into the possession of Martin as assignee, and that he has disposed of the same, and has not accounted to Sheldon for the value. (6) The court erred in allowing interest at the rate of eight per cent. per annum on the judgment, when the rate mentioned in the note sued on is only five per cent."

The judgment for \$1,280.62, recovered by Sheldon against Martin, assignee, recited the goods upon which the vendor's lien existed, their value, and that they were then in the hands of Martin; and defendant's exception is to the evidence tending to contradict this judgment. There was judgment for plaintiff to the amount of the note sued on, and defendant appeals.

W. Showalter and *J. O. Nicholson*, for appellant. *McLane & Atlee*, for appellee.

MALTBIE, J. Foudard & Yglesias were partners in the saloon business in Laredo, and, being insolvents, on or about the 30th day of July, 1883, made a deed of assignment for the benefit of such of their creditors as would accept under it, and discharge them from all future liability on account of their debts; constituting appellee, Raymond Martin, their assignee under the deed, who accepted the appointment, and qualified as prescribed by law. It appears that the appellant, Thomas C. Sheldon, was the original owner of the saloon, and that in the year 1882 he sold a half interest in it to Foudard on a credit, and retained a lien on Foudard's half of the effects to secure the purchase money; subsequently selling the other half interest to Yglesias for cash. After this, Foudard & Yglesias carried on the business as partners until they assigned to Martin. On the 14th of November, 1883, Sheldon recovered of Martin, as assignee, a judgment for \$1,280.62, foreclosing the vendor's lien on the effects previously sold by Sheldon to Foudard, which consisted of saloon fixtures, furniture, and stock of liquors and cigars, etc. The judgment described the several articles upon which the vendor's lien existed, recited their value, and also that they were then in the possession of Martin. About the 1st of December, Sheldon and Martin, in company with a clerk of the defendant firm of Foudard & Yglesias, made a thorough inspection of the effects of the firm, and separated and set aside all articles that could be found, the "lien upon which had been ascertained and foreclosed in the above-mentioned judgment." Martin turned over all of these goods to Sheldon; he executing a receipt to Martin for them at the estimated value of \$666.63. Martin claimed, on the trial, that the goods so delivered were of double that value; the amount stated in the receipt only representing the value of Foudard's interest in the goods, and claiming, further, that the goods delivered were accepted and received in full satisfaction of Sheldon's judgment. Sheldon claimed that the goods transferred to him were only received as a credit on his judgment, and were not received or accepted as a satisfaction of it; and that the sum stated in the receipt represented the full value of the goods. Upon this issue the court below found in favor of the assignee. Soon after the above transaction, the assignee sold to Sheldon the remainder of the bankrupt stock of Foudard & Yglesias for the sum of \$817.62. Upon this portion of the stock, Sheldon had no lien. In consideration of these goods, Thomas C. Sheldon executed his note for the above amount to Raymond Martin, assignee of Foudard & Yglesias, to bear interest at the rate of 5 per cent. per annum till paid. On 12th of September, 1884, Raymond Martin, as assignee, instituted suit on the note, to which Thomas C. Sheldon pleaded the aforesaid judgment as a set-off, and in reconvention of the plaintiff's demand; to which plaintiff replied by a general denial, and also by plea of accord and satisfaction by reason of the facts before stated. The trial was by the court without a jury, and resulted in a judgment in favor of the plaintiff for the amount of the note sued on, with interest at 5 per cent. per annum to the date of the judgment, and at the rate of 8 per cent. from that time. It was shown that the only assets belonging to the estate was the sum of \$250 in cash, besides the note sued on, and that there were consenting creditors of the estate.

It is insisted that there was error in allowing Raymond Martin to testify that "only a part of the goods and property mentioned in the judgment in

favor of *Thos. C. Sheldon vs. Raymond Martin, as Assignee*, ever came into his possession as such assignee." It may be conceded that it was not permissible to thus contradict the recitals of a judgment of a court of competent jurisdiction. But, under the facts of this case, the ruling was immaterial, and affords no ground for a reversal of the judgment,—the court having found that there was an accord, and that the judgment was fully satisfied; and we think the evidence justifies the finding. *Bohunan v. Hans*, 26 Tex. 467; *Campbell v. Wilson*, 6 Tex. 398. This applies also to the second assignment of error. The balance of the assignments, except the sixth, question the sufficiency of the evidence to authorize the conclusions of fact found by the court. We are of opinion that the evidence is ample for this purpose; but, as no good would result from a discussion of it, we abstain from doing so.

The sixth assignment asserts that there was error in fixing the rate of interest, after the rendition of the judgment, at 8 per cent. per annum; the interest prescribed in the contract being 5 per cent. We think that a proper construction of article 2980¹ of the Revised Statutes requires judgments to be rendered in every instance fixing the interest at the rate of 8 per cent. per annum, except when the contract upon which the judgment is founded bears interest at a greater rate than 8 and not to exceed 12 per cent. per annum, and that in all other cases, whether a rate is prescribed in the contract or not, the judgment should bear interest at the rate of 8 per cent.

There being no error in the judgment prejudicial to appellant, it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, judgment affirmed.

GALVESTON, H. & S. A. RY. CO. v. FABER.

(Supreme Court of Texas. February 21, 1888.)

MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—INCOMPETENCY OF FELLOW-SERVANT.

In an action against a railroad for the death of a fireman in a collision caused by a misplaced switch, it appeared that a brakeman had properly placed the switch, and one train had passed safely by shortly before the collision. Evidence for plaintiff tended to show that this brakeman had proved careless and incompetent on other occasions, but not on the occasion of the collision. Plaintiff did not prove carelessness on the part of any one else, nor that the switch could have been misplaced by the train which passed. *Held*, that the court should have charged the jury to find for defendant.²

Appeal from district court, Colorado county; A. H. PHELPS, Judge.

Action by Augusta Faber against the Galveston, Houston & San Antonio Railway Company for damages for the death of her son, a brakeman in de-

¹Rev. St. Tex. art. 2980. All judgments of the several courts of this state shall bear interest at the rate of 8 per cent. per annum from and after the date of the judgment, except where the contract upon which the judgment is founded bears a specified interest greater than 8 per cent. per annum, and not exceeding the highest rate of conventional interest permitted by law, in which case the judgment shall bear the same rate of interest specified in such contract, and after the date of such judgment.

²In the absence of statute, the negligence of a co-servant is one of the risks of employment assumed by an employee, and for which the master is not liable. *Thompson v. Railway Co.*, 14 Fed. Rep. 564. The exemption of the master from liability for injuries resulting to a servant from such negligence is held to continue, though the negligent employee may be the superior in rank of the injured one in the same general undertaking, unless he occupies the place of vice-principal. *Railway Co. v. Adams*, (Ind.) 5 N. E. Rep. 187. But in the United States courts the master has been held liable for injuries incurred by an employee through the negligent exercise of authority conferred upon a co-employee. *Mason v. Machine-Works*, 28 Fed. Rep. 228. As to who are fellow-servants, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note.

defendant's employ. This is an appeal from the second trial, in which plaintiff recovered judgment for \$5,000.

W. N. Shaw, for appellant. *Board & Thompson*, for appellee.

GAINES, J. This case was before this court at the Galveston term, 1885, and is reported in 63 Tex. 344. The judgment theretofore rendered in the lower court was then reversed on the appeal of the present appellant. On the second trial in the district court, the case was submitted to the jury on the statement of facts prepared and filed for the purposes of the former appeal. We have, therefore, precisely the same case for adjudication, except in so far as it has been changed by the charge of the court. Now, as before, the charge is assigned as error, and in this appeal it is also complained that the court erred in refusing to instruct the jury to find a verdict for the defendant. Upon a second or other subsequent appeal, this court adheres to its former ruling unless clearly erroneous. *Bomar v. Parker*, 68 Tex. 435, 4 S. W. Rep. 599. We see no reason to doubt the correctness of the former opinion, and it must be taken as the law of the case. That opinion holds that the charge of the court then under consideration was erroneous because it authorized the jury to find for the plaintiff in the event they found that the death of her son was caused by the negligent conduct of Riley Mason; that he was an incompetent brakeman; and also that this was known to the company's officers. The suit was brought by plaintiff to recover damages for the death of her son. He was a fireman on a train on defendant's road, which had been side-tracked at Wælder to await the passing of another train. On account of a misplaced switch the expected train, as it approached the station, took the siding, and, colliding with the waiting train, occasioned the death of the son. The only witnesses as to the cause of the accident were the engineer and a brakeman on the latter train, both of whom were introduced by plaintiff. The engineer testified that after his train had passed the station, and backed upon the side track, he saw Riley Mason throw the switch to its connection with the main track, and properly fasten it, as it was his duty to do. He knew this was done, because within a short time thereafter a train running on the main track passed over the switch in safety, which could not have been done unless it had been properly placed. The brakeman, Charles McVey, also testified to the passage of the train on the main track a few minutes after the train on which the accident had occurred had moved upon the siding. This is a most important fact; and, though capable of being disproved if not true, no attempt was made either to controvert the fact itself, or to rebut the almost conclusive inference from it that the switch was properly placed when Mason left it. The engineer testified to acts of Mason on other occasions upon the same trip, tending to show his incompetency in handling the switches. McVey also swore that he had previously left a switch open at Luling. There was no evidence whatever tending to show that the accident was brought about by the carelessness or neglect of any other person. The plaintiff was bound to show that the accident occurred through the neglect or incompetence of some one of the persons employed about the train, all of whom were her son's co-employees, and that the company did not exercise due care in his selection. It follows, therefore, that if it was error, as held in the former opinion, to submit to the jury the question of Mason's negligence and incompetency, it was equally erroneous to submit to the jury the question of the negligence and incompetency of the company's servants in general. In other words, if plaintiff failed to make out a case predicated upon Mason's negligence, she failed to make a case at all, and the court should have instructed the jury to find for the defendant. In *Toomey v. Railway Co.*, 8 C. B. (N. S.) 146, it is said: "A *scintilla* of evidence, or a mere surmise, that there may have been negligence on part of the defendants clearly would not justify the judge in leaving the case to the jury. There must be

evidence upon which they might reasonably and properly conclude that there was negligence." This rule is expressly followed in several cases, and is sustained by the weight of authority. *Beaulte v. Portland Co.*, 48 Me. 291; *Lehman v. Brooklyn*, 29 Barb. 234; *Railway Co. v. Jackson*, 3 App. Cas. 193; *Jewell v. Parr*, 13 C. B. 916; *Ryder v. Wombwell*, L. R. 4 Exch. 38; *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Whart. Neg.* § 421n; 2 *Thomp. Neg.* 1237. We perceive the difficulty under which the plaintiff labored in having to make out her case by the testimony of the employes of the defendant. The accident occurred about 4 o'clock in the morning,—an hour when no one was likely to be present except those engaged in operating the train. The testimony of the engineer shows that Riley Mason properly adjusted the switch. In the absence of some countervailing proof, neither the court nor jury were warranted in disregarding his evidence. Being plaintiff's witness, it must be assumed that the engineer saw Mason fix the switch, and believed that he had properly placed and fastened it. It may be that if the switch had been properly placed, and not properly fastened, a train could have passed over it in safety, and may, by the motion of its hindmost car, have changed the switch to the side track, so as to turn a train moving in the opposite direction from the main track. But this could not be known to the court or jury of their own knowledge. We do not say that if it had been proved; by the testimony of experienced persons, that such a result may have followed from the switch's being properly placed, but left unfastened, the jury would not have been warranted in finding that the engineer was mistaken as to the fastening, and in concluding from this the accident was caused by the negligence of Mason.

Because the court erred in not charging the jury to find for the defendant, the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. MANNEWITZ.

(Supreme Court of Texas. February 21, 1883.)

1. NEGLIGENCE—CONTRIBUTORY—INSTRUCTIONS.

In an action against a railroad for personal injuries, defendant claiming that plaintiff's injuries were not due to the railroad accident, an instruction to the jury stated, in substance, that the burden was upon plaintiff to show the extent of his injuries, and that he could recover only for such injuries as the jury believed, from the evidence, were the result of the accident, and not of any other cause. *Held*, that a verdict for plaintiff which was in accordance with the weight of evidence will not be disturbed on the ground that such instruction did not sufficiently state that the evidence on both sides should be considered.

2. SAME—EVIDENCE.

In an action against a railroad for personal injuries, plaintiff's physician testified that plaintiff could not be kept in bed, as moving about relieved his sufferings, but that perfect quiet would be the best treatment. There was no positive evidence that plaintiff did not follow his physician's directions, or that he knew that moving about was injurious. *Held*, not sufficient evidence to submit the question of plaintiff's negligence in care of his injuries to the jury.

3. DAMAGES—FOR PERSONAL INJURIES—PLEADING.

In an action for personal injuries, an allegation in the petition that plaintiff was "injured in his spine, chest, head, and limbs" is sufficient to embrace a heart disease, or an aneurism of the blood vessels situated in the chest.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Action by A. N. M. Mannewitz against the Gulf, Colorado & Santa Fe Railroad Company for personal injuries. Plaintiff recovered judgment, and defendant appeals. The third assignment of error is the refusal of the court below to give the following instruction: "It not being alleged in the petition that the heart disease, if any, or the aneurism of the heart or of the aorta, if any, were caused by the railroad accident, you cannot regard the same, and shall allow plaintiff no damages on account of the same."

Gresham, Jones & Spencer, for appellee.

GAINES, J. This was an action for personal injuries brought by appellee against appellant. Appellant's statement concedes that the evidence was sufficient to warrant the verdict, but it is complained that the court erred in refusing instructions asked on behalf of the defendant in reference to the amount of damages plaintiff was entitled to recover. It is insisted, under the first assignment of error, that the court's charge upon the burden of proof as to the extent of plaintiff's injuries was incomplete, and that therefore the court erred in refusing a special instruction asked for defendant to the effect that the burden was upon plaintiff to show, by a preponderance of evidence, that the disorders with which he was afflicted were the result of the railroad accident. The theory of the plaintiff was that he was suffering from "spinal concussion" caused by the accident; but that of defendant was that his sufferings proceeded mainly, if not wholly, from a disease of the heart or blood vessels which had their origin in some other source. Upon this question the evidence was very conflicting. Such being the issue made by the testimony, the court in its general charge gave the following instruction: "The burden of proof is on the plaintiff, Mannewitz, to show the extent of his injuries which were caused by the turning over of the car. If you believe, from the evidence, that the plaintiff, Mannewitz, had heart disease, or other complaint, at the time of the turning over of the coach, then he would not be entitled to recover damages for such heart disease, or other complaint, but would be confined to damages only for his injuries which were caused by the upsetting of the coach. If you believe from the evidence that the plaintiff, Mannewitz, is suffering from any disease in the head or back, yet unless you believe, from the evidence, that such disease of the head or back was caused by the overturning of the coach, the plaintiff, Mannewitz, would not be entitled to damages for the disease of the head or back. The plaintiff is entitled to recover damages for whatever injuries you believe, from the evidence, he has sustained by the overturning of the coach, if you believe, from the evidence, that the overturning of the coach was caused by the negligence of the defendant company or its employees." It is contended that this instruction is calculated to lead the jury to believe that if the plaintiff showed, by the evidence of his own witnesses, that his condition was the result of injuries received in the railroad accident, they should find accordingly, without taking into consideration the evidence of defendant, and weighing all the testimony together. But we do not so consider it. The jury were told that the burden was upon the plaintiff "to show the extent of his injuries;" that he was entitled to recover only for such injuries as the jury "believed, from the evidence, he had sustained by the overturning of the coach;" and, in effect, that he was not entitled to recover for any disease that proceeded from any other cause. This means that the jury were to consider the whole evidence, and not merely that introduced for the plaintiff, and was not calculated to mislead any competent juror. If the finding had been against the weight of the testimony, the criticism upon the charge may have been entitled to more consideration. But, taking the whole evidence together, it satisfactorily sustains the verdict, and leaves us no reason to think the jury were misled by the charge of which appellant complains. A charge that the plaintiff was entitled to recover for such injuries as he had shown, by a preponderance of evidence, to be the result of the accident, would have been favorable to him, and the omission of such a charge was therefore not prejudicial to the defendant.

A party who receives an injury resulting from the negligence of another, and who neglects to use the proper means to effect a recovery, cannot recover for the aggravation of his injuries accruing from such neglect. This is but a branch of the doctrine of contributory negligence. In this case it appeared that plaintiff was injured on his way to his home in Abilene. After the ac-

cident he continued his journey to Temple, and from that point took the next train to his home. Upon his arrival he placed himself under the treatment of a physician, and, it is to be inferred, continued under such treatment for several months. His attending physician testified: "It was impossible to confine Mr. Mannewitz to his bed. He averred that slight exercise relieved him of pain. This, I believe, is characteristic of the disease. He has been such an active, stirring man that it was impossible to control him." And again: "Mr. Mannewitz did not observe the strict quietude when he was first injured that he ought to have done. His pain made him restless and uneasy. How much harm his restlessness has done him I can't say, but I believe confinement to his bed would have been beneficial." Other physicians testified to the effect that, in case of spinal concussion, rest and quiet were proper treatment, and were very important in order to secure a recovery. The defendant requested the court to give the following special instruction: "If you find, from the evidence, that after the plaintiff received his alleged injuries in the railroad accident, by the exercise of reasonable care and caution, and by following the directions of his doctor, he could have been cured, then you will and can find damages only to the time when you believe he could have been so cured." The refusal of this charge is also assigned as error. It seems to us that the charge assumes certain facts which there was no evidence to establish. But, waiving this, the question is, was it proper for the court to give a charge upon this subject? The attending physician who testified in the case was a witness for the plaintiff, but his testimony indicates that he was willing to state any fact within his knowledge pertinent to the case. If defendant wished to make an issue upon the matter of plaintiff's conduct after the injury as affecting his recovery, by proper interrogatories to the witness, it might have proved whether plaintiff followed his physician's directions or not. As his testimony stands, incidental remarks merely create a surmise that the plaintiff may not have followed his treatment. The witness does not say that he was told of the importance of keeping quiet, or that he knew that moving about would retard his recovery. The physician does state, however, that motion removed his pain. One who has received a physical injury at the hands of another cannot be expected to know in every instance the most prudent thing for him to do, and should not be held negligent because his sufferings are such that they compel him to a course not favorable to his recovery. There is evidence here that plaintiff did not pursue the most beneficial course for the treatment of his injuries, but there is a mere conjecture that he knew of this, or had been seriously advised as to the proper course to pursue. It requires something more than a mere *scintilla* of evidence of a fact in order to authorize the question of its existence to be submitted to the jury. *Railway Co. v. Faber, ante*, 64, (present term.) and cases there cited. We think the court did not err in refusing the instruction.

Neither is the third assignment of error well taken. The petition did not undertake to give a specific catalogue of the plaintiff's injuries. It alleged, however, that he was "injured in his spine, chest, head, and limbs," and this is sufficiently comprehensive to embrace a heart disease, or an aneurism of the blood vessels situated in the chest. The special instruction under consideration would have excluded such diseases from the computation of the damages, although the jury may have believed that they were produced by the injury. The court did not err in refusing the charge.

There is no error in the judgment and it is affirmed.

GALVESTON, H. & S. A. RY. CO. v. COOPER.

(Supreme Court of Texas. February 21, 1888.)

1. CARRIERS—OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a passenger on defendant's train, at midnight got off the train at a water-tank, and, in attempting to get on, was run over. *Held*, that the court should

have charged that if it was not a regular passenger station, and defendant's servants in charge of the train knew that no passenger was to get on or off there that night, and did not know that plaintiff got off, it was for the jury to determine whether defendant was guilty of negligence which was the proximate cause of plaintiff's injury, and also should have defined "proximate cause."

2. NEW TRIAL—MISCONDUCT OF COUNSEL.

In a suit against a railroad for injuries, plaintiff's counsel said to the jury, "You ought to deal severely with these bloated corporations, that can run their road right through a man's house or yard," and the court did not control him, and the jury found a verdict for plaintiff "for amount sued for," (\$20,000.) *Held*, that it was reasonably evident the jury were influenced by the improper language, and the court should have given a new trial.¹

Commissioners' decision. Appeal from district court, Fort Bend county; W. H. BURKHART, Judge.

J. C. Cooper filed suit in the district court on March 15, 1886, against the Galveston, Harrisburg & San Antonio Railway Company for personal injuries alleged to have been caused by the negligence of the defendant railway company, and claiming \$20,000 as actual damages. The case was tried at the October term, 1886, before a jury, who awarded the plaintiff, Cooper, \$20,000, the sum prayed for, as actual damages. Defendant's motion for a new trial was overruled, and it appealed. The court refused the fourth section of third special charge asked by defendant, which is as follows: '*Fourth*. If the plaintiff's case shows any want of ordinary care on his part under the circumstances of it, even the slightest, contributing in any degree, even the smallest, as a proximate cause of the injury, he cannot recover of defendant company; and plaintiff's negligence, if there was any, is the proximate cause of the injury, when, without such negligence, the injury would not have been inflicted.' It is for you to determine, under all the circumstances in the case, whether or not the railroad officers in charge of the train acted with all possible care on the occasion, considering their duty as carriers of passengers, and considering the time, place, and surrounding conditions; and also whether or not plaintiff acted without ordinary care himself, and, if he did, whether or not his own negligence directly caused his injury, or even directly helped to cause it. And, if the train officers acted with all possible care under the circumstances, then you will find for defendant; or if Cooper's own negligence directly caused, or contributed to cause, his own injury, and if the railroad officers, in the usual and customary discharge of their duties did not know of Cooper's negligence (if you find he was negligent) in time to prevent the injury by using ordinary and reasonable care themselves, in either of these cases your verdict should be for the defendant company. The same amount of care by the railroad officials is not required at crossings, water-tanks, and the like, where trains stop for railroad purposes merely, as at regular passenger depots."

Gresham, Jones & Spencer and *Mitchell & Mitchell*, for plaintiff. *Pearson & McCamly*, for defendant.

ACKER, J. Appellee brought this suit to recover damages for personal injury alleged to have been caused by the negligence of appellant's agents and servants. The injury necessitated amputation of the leg between the knee and ankle. Appellant presented a general demurrer to the petition, which was overruled by the court, and this ruling is assigned as error. The petition alleges that the injury was caused by the negligence of appellant's servants in starting the train with a sudden jerk, without notice or signal of any kind; states with much particularity the manner in which the injury occurred, and alleges that it was without any fault or neglect on the part of appellee. We think the petition sufficient, and that the court did not err in overruling the demurrer.

¹See note at end of case.

It appears that Randon, the place at which appellee was injured, was not used by the company as a regular station, but was recognized only as a flag station; that is, a station at which the trains did not stop unless signaled to do so by some person there waiting to take passage, or where there was a passenger aboard for that place. No station-master, ticket office, or telegraph office was kept there; but there was a tank there, at which trains frequently stopped to take water. Appellee was injured about midnight. The train had stopped at the Randon tank to take water, and he got off on the platform. As the train was in the act of starting, he attempted to enter the car, and was injured. There was no person there to take passage, nor was there a passenger aboard to disembark there, and this was known to the train officials, but they did not know that appellee had gotten off the train there. Under this state of facts, we think the court should have given the jury a charge embodying the ideas suggested by the last special instruction asked by appellant, and refused by the court, to the effect that if they believed, from the evidence, that Randon was not a regular passenger station, and that appellant's servants in charge of its train knew that no passengers were to get on or off the train there that night, and that they did not know that appellee had gotten off the train onto the platform, then they should determine, from all the facts and circumstances in evidence, whether appellant's servants were guilty of negligence, and, if so, whether such negligence was the proximate cause of appellee's injury, and also defining proximate cause.

In argument to the jury, counsel for appellee, after speaking of Utley, the conductor of the train by which his client was injured, who had testified on the trial, as having committed perjury, and as being in the sleeping coach at the time the injury occurred, used this language: "He may have been back there with a woman,—he may have been back there with his wife,—instead of attending to his duties." On exception being taken, the counsel stated to the jury: "On reflection, as this is not my case, I will take that back; but, if it were my case, I would stick to it." Counsel for appellee also used, in argument to the jury, the following language: "You ought to deal severely with these bloated corporations, that can run their roads right through a man's house or yard." On exception being taken, the counsel further remarked to the jury: "I repeat it, gentlemen. You ought to deal severely with this bloated corporation, that can run its road right through your house and yard, and hold them strictly to their duty." It seems that no effort was made by the court to control counsel, or to require him to confine his argument to the record. Appellee laid his damages at \$20,000. The jury returned the following verdict: "We, the jury, find that J. C. Cooper, plaintiff, was injured through the fault of the G., H. & S. A. R. R. Co., and give him judgment for the amount sued for." The court then directed the foreman to write a verdict specifying the finding in dollars; whereupon the foreman wrote the following verdict: "We, the jury, find for the plaintiff the sum of twenty thousand dollars,"—which was received by the court, and judgment entered thereon. The language used, and course of argument to the jury pursued by counsel for appellee, was objected to by appellant at the time, and proper exception taken. The attention of the court below was called to it in the motion for new trial; and it is here insisted that the amount of the verdict, as well as the language in which the first verdict was returned, indicate improper motives and prejudice upon the part of the jury, rather than an honest desire to award reasonable compensation for the injury. We are not prepared to say that the amount of the verdict is excessive, though it is large, if plaintiff was entitled to recover, and as to this we express no opinion; but the language employed by counsel for appellee in addressing the jury was not legitimate, and was such as should never be indulged in in any case. The first verdict gave appellee "judgment for the amount sued for;" and this, together with the large amount "sued for," considered with relation to the im-

proper language used by counsel in argument, make it reasonably evident to us that such language probably did influence the verdict, and we think the court erred in refusing to grant a new trial. *Railway Co. v. O'Hare*, 64 Tex. 604. We are therefore of opinion that the judgment of the court below should be reversed, and the cause remanded.

WILLIE, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

NOTE.

TRIAL—MISCONDUCT OF ATTORNEY IN ARGUMENT. It is improper for an attorney to make a statement to the jury of a fact, as of his own knowledge, which has not been introduced in evidence, relating to the issues of the case, *People v. Dane*, (Mich.) 26 N. W. Rep. 781; *Hall v. Wolf*, (Iowa.) 16 N. W. Rep. 710; *Amperse v. Fleckenstein*, (Mich.) 24 N. W. Rep. 564; *Tillery v. State*, (Tex.) 5 S. W. Rep. 842; *Bullard v. Railroad Co.*, (N. H.) 5 Atl. Rep. 888; or to refer to matters not in evidence calculated to prejudice the other party, *Norton v. State*, (Ind.) 6 N. E. Rep. 126; *Brow v. State*, (Ind.) 2 N. E. Rep. 296; *Eppe v. State*, (Ind.) 1 N. E. Rep. 491; *State v. Abrams*, (Or.) 8 Pac. Rep. 337; *Clark v. State*, (Tex.) 5 S. W. Rep. 115.

It is also improper for an attorney to comment on the fact that the other party has taken a change of venue, *Campbell v. Maher*, (Ind.) 4 N. E. Rep. 911; or on papers not in evidence, and the conduct of parties in connection therewith, *Donovan v. Richmond*, (Mich.) 28 N. W. Rep. 516; or on evidence that has been excluded, *Paper Co. v. Banks*, (Neb.) 16 N. W. Rep. 838; or on the fact that the defendant in a criminal case has refrained from testifying, *Petite v. People*, (Colo.) 9 Pac. Rep. 622; *State v. Balch*, (Kan.) 2 Pac. Rep. 609; or to appeal to prejudices foreign to the case, *Bremmer v. Railroad Co.*, (Wis.) 20 N. W. Rep. 687; *Rickabus v. Gott*, (Mich.) 16 N. W. Rep. 384; *Porter v. Throop*, (Mich.) 11 N. W. Rep. 174; *State v. McCool*, (Kan.) 9 Pac. Rep. 745.

Misconduct of an attorney in arguing a case is a ground for reversal of the verdict and ordering a new trial, *Campbell v. Maher*, (Ind.) 4 N. E. Rep. 911; *Brow v. State*, (Ind.) 2 N. E. Rep. 296; *Bremmer v. Railroad Co.*, (Wis.) 20 N. W. Rep. 687; *Paper Co. v. Banks*, (Neb.) 16 N. W. Rep. 838; *Hall v. Wolf*, (Iowa.) Id. 710; *Rickabus v. Gott*, (Mich.) Id. 384; if the adverse party is prejudiced thereby, *Boyle v. State*, (Ind.) 5 N. E. Rep. 208; *Shular v. State*, (Ind.) 4 N. E. Rep. 870; *Anderson v. State*, (Ind.) Id. 68; *Eppe v. State*, (Ind.) 1 N. E. Rep. 491; *Donovan v. Richmond*, (Mich.) 28 N. W. Rep. 516; *People v. Dane*, (Mich.) 26 N. W. Rep. 781, and note; *Sunberg v. Babcock*, (Iowa.) 24 N. W. Rep. 19; *Burdick v. Haggart*, (Dak.) 22 N. W. Rep. 589; *State v. Miller*, (Iowa.) 21 N. W. Rep. 181; *Porter v. Throop*, (Mich.) 11 N. W. Rep. 174; *Tillery v. State*, (Tex.) 5 S. W. Rep. 842; *State v. Clouser*, (Iowa.) 83 N. W. Rep. 660.

As to what is not improper in argument, see *Boyle v. State*, (Ind.) 5 N. E. Rep. 208; *Shular v. State*, (Ind.) 4 N. E. Rep. 870; *Thomas v. State*, (Ind.) 2 N. E. Rep. 808; *Scott v. Railroad Co.*, (Iowa.) 27 N. W. Rep. 276; *Gavigan v. Scott*, (Mich.) 16 N. W. Rep. 769; *State v. Brooks*, (Mo.) 5 S. W. Rep. 257.

As to improprieties not sufficient to justify a reversal, see *Norton v. State*, (Ind.) 6 N. E. Rep. 126; *Anderson v. State*, (Ind.) 4 N. E. Rep. 63; *Hinton v. Railroad Co.*, (Wis.) 27 N. W. Rep. 147; *Tucker v. Cole*, (Wis.) 11 N. W. Rep. 703; *Porter v. Throop*, (Mich.) Id. 174; *People v. Bush*, (Cal.) 10 Pac. Rep. 169; *State v. McCool*, (Kan.) 9 Pac. Rep. 745; *Petite v. People*, (Colo.) Id. 622; *State v. McCool*, (Kan.) Id. 618; *People v. Hopt*, (Utah.) Id. 407; *State v. Abrams*, (Or.) 8 Pac. Rep. 337; *State v. Winter*, (Iowa.) 34 N. W. Rep. 475; *Lamar v. State*, (Miss.) 8 South. Rep. 78; *Railroad Co. v. Fox*, (Tex.) 6 S. W. Rep. 569.

JACKSON *et al.* v. HARRY *et al.*

(Supreme Court of Texas. March 20, 1888.)

1. MORTGAGES—DEED OF TRUST—AGREEMENT THAT THE OWNER SHALL SELL THE TRUST GOODS.

Where the evidence tends to show an agreement with one of the trustees, before the acceptance of the trust by the other, that the control of the property is to remain with the managing partner of the firm, an instruction that if there was such an agreement, or if the managing partner remained in the control of the business, the deed would be void, sufficiently submits the validity of the deed to the jury, under Texas act, March 24, 1879, providing that a trust deed of any stock of goods exposed for sale, contemplating a continuance of possession and sale by the owner, shall be void.

2. NEW TRIAL—MISCONDUCT OF COUNSEL—OBJECTIONABLE LANGUAGE TO JURY.

A verdict will not be set aside because of objectionable language used by counsel in addressing the jury, where the judge at the time corrected the counsel, the coun-

sel requested the jury not to consider the language, and the opposing counsel could have had the jury further cautioned by the court, the presumption being that the verdict was not affected by the remarks.¹

3. APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action to enforce a trust deed of personal property to secure a debt as against other creditors, where the instructions cover every phase of the testimony, explain the law upon every issue, submit to investigation the consideration, motives, and purposes of the parties to the transaction, and the jury pass upon all the facts in evidence, the verdict will not be set aside though the court might from the evidence have reached a different result.

Appeal from district court, Limestone county; J. R. Frost, Judge.

J. D. Harby and others brought an action against T. E. Jackson, sheriff, and his sureties, the firms of Leon & H. Blum, Wallis & R. E. Edmison, and Isaac Whatley. The issue was the validity of a deed of trust given by Edmison and Whatley to secure a debt due plaintiffs, under act Tex. March 24, 1879, relative to assignments for the benefit of creditors, which provides that every mortgage deed of trust, given by the owner of any stock of goods exposed for sale in the regular course of business, contemplating a continuance of possession and sale by the owner, shall be void. From a judgment for plaintiffs defendants appeal.

Burrow & Kincaid, for appellants. *L. B. Cobb*, for appellees.

WALKER, J. This is a second appeal. 65 Tex. 710. The facts are substantially the same here as in the former appeal. The assignments of error which are insisted upon in the brief of appellants question the sufficiency of the evidence to support the verdict found again for the plaintiffs, and complain of the charge of the court in that it failed to submit clearly the issue whether the trust deed was in contravention to section 17 of act March 24, 1879. The case was reversed on the former appeal because of the charge of the trial judge in limiting the action of the jury, upon the alleged fraud, to the inquiry whether "there was a conspiracy or combination to defraud between the grantors and either the trustees as beneficiaries provided for," the court holding that "there was testimony from which the jury may have believed the grantors were actuated by a fraudulent motive, and that the plaintiffs had notice of it, and yet that the plaintiffs were not imbued with the ranker guilt * * * usually attached to the words 'combination' or 'conspiracy.'"

The instructions now under consideration exhibit care and accuracy in their preparation. They covered every phase in the testimony, explained the law upon every issue, submitting to investigation the considerations, motives, and purposes of the parties to the transaction. The parties themselves were examined, and their credibility was a matter for the jury. The deed of trust, with all the light the circumstances could give before, at the time, and after, its execution, the manner of testifying by the witnesses, and their standing were all to be passed upon under the instructions of the court in reaching a verdict. None of the facts in evidence are denounced by our courts as fraudulent *per se*. They are but badges or evidence of fraud. Strong they may be, and the strength increased by their number, yet the jury were authorized to consider them with the full details developed, and, if satisfied of the honesty and fairness of the transaction, the jury could so find. That Edmison's subsequent correspondence was equivocal, and a proper subject for cross-examination when tendered as a witness, and affecting, perhaps, his credibility, his letters were not admissions against the plaintiffs. The rights of the beneficiaries in the trust deed vested at its making, and no subsequent acts or declarations of Edmison's could divest the beneficiaries of whatever of rights they had acquired. To admit such declarations, made after the act

¹Respecting misconduct of counsel as a ground for granting a new trial, see *Railway Co. v. Cooper*, (Tex.) *ante*, 68, and *note*.

they are used against, in absence of collusion established by other testimony, other than a subject for cross-examination, has been held sufficient error to reverse. *Manufacturing Co. v. Creary*, 161 U. S. 161, 6 Sup. Ct. Rep. 369. The "badges of fraud" appearing in the case have all been subject of discussion by our courts. *Ellis v. Valentine*, 65 Tex. 545; *Levy v. Fischl*, Id. 311; *Allen v. Carpenter*, 66 Tex. 140; *Scott v. McDaniel*, 67 Tex. 316, 3 S. W. Rep. 291; *Oppenheimer v. Haiff*, 68 Tex. 409, 4 S. W. Rep. 562. There was an excess in value of the goods over the debts secured, but the residue was not concealed or subjected to loss. That the secured debts were actual is not controverted. There is testimony that the purpose of the transfer was to secure the creditors named, and no other is shown. The compensation for the trustees was reasonable. The intent of the makers, and the innocence of the trustees and beneficiaries under the law, were subjects of the charge of court, and were passed upon by the jury. Though this court upon the testimony might have reached a different result, yet, in the effect of the testimony to establish fraud, the verdict will be sustained. The issue is whether the circumstances, with the law applied, show the alleged fraud. The jury negative it, and they had the right to do so. The burden of proving fraud was upon the defendants.

The assignments of error against the charge complain of the refusal of the court to give the following: "If at the time of the trust deed, or before J. J. Whatley had been informed of the existence of the trust deed, and before he had accepted the trust, Harby, the other trustee, made an agreement with Edmison by virtue of which Edmison was to re-enter the store, and sell the goods out at retail in due course of business, as clerk or agent of the trustees, at a salary for his services for selling the goods, said trust deed is void, and plaintiffs cannot recover." Upon this subject the court had already charged, "If you believe, from the evidence, that at the time of the execution of the trust deed there was a verbal understanding, between the plaintiff J. D. Harby and R. E. Edmison, that Edmison was to remain in charge of the goods transferred, and control the business of selling the goods out at retail; or if you believe, from the evidence, that Edmison was the managing partner of the firm, and controlled and managed the business of the store before the deed of trust was made, and that after it was made he continued in charge and control of the goods transferred,—then, under such circumstances, the plaintiffs cannot recover." The charge as given substantially submits the seventeenth section of act of March 24, 1879. The test of legality of course depends upon whether the transfer be real and honest. A transaction not intended to transfer, or not in fact transferring, the property cannot be real, nor any such franchise honest. While the subsequent contract by the trustee with the debtor to aid in the sale is a subject of inquiry as a circumstance,—for what effect the jury may determine,—yet in itself it could not affect rights previously acquired, if at all, by the beneficiaries. The charge asked did not submit the true issue and its refusal was not error.

There is complaint that counsel for plaintiff indulged in objectionable words in his address to the jury. The judge below at the time corrected the counsel. The words were restricted by counsel, he requesting the jury to give no attention to the language. Counsel for defendant could have called the attention of the court, so that the jury might be further cautioned. But it is not probable that the remarks objected to affected the verdict. There are no errors found in the record. The case is affirmed.

GOODE *et al.* v. LOWERY *et al.*

(Supreme Court of Texas. February 23, 1888.)

1. TRIAL—FINDINGS BY THE COURT—MATERIAL ISSUES—REV. ST. TEX. ART. 1833.

Under Rev. St. Tex. art. 1833, providing that, upon a trial by the court, the judge shall, at the request of either party, state separately in writing his conclusions of

law and of fact, the lower court being the primary judge as to what is material, it is not error for such court to fail to find a certain issue claimed by counsel to be material when there is nothing in the record to show that such issue was material.

2. ESTOPPEL—TO CLAIM TITLE TO LAND—DECLARATIONS OF FORMER OWNER.

In an action for the partition of real estate, where a party under whom defendants claim title has made certain declarations, and acted in a manner inconsistent with defendants' title, defendants are not estopped from relying on such title by the conduct of such party, where it is not shown that defendants, or those under whom they claim, influenced or brought about in any way such conduct.

3. EQUITY—STALE DEMANDS—LEGAL TITLE.

Where a party, under whom plaintiffs claim as heirs, in an action for partition having made a deed to defendants' grandfather, under whom defendants claim, held the land for many years in trust for defendants, and those under whom they claimed, and during that time did not repudiate the trust, the doctrine that such deed is a stale demand, and not available to defendants as a muniment of title, will not prevail.

Commissioners' decision. Appeal from district court, Colorado county; GEORGE MCCORMICK, Judge.

Action by Belle Goode, George Goode, Alice Richardson, and A. D. Teat and W. T. Teat, minors, by E. H. Simpson, their guardian, Gertrude Simpson and Hattie Simpson, children by a second marriage and heirs of W. B. Scotese, for partition of certain land claimed as descended from their father, against W. L. Clamp, C. C. Clamp, and W. W. Arnett, to whom J. R. Scotese and Sarah E. Hill, children of said W. B. Scotese by his first marriage, had conveyed the whole of said land, claiming it as descended to them through their mother and against Virginia Lowery. Judgment for defendants, except Virginia Lowery, and plaintiffs appeal.

Kennon & Townsend and Fourd & Thompson, for appellants. *Brown & Dunn*, for appellees.

MALTBIE, J. W. B. Scotese immigrated to Texas as a single man in the year 1832, and settled in Washington county. In November, 1836, he was married to Theodocia C. Smith, and on or about 10th of January, 1838, he was awarded a head-right land certificate for a league and labor; one-third being granted to him individually as a single man, and two-thirds being an augmentation in consideration of his marriage. On the 10th day of January, 1838, Scotese and his wife, by their deed in writing, for the recited consideration of \$900 paid, transferred to W. P. Smith their augmentation head-right, and authorized it to be located in Smith's name; and on the same day Scotese and wife executed a power of attorney to Smith, authorizing him to locate the certificate, and have it patented to himself. On 30th day of March, 1838, Smith executed a writing by which he agreed to convey the two-thirds of the league of land, when patent should be obtained by virtue of the certificate transferred to him by Scotese and wife, to Mrs. Theodocia Scotese, or to devise it to her by will. Scotese and wife lived together until 1850, when they were divorced. There was born of that marriage J. R. Scotese and Mrs. Hill, who are the sole heirs of Mrs. Theodocia Scotese, and also of W. P. Smith, who was their grandfather. W. B. Scotese, soon after he was divorced, married the second time; and there were children born of this marriage also, who are the plaintiffs in this suit. The head-right certificate of W. B. Scotese, which was issued for a league and labor, presumably to include his head-right as a single man, and the augmentation to which he and his wife were entitled, was rejected by the traveling board to detect fraudulent land certificates; and he instituted suit in the district court of Washington county, in 1846, to establish it as genuine, and a decree was rendered in his favor to that effect. Afterwards the certificate was lost, and Scotese made affidavit that it was his property, and that he had never sold or in any manner transferred it; and obtained a duplicate from the commissioner of the land-office. This certificate was located by De Cordova on land in McKinney county, and a patent issued to W. B.

Scotes to the land in 1850. Scotes in that year conveyed to De Cordova 2,240 acres of it, in consideration of his services for locating this certificate, and another in the name of Evans, leaving of the Scotes survey 2,188 acres. W. P. Smith died in 1867, and W. B. Scotes in 1883. In 1872, W. B. Scotes delivered the patent to the land in controversy to his son J. R. Scotes, who testified that he had paid taxes on it, and claimed it for himself and Mrs. Hill ever since. There was no evidence that W. B. Scotes had ever paid taxes on the land, and it was not in the possession of any one until 1883. During that year, J. R. Scotes and Mrs. Hill sold and conveyed to Clamp & Clamp, who fenced and built houses upon it, and have been in actual possession since that time. The plaintiffs, Belle Goode *et al.*, children of W. B. Scotes by his second wife, brought this suit for a partition of the unsold portion of the W. B. Scotes league, which was tried by the court without a jury, and judgment rendered for defendants.

The first complaint is that the court erred in not finding and reducing to writing its conclusions of law and fact on the material issues raised by the pleadings of the parties, when plaintiffs at the time requested the court to do so. It appears from the record that the court did reduce to writing its conclusions of fact and of law, and that counsel afterwards requested more specific findings in reference to the questions of estoppel and of stale demand, and that the court in response stated substantially that, in its opinion, the questions had been as fully answered as the evidence would authorize. In such event the district court is the primary judge as to what is material, and what facts the evidence tends to prove, as well as the conclusions of law and fact to be drawn therefrom. Article 1383 of the Revised Statutes provides that, upon a trial by the court, the judge shall, at the request of either of the parties, state in writing the conclusions of fact found by him separately from the conclusions of law, which conclusions of fact and law shall be filed with the clerk, and shall constitute a part of the record. The court made out and filed a statement of facts in the case according to law, which must be presumed to be correct, and, if there was an omission to find any conclusions of fact or law to the prejudice of the plaintiffs, it can be revised in this court; but, where the court reduces its conclusions of fact and law to writing, a failure to find a particular issue claimed by counsel to be material is not error unless it is made by the evidence to appear material to this court. It does not appear from the record that W. B. Scotes was influenced by the words or conduct of defendants, or those under whom they claim, to bring suit to establish his head-right certificate, or to make affidavit, after its loss, that it was his own property, and that he had not sold or transferred it, or to contract with De Cordova for its location, and convey him a portion of it; nor change his condition in reference to the land certificate or the land in any way whatever. Nor can it be presumed from these facts, and the failure of defendants to prove, that either W. P. Smith or Theodocia C. Scotes objected to the action of W. B. Scotes in the premises; and therefore defendants are not estopped to assert any title they may have to the land. Nor can a court presume, from the facts herein stated and from the further fact that land certificates are personal property, and may be transferred by delivery, that W. B. Smith sold or reconveyed the certificate to W. P. Scotes.

It is indicated that the conveyance from W. B. Scotes and wife to W. P. Smith of date January 10, 1838, has become a stale demand, and that it is not available to defendants as a muniment of title, upon the theory that, though in form a deed, it is in fact an executory contract. The lapse of 10 years or more after the time when suits should be brought is now generally conceded to be a good defense to actions on executory contracts, when no sufficient excuse is given for the delay in bringing suit; but it does not follow that the person holding the legal title under such circumstances could reconvey as against a defendant in possession under an executory contract; and we think

the contrary may be safely asserted as the rule in all instances where the vendee has complied with his part of the contract. The legal and equitable title to two-thirds of the certificate was vested in Smith by deed from Scotesc and wife, with directions that the patent issue to the same in the name of Smith. But for some reasons the officers of the government issued the original head-right of W. B. Scotesc, and the augmentation of himself and wife, as a single certificate, instead of one certificate for one-third, and another for two-thirds, as seems to have been contemplated would be done. A certificate having issued to W. B. Scotesc for a league of land, upon its location the patent was issued to him for the whole league; but two-thirds of it was in trust for W. P. Smith, and neither Scotesc nor his heirs could acquire title to it without first repudiating the trust. And we are of opinion that the facts shown, even if known to Smith, cannot be considered such repudiation. The land was intended ultimately for the benefit of Scotesc's wife; and all of his acts, except the conveyance to De Cordova, was in furtherance of the trust, and this should not be held to operate as a repudiation of it, except as to the land conveyed, especially as it is susceptible of explanation if the parties to it were in life. For these reasons we do not think the doctrine of stale demand is applicable to the facts of this case. It has not been shown that appellants' ancestor had the right to convey any land in the league except his one-third interest; and, it appearing that he did convey more than this, it follows there was nothing left for appellants to inherit, and they cannot recover. W. B. Scotesc had no implied authority to bargain or convey appellees' land in consideration of the location of the certificate, either from the fact he was tenant in common, or from the fact that he held Smith's portion of the certificate in trust for him; and no express authority is shown. The judgment should be affirmed.

WILLIE, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

HANCE *et ux.* v. GALVESTON WHARF CO.

(*Supreme Court of Texas.* February 24, 1888.)

JUSTICE OF THE PEACE—JUDGMENT—ENJOINING EXECUTION.

Justices' courts under the constitution and laws of Texas, not being courts of special jurisdiction, in which all the facts giving them jurisdiction must appear, the fact that a transcript from the justice does not show expressly that all the defendants in an action were cited to appear does not invalidate the judgment.

Appeal from district court, Galveston county; W. H. STEWART, Judge.

Suit by W. B. Hance and wife against the Galveston Wharf Company, to enjoin an execution. Judgment for defendant, and plaintiffs appeal.

Burns & Burns, for appellants. *Alexander Sampson*, for appellee.

STAYTON, J. This suit was brought by appellants to enjoin an execution issued under a judgment rendered against them in a justice's court. The grounds on which the injunction is sought are that the appellants were never cited, and that they did not appear by attorney. The cause was tried without a jury, but no conclusions of law and fact are found in the record. A certified copy of the justice's record was offered in evidence. This shows that citation issued, and that on September 3, 1877, the parties appeared by attorney, when judgment was rendered against Mrs. Hance only; it reciting that citation issued to William Hance had not been served. That judgment was set aside, and the cause was regularly continued thereafter from term to term until set for trial on December 10, 1877, at which time judgment was rendered against both defendants. Execution issued on that judgment, July 10, 1878, and the execution which it is sought in this suit to enjoin was the second one issued. The fact that the transcript from the justice's court does not expressly show that both the defendants were cited, does not invalidate the judgment.

Justices' courts, under the constitution and laws of this state, are not courts of special jurisdiction, in which all the facts which gave the jurisdiction in a particular case must appear, or their proceedings be held of no effect. In *Williams v. Ball*, 52 Tex. 608, the rule applicable to domestic judgments of courts of general jurisdiction was applied to a justice's judgment. If, in the case before us, the judge who tried the cause had based his judgment on the transcript from the justice's court, we would not be authorized to disturb it. He, however, heard evidence in the cause; and, while there was a conflict thereon, there was ample evidence to justify a finding that both the defendants were duly cited before the judgment was rendered. There is no error in the judgment, and it will be affirmed.

EBELL v. BURSINGER.

(Supreme Court of Texas. February 24, 1883.)

1. TRUSTS—POWERS AND DUTIES OF TRUSTEES—ACTIONS BY.

An authority granted to a trustee to receive rents, and sell, at his discretion, the property held in trust, the proceeds to be for the benefit of the *cestui que trust*, does not imply a power to defend alone a suit to set aside, on the ground of fraud and intimidation, the deed under which he holds; and the *cestui que trust* must be made a party defendant.

2. JUDGMENT—BY DEFAULT—DEFECT IN PARTIES.

A judgment taken by default should be set aside upon motion, where it appears that the real party in interest was not made a party to the action.

Appeal from district court, Fort Bend county; W. H. BURKHART, Judge. Action by Anna Bursinger against John Ebell to set aside a conveyance on the ground of fraud and intimidation. Judgment was taken by default, and, the court refusing to set it aside on the ground of want of a necessary party in the action, defendant appeals.

P. E. Pearson, for appellant. *Parker & Pearson*, for appellee.

GAINES, J. Appellee brought this suit against appellant alone to cancel a deed executed by her, conveying to him, in trust for the benefit of his daughter, Anna Ebell, certain lots in the town of Rosenberg. The petition alleged, in substance, that the conveyance was procured by threats and intimidation. A copy of the instrument was made a part of the petition, from which it clearly appears that the conveyance was made solely for the benefit of the daughter, although the trustee was authorized to collect the rents for her benefit, and in his discretion to sell the property, and to apply the proceeds to her sole use. The prayer was for a cancellation of the deed, and for a writ of possession. No answer having been filed on the fifth day of the term, the plaintiff took a judgment by default. The defendant filed a motion, praying the court to set aside the judgment, and grant him a new trial, which was overruled. One ground of the motion was that the judgment was erroneous because the beneficiary in the deed sought to be set aside had not been made a party to the suit. It is now assigned that the court erred in rendering judgment without Anna Ebell's having been made a party defendant. Two questions are presented by the assignment: *First*, was the *cestui que trust* a necessary party to the suit? *And, second*, can the objection for want of a necessary party be taken by motion in the court below after default or upon appeal?

As to the first question, the general rule is well established that, in suits by or against the trustee for the recovery of the trust property, the beneficiary is a necessary party. *Bales v. Linthicum*, 48 Tex. 224; *Huffman v. Cartwright*, 44 Tex. 296; *Hall v. Harris*, 11 Tex. 300; *Holland v. Baker*, 3 Hare, 72; *Woodward v. Wood*, 19 Ala. 218; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Richards v. Richards*, 9 Gray, 813; *Ward v. Hollins*, 14 Md. 158; 1 Daniell, Ch. Pr. (5th Ed.) 220, and note; *Story*, Eq. Pl. § 207; 2 Perry, Trusts, § 873. To this rule there are well-recognized exceptions; but these embrace mainly

that class of cases where, by reason of the number of the beneficiaries, it is inconvenient to make them parties, and where it may be presumed that it was the intention to invest the trustees with power to prosecute and defend suits in their own names. An apt illustration of the exception is found in the case of the trustees in a mortgage to secure a series of negotiable bonds upon the property of railroad companies. *Shaw v. Railroad Co.*, 5 Gray, 162. Another illustration is afforded by the case of an assignee in a deed of an assignment made by an insolvent for the benefit of his creditors. *Kerrison v. Stewart*, 93 U. S. 155. The appointment of an assignee in such cases generally grows out of the necessity of having some agent to act for beneficiaries, who are usually too numerous to act together. In such a case the presumption is great that he is their representative, not only as to the general management of the assets, but also to prosecute and defend suits involving title to the assigned estate. The authority granted to the trustee in the present case, to receive rents for the use of the *cuius que trust*, and, in his discretion, to sell the property, the proceeds to go to her benefit, does not imply a power in him to defend alone a suit involving title to the trust-estate; and we are therefore of opinion that the beneficiary was a necessary party.

We come, then, to the second question, can the objection that there is the want of a necessary party be taken after a judgment by default? This question must also be answered in the affirmative. In *Anderson v. Chandler*, 18 Tex. 436, Chief Justice HEMPHILL recognizes the doctrine that the objection is good upon a writ of error when the defect appears upon the face of the petition. The defect, however, did not so appear in that case, and the point was not decided. The principle there recognized is that generally adopted in the common-law courts, (*Bell v. Layman*, 1 Mon. 39; *Wooster v. Northrup*, 5 Wis. 245; *Governor v. Webb*, 12 Ga. 189; *Horner v. Moor*, 5 Burr. 2614;) and has usually prevailed in courts of equity, (1 Daniell, Ch. Pr. 294.) The court should not render a judgment, there being the want of a necessary party to a suit. The defendant in such a case has a right to presume that the court will not enter an erroneous judgment against him, and hence should not be held in default until the necessary party is brought before the court. If judgment by default be taken, it should be set aside upon motion; and, in case the motion be overruled, it will be reversed upon appeal or a writ of error. The effect of the judgment in this case was to take the property in controversy from the possession of appellant, though he held it for the sole use of his daughter, and to tax him with the costs of a suit in which he had no beneficial interest. It was erroneous, and should have been set aside upon the motion filed for that purpose.

For the errors of the court in proceeding to the judgment without making the only person beneficially interested in the subject-matter adversely to the plaintiff a party, and in overruling the motion to set aside the judgment, the judgment will be reversed, and the cause remanded, with instructions to the court below to proceed no further until Anna Ebell is made a party defendant by amendment, and that, upon plaintiff's failure to do this, the suit be dismissed.

GULF, C. & S. F. RY. CO. v. WILLIAMS.

(Supreme Court of Texas. February 28, 1888.)

CARRIERS—OF PASSENGERS—INJURIES TO PASSENGER—STARTING TRAIN WITHOUT SIGNAL.

Plaintiff, a passenger on defendant's train, was injured while alighting at a depot, and in an action for damages the court charged that he was entitled to recover if defendant's servants did not stop the train a reasonably sufficient time, or did not give signal of starting again, by whistle or bell. *Held* error, in that the jury would have been compelled to find for plaintiff if no such signal had been given,

even though the train may have stopped a sufficient length of time, thus inducing the belief that plaintiff might leave the train without negligence at any time before signal of intention to start again.

Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

Action for damages, by Jesse Williams against the Gulf, Colorado & Santa Fe Railroad Company, for injuries received in not being allowed sufficient time to leave defendant's train at its depot. From a verdict and judgment for plaintiff, defendant appeals.

Ballinger, Mott & Terry, for appellant. *Wheeler & Rhodes*, for appellee.

STAYTON, J. The appellee was a passenger on the appellant's railway, and alleged that he was injured, in attempting to leave its car on reaching his destination, by the sudden and violent movement of the car without notice, before he had a sufficient and reasonable time to leave the car after it stopped. The evidence as to the manner in which he was injured, as to whether the train stopped a sufficient and reasonable time to enable him to leave the car in safety, and as to whether notice, by ringing the bell, blowing the whistle, or otherwise, of an intention to put the train in motion was given, was conflicting. So standing the evidence, the court instructed the jury as follows: "The defendant company is required to stop the train at the station a reasonably sufficient time to enable its passengers to get off the car, and it is also required to give signal of starting again, by whistle or bell, and if you believe from the evidence that defendant's servants were guilty of negligence in either of those respects, and that plaintiff's injuries were caused by such negligence, without any contributory negligence on the part of the plaintiff, then the plaintiff would be entitled to your verdict." "The plaintiff alleges in his petition that when the train arrived at Alvin, [plaintiff's destination,] and came to a full stop, and invited the passengers to get off, he was in the act of getting off, when, owing to the want of sufficient time and to a sudden jerk of the car without signal, he was violently thrown to the ground striking the side of the car, and the wheel mangled his left arm. If you believe from the evidence that the plaintiff received his injuries in said manner, and that said injuries were caused by the negligence of defendant's servants in not stopping the train a sufficient time to enable him to get off, or suddenly starting the car by a jerk, without signal of bell or whistle, the plaintiff would be entitled to your verdict, unless you believe from the evidence that the plaintiff by his own negligence contributed to the injury."

It was incumbent on the plaintiff to prove that his injury resulted from the negligence of the servants of the appellant. It would ordinarily be negligence in a railway company, when reaching a place at which passengers are to leave its train, to put the train in motion again before passengers had sufficient and reasonable time to alight; for they would be expected to do so, and would incur danger if the train was put in motion while they were in the act of alighting. It does not follow, however, if a train be stopped for sufficient and reasonable time, that it will be negligence *per se* to put it in motion again without giving signal of intention to do so by whistle or bell or otherwise. The charges inform the jury, in effect, that the appellant was guilty of actionable negligence if it failed to stop its car for a sufficient and reasonable time to enable passengers to alight, and that it was negligent, if, after stopping its train at the place where appellee was to leave it, it started again without giving signal by whistle or bell. The charge was not that the two acts combined would constitute negligence, but that either would. In the absence of a statute requiring a signal to be given by bell or whistle, it is error for a court to instruct a jury that it is negligence to put a train in motion without a signal so given. There is no statute in force in this state requiring a signal to be so given before a train is put in motion, after having stopped at a station

where passengers are to alight. The jury may have believed, under the evidence, that the train stopped at Alvin sufficiently long to enable the appellee to leave the train with safety, yet, under the charge, they would have been compelled to find for him, notwithstanding this, if a signal of intention again to put the train in motion was not given in one of the modes specified. It was also necessary that it should appear that the appellee was not guilty of contributory negligence. The tendency of the charge was to induce the jury to believe that the appellee, without negligence, might attempt to leave the train at any time before a signal of intention to move it was given in one of the modes pointed out in the charge, without reference to the length of time the train remained at the station. A case might arise in which it would be negligence to put a train in motion without signal, when it had remained at a station a sufficient length of time to enable passengers to leave it in safety; but whether so in a given case would be for the determination of the jury in view of all the facts; but a court would not be authorized to inform the jury that the failure to give a signal would be negligence, and less still would it be authorized to instruct that the failure to give a signal in a specific manner would be negligence. The charge was that appellant was "required to give signal of starting again by whistle or bell," by which the jury were given to understand that the law imposed this specific act as a duty. If this were true, an omission in this respect was negligence; and, throughout the charge, the court assumed and declared that the specific duty existed, and that a failure to perform it was negligence. Whether this omission, if it occurred, was negligence, depended on all the facts existing at the time the appellee attempted to leave the car, and was for the determination of the jury. The charge practically withdrew this question from them, and required a finding that the servants of appellant were negligent if the jury believed from the evidence that the car was put in motion without signal given by bell or whistle. For this error, the judgment will be reversed, and the cause remanded.

NOTE.

CARRIERS—DUTY—PASSENGER ALIGHTING FROM TRAIN. The implied contract of the carrier to carry the passenger safely to his point of destination includes the duty of announcing the arrival of the train at the station, and of giving him a reasonable opportunity to leave the cars at the regular stopping place. *Hurt v. Railway Co.*, (Mo.) 7 S. W. Rep. 1; *Railway Co. v. Prinnell*, (Va.) 3 S. E. Rep. 95; *Railway Co. v. Rushing*, (Tex.) 6 S. W. Rep. 834; *Railway Co. v. Butler*, (Ind.) 14 N. E. Rep. 599; *Keller v. Railway Co.*, (Minn.) 6 N. W. Rep. 496; *Bartholomew v. Railway Co.*, (N. Y.) 7 N. E. Rep. 623. As to what is a reasonable time must depend upon the circumstances of each case. *Keller v. Railway Co.*, *supra*.

The announcement of the station, and the stoppage of the train is an invitation to the passenger to alight. *Railway Co. v. Prinnell*, *supra*; *Bartholomew v. Railway Co.*, *supra*. A railroad company is not bound to render its passengers personal assistance in alighting from its trains when they are in proper position, and suitable and safe means are provided therefor. *Raben v. Railway Co.*, (Iowa,) 34 N. W. Rep. 621; *Simms v. Railway Co.*, (S. C.) 8 S. E. Rep. 301.

The rule that a railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination does not extend to the act of setting them down thereat. Thus, when the servants of a common carrier afford passengers a reasonable time to leave the cars after arrival at the end of their journey, they have the right, at the expiration of such reasonable period, to presume that all the passengers whose place of destination is then reached have done what is customary for passengers in like circumstances to do, to-wit, have left the cars. When such a reasonable time has thus elapsed, it is no part of the duty of the servants of such corporation to make personal inspection of or to interrogate the remaining passengers, to see whether they intend leaving the cars. *Hurt v. Railway Co.*, *supra*; *Raben v. Railway Co.*, (Iowa,) 35 N. W. Rep. 645. The rule applies only in respect to things appertaining to the actual transportation of the passenger, and in regard to results naturally to be apprehended from a failure to exercise such vigilance. *Morris v. Railway Co.*, (N. Y.) 18 N. E. Rep. 456; *Kelly v. Railway Co.*, (N. Y.) 15 N. E. Rep. 879; *Hayman v. Railway Co.*, (Pa.) 11 Atl. Rep. 815. When the cars stop at a passenger's place of destination, it is his duty to leave the car without unnecessary delay. *Keller v. Railway Co.*, *supra*.

The purchase of a ticket at a railroad ticket office gives no right to the passenger, except upon condition of presenting himself for passage before the signal is given for a

start; and, if he comes after that, it is not negligence, as against him, that the train starts in obedience to it, and plaintiff is injured in attempting to get on. *Faulitsch v. Railway Co.*, (N. Y.) 6 N. E. Rep. 577. But if the officer in charge puts the train in motion, knowing that such person is in the act of getting on, and he is injured thereby, the railway company will be liable. *Railway Co. v. Fox*, (Tex.) 6 S. W. Rep. 569.

The duty of the carrier to one who is not a passenger, while in the act of alighting, is relative, and not absolute, and the liability of the company depends upon a failure to use ordinary care after actual notice of his danger. *Griswold v. Railway Co.*, (Wis.) 26 N. W. Rep. 101.

GLENN v. KIMBROUGH'S ESTATE *et al.*

(Supreme Court of Texas. February 26, 1888.)

1. EXECUTORS AND ADMINISTRATORS—JUDGMENT OF PROBATE COURT—RIGHT OF HEIRS TO APPEAL.

Under Rev. St. Tex. art. 2081, which gives the decisions of the probate courts approving or disapproving claims against estates the force and effect of judgments, and allows the claimant, or any person interested in the estate, to appeal to the district court as from other judgments of the county court in probate matters, the heirs of an estate may appeal from the allowance of a claim against the estate, without giving notice of such appeal, though they did not appear and contest the claim in the probate court.

2. SAME—APPEAL FROM PROBATE COURT—JOINDER OF HEIRS.

When the heirs of part of an intestate estate appeal from the allowance of a claim against the estate, the whole question is opened, the same as if all the heirs had joined in the appeal.

3. SAME—PROBATE PRACTICE—PRESUMPTION AS TO HEIRS.

When the allowance of a claim against an intestate estate is appealed from by parties claiming to be heirs of the estate, and the claim is disallowed by the district court upon the appeal, if there is no statement of facts in the record, it will be presumed, in support of the judgment, that the evidence showed that such parties were heirs of the estate.

4. SAME—PROBATE PRACTICE—CONTESTING CLAIM.

Claims presented for approval of the probate court against an estate may be contested without affidavit supporting the objections thereto.

5. SAME—DISALLOWANCE OF CLAIM—REFUSAL TO STRIKE OUT ANSWER.

When a claim against an estate is considered on its merits and disallowed as unjust and incorrect, the claimant cannot complain because the court denied his motion to strike out, for want of verification, an answer setting up that he had assigned his claim before its presentation to the administrator, since such ruling, if incorrect, was, under the circumstances, harmless error.

6. APPEAL—PRACTICE—ASSIGNMENTS OF ERROR.

Under court rules Tex. No. 121, which provides that the party prejudiced by a violation of the rules may reserve a bill of exceptions and assign the same as error, an assignment of error based upon an alleged violation of the rules will not be considered when no exception has been reserved.

Commissioners' decision. Error from district court, Orange county; W. H. FORD, Judge.

H. A. Glenn presented his claim for services as nurse against the estate of G. H. Kimbrough and J. A. Kimbrough, deceased. The claim was allowed by the administrator, and approved by the probate court. From this decision two of the heirs, H. E. Poe and Mary A. L. Poe, appealed to the district court. That court refused to strike out the unverified answer of the heirs, which, after denying the justness and correctness of the claim, set up that claimant had assigned his claim before he presented it to the administrator; and, after hearing the case upon its merits, disallowed the claim. The claimant brings error.

John T. Stark, for plaintiff in error.

COLLARD, J. It is provided by statute of this state that the action of the probate court in approving or disapproving a claim (against an estate of a deceased person) shall have the force and effect of a final judgment, and when the claimant, or any person interested in the estate, shall be dissatisfied with such action, he may appeal therefrom to the district court as from other judgments of the county court rendered in probate matters. Rev. St. art. 2081.

It is also provided that any person who may consider himself aggrieved by any decision, order, decree, or judgment of the county court (in probate matters) shall have the right to appeal therefrom to the district court of the county upon complying with the provisions of other sections of the law. Rev. St. art. 2201. The next article prescribes that he (the appellant) shall, within 15 days after such decision, etc., file with the county clerk a bond with two or more good and sufficient sureties, payable to the county judge and to be approved by the clerk, conditioned that the appellant shall prosecute his appeal to effect and perform the decision, order, decree, or judgment which the district court shall make thereon in case the cause shall be decided against him. No notice of appeal is required by the law.

In the case at bar the administrator, R. H. Smith, allowed the account of plaintiff in error for \$800 on the 17th day of November, 1882, and on the 20th of the same month the county judge duly approved it, and assigned it to the fourth class. On the 5th of December, 1882, H. E. and Mary A. L. Poe, claiming to be heirs at law of decedents filed in the probate court their bond for appeal from the order of approval to the district court, complying with the terms of the statute, which bond was at once approved by the clerk. If they were such heirs they had the right of appeal from the action of the probate judge, and that without notice of appeal.

To entitle an heir, or person interested in the estate otherwise than as heir to appeal from an order of the probate court, it is not necessary that he should have appeared to contest the matter before the court, and made objections to the approval of the claim. He could so appear and contest the claim, (Rev. St. art. 2027,) but such appearance is not made essential to the right of appeal. The statute awards the right to any person interested in the estate without any such limitation; the only condition is that the law regulating appeals must be complied with. It is urged, however, that H. E. and Mary A. L. Poe, if heirs at all, were only heirs of one-fourth of the estate, and though the district court could entertain their appeal, and revise the judgment of the probate court, it could only do so to the extent of their interest in the estate. We cannot give our assent to this proposition. Upon appeal the district court tries the whole case *de novo* for all persons interested. One person having the right of appeal and exercising it, does so for all persons having a similar right. The appeal is for the purpose of revising the management of the estate, and affects the rights of all persons interested therein. If the rule were otherwise, and one of several heirs appeal, with a favorable result and a saving to the estate, the appellant would not derive the full benefit of his appeal; because, upon distribution, each heir would be entitled to his respective share of the estate, without regard to the appeal.

Plaintiff in error says there was no evidence showing that H. E. and Mary A. L. Poe were heirs of the estates, and asks a reversal on that ground. There being no statement of facts in the record, we cannot determine the issue as to what the proof did show. We must therefore presume that there was evidence to support the judgment.

The law requiring a denial under oath of the correctness of an account properly sworn to has no application in proceedings in the probate court. Claims presented for approval of the probate court against an estate may be contested without affidavit supporting the objections thereto. Appellants had the right to appeal. If heirs of the estate, and their bond being in all respects regular, there was no error in refusing to dismiss the appeal for want of bond.

The trial judge heard the appeal on the 16th day of October, and took the case under advisement until the 1st day of November, when the judgment was rendered, it being the last day of the term. The failure of the judge to render judgment at least two days before final adjournment is assigned as error. Rule 65 for the government of district courts requires "that when a cause has

been submitted to the judge on the law and facts, it shall be determined and a judgment rendered therein during the term and at least two days before the end of the term, if it has been tried and submitted one day before that time, unless it is continued after such submission by consent of parties placed on the record," etc. Rule 121 provides that the party prejudiced by a violation of the rules may reserve a bill of exceptions, and present the same as a ground for a new trial, and assign the same as error. There was no exception reserved concerning the delay of the court in rendering judgment. Without such exception, the assignment cannot be considered by this court. Assignments of error do not take the place of bills of exceptions.

The court below decided that the account of plaintiff in error was unjust and incorrect, manifestly showing that the court did not consider that part of contestant's answer which set up that the account was the property of another. The ruling of the court, then, in refusing to strike out the answer because not sworn to, if error, was harmless. If there was error in the ruling, it resulted in no injury to plaintiff, as the court decided the case upon the merits of the account. Finding no error in the judgment requiring a reversal of the cause, we conclude the judgment of the district court ought to be affirmed.

WILLIE, C. J. Report of commissioners of appeals examined, their opinion adopted, and judgment affirmed.

SCHMICK, Sheriff, et al. v. NOEL.

(*Supreme Court of Texas. April 24, 1888.*)

1. ATTACHMENT—WRONGFUL LEVY—RIGHT OF SHERIFF TO ATTORNEY'S FEES.

In an action against a sheriff for wrongfully attaching goods, where the attaching creditors are made parties, and they had given an indemnifying bond against all "loss, costs, charges," etc., that might arise or be incurred by the levy of such attachment, it is not error to enter, for the sheriff, a judgment for \$100 against such creditors for attorney's fees expended by him in defending the suit before the creditors appeared.

2. WITNESS—IMPEACHMENT ON CROSS-EXAMINATION—READING DEPOSITION IN REBUTTAL.

Where, on cross-examination of plaintiff, defendants sought to leave the impression that plaintiff testified differently in a deposition, taken by defendants to be used in the case, but not offered in evidence, plaintiff may read such deposition in rebuttal.

3. FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—EVIDENCE.

Where a sale of goods is attacked as being in fraud of creditors, it is error to permit the vendor to be asked: "Is it not true that the notes given you in part payment of the goods were taken and made in good faith?"

4. SAME—ACTIONS TO SET ASIDE—PROOF OF FRAUD—INSTRUCTIONS.

Where a sale of goods is attacked on the ground of fraud, it is error to charge that "fraud cannot be presumed, but must be proved to the satisfaction of the jury by evidence adduced at the trial. And in this case the burden is on the defendants to prove the fraud as alleged by them; but, as any other fact, it may be proved by positive or circumstantial evidence."

Appeal from district court, Eastland county.

Action by N. W. Noel against J. K. Schmick, sheriff of Eastland county, and his sureties, for damages for wrongfully attaching a stock of goods. After suit was begun, F. Ratto & Co. and Thomas Randall & Co., plaintiffs in the attachment suit, who had given the sheriff a bond of indemnity, appeared, and defended the action. Verdict and judgment for the plaintiff, and the attachment creditors appeal.

Fleming & Moore, for appellants. *L. C. Alexander* and *A. M. Jackson*, for appellee.

WALKER, J. 1. December 7, 1888, appellee brought suit against Schmick, sheriff of Eastland county, and his sureties, for damages for the wrongful seizure of a stock of goods. January 8, 1889, Schmick and his sureties answered,

setting up in bar of the action that Schmick, as sheriff, under attachments in his hands against one J. H. Wood, had seized the property; that the goods belonged to Wood; that the plaintiff's claim was fraudulent, and was, under a contract of sale, fraudulent as against the creditors of Wood. On same day, Schmick made application that F. Batto & Co., of Galveston, and Thomas Randall & Co., of Dallas, the plaintiffs in the attachment suits under which the seizure had been made, be made parties defendant; alleging that they had executed to him indemnity bonds before he had levied the attachments, indemnifying him from all "loss, costs, charges, judgments, or suits" that might arise or be incurred by him by virtue of the levy of the attachments upon the property seized. The court refused this application; but at the next term, June 4, 1884, the attaching creditors made themselves parties, and pleaded, as the original defendants, that the seizure was under attachment regularly issued and levied upon the property, which was alleged to have belonged to Wood, and was fraudulently claimed by the plaintiff. June 11, 1884, defendant Schmick, by pleading, set up claim for \$100 as reasonable attorneys' fees incurred by him in defense of the suit before the attaching creditors had appeared; alleging that it was a necessary charge incurred by him, and that he had incurred it relying upon the indemnity bonds made by the creditors before he had levied the attachment. He asked judgment against them generally. There was a trial before a jury; verdict and judgment for plaintiff against all the defendants for the amount of the verdict, and for \$100 in favor of Schmick against the attaching creditors who had made bonds securing him.

It was not error to allow the recovery of reasonable attorney's fees, where, as in this case, the sheriff had notified his indemnitors of the pendency of the suit, and had not been furnished counsel for his defense. His bonds protected against "charges" additional to "costs." He had incurred the liability of counsel fees only after the neglect of his indemnitors to employ counsel. It was agreed that the amount was reasonable. The counsel employed seem to have acted during the entire litigation, and for all the defendants, as against the plaintiff. *Roberts v. Palmore*, 41 Tex. 619; *Kellogg v. Muller*, 68 Tex. 186, 4 S. W. Rep. 861.

2. In this case on a former appeal it was held that where the plaintiff, in answer to interrogatories, had testified and was present testifying on the trial, that while it was an irregularity to permit plaintiff, after testifying orally on the stand, to read his own depositions thus taken, and not read by defendant, still, being within the discretion of the trial judge, it was not cause for reversal. In this case it appears that on cross-examination the defendants had sought to leave the impression upon the jury that he had testified differently by depositions; that, after defendants closed their testimony, plaintiff in rebuttal read his depositions. 64 Tex. 408.

The sixth assignment of errors complains that Wood was allowed, by depositions, to testify for plaintiff to his interest in making the sale to Noel, and that the transaction was in good faith. The fifth bill is substantially as follows, viz.: On the trial, plaintiff offered a deposition of J. H. Wood taken by defendants, and crossed by plaintiff, but not offered by defendants. To the first cross-interrogatory, as follows, viz.: "Is it not true that the sale to plaintiff was in good faith, and without intent on your part to defraud your creditors?" defendants objected that the witness had not been examined by them on this matter, and, as this was plaintiff's witness, it was not competent for plaintiff to show the secret intents or motives of his vendor in this way by him, which objection was sustained, and the answer excluded. Whereupon the plaintiff offered the second cross-interrogatory, and Wood answered as follows: "Did you communicate to plaintiff any design or purpose on your part to defraud your creditor at or before said sale?" Answered, "No." To said question and answer defendants made the same objections as to the preceding interrogatory, which said objection was by the court overruled. Whereupon the

plaintiff offered the fifth cross-interrogatory, viz.: "It is not true that the notes given by Noel to you in part payment of the goods were taken and made in good faith?" Answered, "It is." To said question and answer the defendants objected for the same reason stated in their objection to the first interrogatory above, which objections were by the court overruled. This deposition had been taken by defendants, but was offered by the plaintiff. No question in the direct interrogatories authorized or called for the facts included in these questions and answers. It is evident that the transaction of sale was valid if the notes, the principal part of the consideration, were untainted with fraud. It is well said in *Miller v. Jannett*, 63 Tex. 86: "If the elements constituting fraud accompanied the sale, it was unimportant what the real object of the parties was, and no honest intention on their part would have made that valid which the law declares shall be void under the circumstances." Besides, this is an assumption by the witness to pass upon the very questions submitted with proper instructions to the jury. The testimony does not come under that class of cases discussed in *Hamburg v. Wood*, 66 Tex. 176. A fact known to the witness, though only from his own consciousness, and which may be pertinent to the issue, is admissible; but not when to such fact is added the exercise of the judgment upon its relation to other facts, and an opinion upon such combination is expressed. This testimony of the witness that the giving and recovering of the notes were in good faith was error, and such that it is likely that injury resulted.

4. The seventh assignment of error complains of the charge of the court, "that fraud cannot be presumed, but must be proved to the satisfaction of the jury by evidence adduced on the trial. And in this case the burden is on defendants to prove the fraud as alleged by them; but, as any other fact, it may be proved by positive or circumstantial evidence." The complaint upon this is more than mere verbal criticism. The defects have often been pointed out by this court. Fraud is presumed wherever the presumption from the circumstances in evidence is sufficiently strong to produce conviction upon the jury trying the issue. As to quantity of evidence, the law prescribes no rule,—a preponderance is sufficient; and it is not required that the same degree of certainty be produced as in criminal cases. The formula used is contradictory, and conveys no clear meaning to the jury. The defect would not, perhaps, require a reversal. *Burch v. Smith*, 15 Tex. 223; *Weaver v. Ashcroft*, 50 Tex. 445; *Sparks v. Dunsen*, 47 Tex. 144.

5. As to the effect of the effort of plaintiff to cure the error in the former appeal by filing the paper, attempting to dismiss as to the sureties while the former appeal was pending, and the action of the court upon the document, we see no error. Rev. St. art. 1259.

There being in evidence much testimony against the validity of the transfer by Wood to Noel as well as supporting it, we cannot say that the error in admitting the testimony of Wood, above discussed, was harmless; and for such error the judgment below will be reversed, and cause remanded.

BRUNSWIG et al. v. WHITE et ux.

(Supreme Court of Texas. April 30, 1888.)

1. DRUGGISTS—SALES OF POISON—ACTION FOR INJURIES—PLEADING.

In an action for damages for negligently causing the death of plaintiffs' child, a complaint alleging that plaintiffs' agent, as customer of defendants, druggists, demanded quinine, but was by defendants' clerk given morphine instead, and relying on the representation of said clerk that the drug was quinine, plaintiffs administered the same to their daughter, from the effects of which she died, states a good cause of action.

2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for wrongfully causing the death of plaintiffs' child by the sale of morphine for quinine, under evidence that a person, as agent for plaintiffs, called at

defendants' drug-store, demanded quinine, but was given morphine, and told by the clerk that it was the best French quinine, and under evidence by such clerk that he had delivered what was called for, and that ounce bottles of both drugs were kept in separate places some distance apart, but that both were wrapped in blue paper, an instruction that plaintiffs could not recover if their agent was negligent in not examining the label of the bottle, was properly refused, as not called for by the evidence, and where the jury had been told that plaintiffs could not recover if their agent got what he had called for.

8. SAME—SALE WITHOUT PRESCRIPTION.

In an action for the wrongful death of an infant, it is proper to refuse to grant a new trial on the ground that the verdict was contrary to the evidence, where the evidence showed, and the jury found, that defendants negligently sold morphine for quinine, though not on prescription, but on private application therefor, as that would not excuse a druggist from exercising due care in dealing with persons who of necessity must rely on him for the article they wish to use.

4. DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES—DISCRETION OF JURY.

In an action for the wrongful death of plaintiffs' daughter, six years old, caused by the negligent sale of morphine, instead of quinine, a charge that the value of the child's services during the period of her minority should be ascertained by the jury as best they could from their own judgment, common sense, and sound discretion, and the evidence, is unobjectionable, and the proper mode of ascertaining damages where, from the undeveloped state of the child, an estimate of its services would be matter of opinion, and no expert testimony would be better than the judgment and common sense of the jury.¹

5. SAME—INSTRUCTIONS.

Where, in an action to recover damages for the wrongful death of plaintiffs' child, the court had charged that plaintiffs could recover only for medical expenses, and the reasonable value of the child's services during minority, but neither for the physical or mental suffering of the deceased, nor for the anguish caused them by the death of their child, it is not error to refuse to repeat the same charge.

6. SAME.

In an action for the wrongful death of plaintiffs' child, a charge that the damages to be awarded should not exceed the sum expended in the efforts to restore its health and the value of its services during minority, nor the amount sued for, is not erroneous, because not cautioning the jury to exclude expenses for nurture, education, etc., and though improper in referring to the claim of damages, does not require a reversal where the verdict is largely below that amount.

Appeal from district court, Tarrant county.

Action for the wrongful death of their minor daughter by E. L. and C. E. White against L. N. Brunswick & Co., druggists, caused by the negligent sale of morphine instead of quinine. Verdict and judgment for plaintiffs, and defendants appeal.

Ball & McCart, for appellants. *Furman & Steadman* and *Carter & Wynne*, for appellees.

WALKER, J. E. L. and C. E. White, the parents of Chalcy White, their daughter, about six years old at her death, sued appellants for damages for negligently causing her death. Appellees, in their petition, allege, in substance, that they were on the 30th day of August, 1883, husband and wife, the parents of said infant, who was about six years old; that on said day appellants were wholesale and retail druggists, doing business in the city of Fort Worth; that on the 29th day of August, 1883, their said child being sick, appellee E. L. White told his brother, George White, who was on that day going to said city, that he had better get a bottle of quinine; that accordingly said George White did, when he arrived in said city, apply to the agent and servant of appellants, one H. D. Ramsey, for quinine, which was a wholesome and harmless drug; but that said Ramsey negligently and carelessly sold and delivered to said George White a poisonous drug known as "sulphate of morphia," commonly called "morphine;" that said George White received said

¹In general, as to the measure of damages for negligently causing death, see *Cooper v. Railway Co.*, (Mich.) 38 N. W. Rep. 806; *County of Howard v. Legg*, (Ind.) 11 N. E. Rep. 612, and note; *Stoher v. Railway Co.*, (Mo.) 4 S. W. Rep. 389; *Hogue v. Railroad Co.*, 82 Fed. Rep. 305; *Davis v. Guarnieri*, (Ohio), 15 N. E. Rep. 350; *Banking Co. v. Rouse*, (Ga.) 5 S. E. Rep. 637.

drug believing it to be quinine, and paid for it out of money belonging to him and E. L. White as partners; that in applying for quinine the design on the part of said George White was to procure the same for the common benefit of his own family and that of E. L. White, all of whom lived in one house, and used together any quinine that might be on hand; that neither plaintiff nor said George White knew that said drug was anything but quinine; that said drugs of morphine and quinine closely resemble each other, and the appellees and said George White, not being experts nor able to test the quality of drugs, relied wholly on the representations of said Ramsey as to the character of the drug delivered, and so relying they did administer the same to their said child in such quantity that it produced and caused her death, the dose being a reasonable and proper one had the drug been quinine as represented,—alleging damages as follows: \$50 for medical attention, and \$7,500 for the loss of her services from the time of her death until she would have arrived at the age of 21 years. Appellants answered by general and special demurrer, setting up as ground of special demurrer that the petition failed to show any privity of contract between plaintiffs and defendants, or between defendants and the deceased; defendants also pleaded contributory negligence on part of plaintiffs, and on part of George White, their agent. The demurrer was overruled. Trial, and judgment had for plaintiffs for \$1,500.

The petition alleged facts showing the contract relations between plaintiff E. L. White, as customer, with the defendants, as druggists; the sale and delivery of the morphine instead of quinine; that, relying upon the declaration of the druggist clerk that the drug was quinine, and believing it to be quinine, the plaintiffs had administered it to their daughter, from the effect of which she died. This makes a cause of action.

The charge of the court submitted the facts in evidence with suitable definitions of the degrees of carefulness required of druggists and of the customer; that plaintiffs could not recover if their negligence had contributed to the death of the child. Upon the measure of damages the rule was given: "If you find for the plaintiffs you will find for them such damages as you may think proportioned to the injury resulting from the death of the child, not to exceed, however, the sum expended in an effort to have her relieved from the effects of the morphine, and the reasonable value of the services of the child from the time of her death until she would have attained the age of twenty-one years, not to exceed the sum sued for. Neither physical nor mental suffering of the deceased child, nor the mental anguish of the parents in consequence of the death of their child, are items or elements of damages to be considered by you. And the value of the child's services during the period of her minority (if you should find for plaintiff) is to be ascertained by you as best you can from your own judgment, common sense, and sound discretion, and the evidence before you." And further: "If * * * [the druggist clerk] did not sell the drug to George White at all, or if he did sell it to him, yet he sold to him the article called for, then the plaintiffs cannot recover. * * * The burden of proof is on the plaintiff to show that the drug was purchased from defendants, and that quinine was asked for, and that it was sold and represented to be quinine."

The defendants insist that the court erred in refusing to charge the jury that if "George White was guilty of negligence in failing sufficiently to examine the label upon the bottle in question after he received the same, and that if he had examined the label the fact that the bottle did not contain quinine would have been discovered, and that such negligence contributed to the injury." The testimony showed that at request of plaintiff E. L. White, his brother George had bought the drug, expecting to get quinine; that returning from town he produced the bottle containing the drug, telling plaintiff what the druggist clerk had said about it; that he put it upon the mantle-piece, from which it was taken when the dose was prepared for the child. George

White testified that he asked for quinine, and that he was assured by the druggist clerk that it was the best quality of French quinine. It also appears that after the family became alarmed at the effects of the drug, George White took the bottle to a physician to know what was its contents. The clerk testified that he had no recollection of having sold the bottle; that if he did so, he had delivered what was called for; that there was no French quinine in the shop, and that the two drugs were kept in separate places, some distance apart; that ounce bottles of both were wrapped in blue paper, and that it was not usual to examine contents of bottles or packages sold in bulk. Upon this state of facts, even if the charge asked had not been obnoxious in declaring as matter of law that the failure of George White to notice the label, and that such examination would have disclosed the danger, constituted contributory negligence, still it was not warranted. The part performed by George White as the medium between plaintiffs and the defendants was, on the one hand, to buy; and on the other, to receive and bring home. No call is made by the testimony for the action of the jury to ascertain the proper care on his part further than was given,—that if he got what he called for from the druggist the plaintiffs could not recover.

The eighth assignment challenges the correctness of the charge upon the mode of ascertaining the amount of damages: "And the value of the child's services during the period of her minority is to be ascertained by you as best you can from your own judgment, common sense, and sound discretion, and the evidence before you." In the charge, as given above, it will be seen that the correct rule had been given, viz.: the medical expenses and the reasonable value of the services of the child from her death till she would have attained the age of 21 years. The testimony to the services, etc., of the child was given by her mother. "She [the deceased] was six years old when she died. * * * She was a bright, intelligent child, and, with the exception of a few chills, had been in good health before this morphine was given her. She was of great assistance about the house. She aided me in taking care of my baby, then about a year old; she helped to wash the dishes, and swept the house, and rendered other services about the house. We were poor people, and all of us worked." The parents were engaged in the dairy business, about four miles from Ft. Worth.

In *Railroad Co. v. Nixson*, 52 Tex. 24, the question was raised, but not decided in this character of case, whether "the jury can determine for themselves, in their own uncontrolled discretion, the amount of pecuniary compensation which the parents should recover." In *Railway Co. v. Cowser*, 57 Tex. 304, in discussing the discretion which may be exercised by the jury in fixing the amount of compensation, the court suggests: "If it should be allowed in any case it would be upon the principle of necessity only, and should be restricted to that class of cases in which from the necessity of the case satisfactory evidence was not attainable." Again in *Railroad Co. v. Kindred*, 57 Tex. 504, in case of the mother suing for damages from death of her adult son, it was held that "the evidence in this class of cases, from the nature of things, cannot furnish the measure of damages with that certainty and accuracy with which it may be done in other cases; hence the necessity and wisdom of leaving the question of damages to the discretion of the jury, which will be revised by the court; but their finding will not be set aside, unless it be made to appear that such discretion has been abused." These cases show the condition in which our courts leave the question raised in this assignment. In this case the cause of action is for damages for loss of services during minority of the child. This limit in time, and the further fact that the parents have the legal right to the child's services during minority, prevent the direct application of the rule in the *Kindred Case* as a matter of principle. In *Potter v. Railroad Co.*, 21 Wis. 374, the court discusses the measure of damages, and the means in practice of ascertaining them under the

statute, like the Texas statute, a substantial re-enactment of Lord Campbell's act 9 & 10 Vict. c. 93: "The verdict must be based upon evidence. The statute is peculiar, and much must be left to the sound judgment and discretion of the jury. But we do not think that it was intended that they should find a verdict for damages, without evidence of pecuniary loss. What is the testimony as to such loss in this case? It is that the deceased was aged eleven years and three months; that she was a bright, intelligent girl, strong and healthy, had been to school and to Sunday school; was a good child to work, and accustomed to help her mother. This is all, and it is sufficient to base a verdict for any reasonable sum for the loss of the services of the deceased during her minority." In *City of Chicago v. Major*, 18 Ill. 359, in a suit for death of a child four years old, the trial judge charged the jury that they must make their estimate of pecuniary damage from the facts proved, and that it was not necessary that any witness should have expressed an opinion as to the amount of such pecuniary loss. On appeal the court held: "In this, as in other cases, it was proper for the jury to exercise their own judgment upon the facts in proof by connecting them with their own knowledge and experience, which they are supposed to possess in common with the generality of mankind. It is only where witnesses are supposed to possess a skill and judgment superior to the generality of mankind upon a particular subject that their opinions are allowed to go to the jury for the purpose of supplying the supposed want of experience and judgment of the jury. Where such aids are not attainable, or are not produced, then the jury must be guided by their own best judgment applied to the facts in proof for the purpose of arriving at a conclusion." In *City of Chicago v. Hering*, 88 Ill. 207, suit for the death of a child four years old, arguing, it was declared, where it was claimed that a verdict of \$600 was excessive: "As a matter of law we cannot so declare, and as a matter of fact how can we know that the amount is in excess of the pecuniary damage sustained? When proof is made of the age and relationship of the deceased to the next of kin, the jury may estimate the pecuniary damages from the facts proven in connection with their own knowledge and experiences in relation to matters of common observation. It is not indispensable there should be proof of actual services that may have been or might be rendered;" citing *Railroad Co. v. Shannon*, 43 Ill. 388.

In *Railroad Co. v. Becker*, 84 Ill. 486, in suit for death of a boy between six and seven years old, and upon a verdict of \$2,000 damages, the court declares "the amount is not so large as to justify the inference that the jury was actuated by passion or prejudice. It is true that in an action of this character the recovery must be confined to the pecuniary loss, but the amount of damages was a question of fact for the jury;" refusing to set it aside.

From this citation of authorities, which, in the main, we approve, in connection with the statute, "The jury may give such damages as they may think proportioned to the injury resulting from such death," (Rev. St. art. 2909,) we may suggest: (1) Where the killing of the child was wrongful, and the parents are entitled to at least nominal damages. (2) Where the testimony shows the bodily health and strength; the sprightliness or want of it, of mind; the aptitude and willingness to be useful in performing services; the mode such faculties are exercised as in useful labor or otherwise; and when from the age or undeveloped state of the child any estimate of value of the services until majority would be matter of opinion, in which no particular or especial knowledge in way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value,—then, upon such testimony, the sound discretion of the jury can be relied on to determine the value, without any witness naming a sum. (3) As the age of the child increases, and his faculties develop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damages from the loss. And (4) the circumstances of

the parents suing, as in this case, often become necessary as evidence; not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise. In this case the parents kept a dairy; all the family worked. The child, by attending to some duties, relieved the mother, so that she could engage in other necessary labor. We consider the clause in the charge objected to to be cautionary, and as likely to have benefited the defendants as the plaintiffs. It was rather an admonition against extravagance than a suggestion to it. The words are not misleading, nor do they encroach upon the rule as to damage previously given. "We cannot and will not presume that the jury were other than intelligent men. They are not an accidental part of the tribunal of justice. Juries are an institution of the fundamental law of the land, and we, as a court of errors, can predicate nothing upon their errors, or call that an error of instruction which to us is intelligent and right." *Railroad Co. v. Ogier*, 85 Pa. St. 66.

The twelfth assignment relates to the refusal of the court to give an instruction asked, which had already been given by the court, limiting the recovery to the pecuniary loss of the plaintiffs. This refusal to repeat the charge was not error.

In fourteenth assignment is urged as error the measure of damages given, viz.: "Such as you may think proportioned to the injury resulting from the death of the child, not to exceed, however, the sum expended in the efforts to restore her, and the reasonable value of the services of the child from the time of her death until she would have attained the age of twenty-one years, not to exceed the amount sued for." This, it is insisted, was calculated to mislead or prejudice the jury by indicating that the amount claimed could control in some way their finding. It is insisted also that the court should have limited the value to probable net proceeds, excluding expenses of nurture, education, etc. We do not think that a jury of ordinary discretion would need such a caution from the judge. The reference to the amount claimed has been regarded improper, but not such error as to require reversal, when the verdict, as in this case, is largely below that claimed. *Newman v. Dodson*, 61 Tex. 92. The recovery by husband and wife jointly is not a violation of the rule requiring the jury to apportion the amount found. The plaintiffs are equally entitled to recovery.

The sixteenth assignment is upon the refusal to grant a new trial upon the facts. The sufficiency of the testimony, under proper instructions, was for the jury. How much of non-expert medical practice may be indulged in is not for the courts to determine. Only in case of alleged injury are such matters brought before the courts. It may be that many men are their own physicians,—prescribing for themselves and families. But this will not excuse the expert druggist from responsibility for want of care or of skill required in his business when dealing with men who from necessity must rely upon the druggist for the article they may wish to use.

There is no error in the record, and the judgment is affirmed.

KLEIN v. CITY OF DALLAS.

(Supreme Court of Texas April 24, 1888.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIABILITY FOR INJURY.

Where its charter gives a city control of its streets, sidewalks, sewers, and all things usually appertaining to city supervision, and its ordinances recognize a certain avenue as a street, it is error, in an action for injuries sustained by reason of the negligent construction of a sidewalk and ditch in such avenue, to instruct the jury to return a verdict for defendant unless they find from the evidence that it constructed the sidewalk and ditch.

2. SAME—POSITIVE INSTRUCTIONS AS TO CONTROL.

In an action against a municipal corporation for injuries received by reason of the defective condition of its streets, where the charge assumes that the streets in

question were public streets and highways, and was based on that assumption, there is no error in not giving positive instructions as to the fact. If there is anything wanting in that respect, a special charge should be asked.

2. SAME—NOTICE OF DEFECT—DESTRUCTION.

In an action against a municipal corporation for injuries sustained from the negligent construction of a sidewalk and ditch in one of its streets, an instruction that plaintiff cannot recover unless defendant had notice of the defective and dangerous condition of the sidewalk and ditch, without further instruction as to the law of actual and constructive notice, and without qualification as to the possible finding that the city built the walk and ditch, is error.¹

Commissioners' decision. Appeal from district court, Dallas county.

Action by John Klein against the city of Dallas for personal injuries sustained by falling into a sewer or ditch bordering on the sidewalk in one of defendant's streets. The court charged that if plaintiff received his injuries in the manner stated in his petition; if the sidewalk was in a dangerous condition by reason of the ditch, and that the ditch or sidewalk was constructed by defendant; and if, prior to the time plaintiff was injured, defendant had notice of the dangerous condition of the sidewalk or ditch, and plaintiff was guilty of no negligence on his part contributing to his injuries,—to find for plaintiff actual damages. But if the sidewalk was not in a dangerous condition for ordinary travel, to find for defendant. Also that if there was no evidence that defendant constructed the sidewalk or ditch, and no evidence that defendant took charge of them, to find for defendant; and if there was no evidence that, before plaintiff was injured, defendant had notice of the condition of the sidewalk or ditch, to find for defendant. The defendant had a verdict and judgment; and, plaintiff's motion for a new trial being overruled, he appealed.

W. F. Short and *N. G. Turney*, for appellant. *M. H. Johnson*, for appellee.

COLLARD, J. The charge of the court assumed that the streets were public streets and highways of the city, and based the charge upon that presumption. There was no error in omitting to instruct the jury positively as to the fact. Had there been anything wanting in the general charge in this respect, it was the duty of the plaintiff to have asked a special charge covering the point.

The charter of the city of Dallas is very similar in its provisions to that of the city of Galveston, which was construed by the supreme court in the case of *City of Galveston v. Posnatsky*, 62 Tex. 118. That case lays down the law of this state in relation to the liability of a municipal corporation acting under charter from the state. It is there said "that, when such a corporation accepts a charter giving defined powers, the law imposes the duty of faithfully exercising them, and gives an action for misfeasance or neglect in this respect to any person who may be injured by such failure of duty." The law was exhaustively considered, and the conclusion of the court supported by numerous authorities and decisions, and there can be no occasion to add a word to what has been said upon the subject. The court instructed the jury to return a verdict for the defendant, unless they found from the evidence that it constructed the sidewalk and the ditch. This was error. By its charter the city was given control of its streets, sidewalks, and sewers, and all things usually appertaining to city supervision. Its ordinances recognized Pacific avenue as a street, as well as the streets intersecting it. Under such circumstances, it could not avoid responsibility for the neglected condition of the streets, its sidewalks, and drainage, whether it constructed them or not. If the sidewalk and sewer were dangerous to the traveling public, and remained so, the corporation was bound to change and repair them; and, if it

¹See note at end of case.

neglected to do so, it would be answerable in damages to persons injured by such neglect, under qualifications, as to notice, hereafter considered.

The court also told the jury that plaintiff could not recover unless it had notice of the defective and dangerous condition of the sidewalk and ditch. This charge, given without qualification, as it was, was erroneous. Had the circumstances of the case required notice, and had the charge informed the jury that defendant must have had actual or constructive notice, and explained what was meant by constructive notice, the instruction would have been correct. If the corporation, by the exercise of ordinary diligence, would have discovered the defect in time to have made the needed repairs before the injury, it would be affected with the consequences of notice; it would be held to have had constructive notice. *Barnes v. Newton*, 46 Iowa, 567; *Cleveland v. St. Paul*, 18 Minn. 279, (Gil. 255; *Lindholm v. St. Paul*, 19 Minn. 245, (Gil. 204.) Had the city itself constructed the sidewalk and ditch, no notice of a visible defect, either actual or constructive, would have been necessary. *Rockwell v. Railroad Co.*, 64 Barb. 438. The jury may infer notice (constructive) from the existence of other established facts, (*Lindholm v. St. Paul*, *supra*; *Reed v. Northfield*, 13 Pick. 94; *Hume v. New York*, 47 N. Y. 639; *McLaughlin v. Corry*, 77 Pa. St. 109; *Goodno v. Oshkosh*, 28 Wis. 300; *Springfield v. Doyle*, 76 Ill. 202;) but the question of notice must be left to the jury in all cases, whether it be actual or constructive. What facts would be sufficient to put the corporation upon inquiry would depend upon a variety of conditions,—the length of time the defect had existed, its notoriety, the frequency of travel over it, and the character of the defect itself. Such facts would be admissible in evidence to be considered and weighed by the jury. The existence of a dangerous sidewalk or street would not in any case of itself justify a legal presumption that it was known to the city authorities except where it is visible, and where the city had itself constructed the sidewalk, and made the excavation or obstruction. The act of a wrong-doer rendering usual travel dangerous, without knowledge, actual or constructive, on the part of corporate officers, would not create a liability on the part of the city.

We offer no opinion upon the question of the sufficiency of plaintiff's evidence to show any defect in the sidewalk or ditch, that would render the way dangerous to travel by night, even on an unlighted street. We have intended merely to indicate the law that would govern the case if the dangerous defect should be established by sufficient proof. Our conclusion is that there was error in the charge of the court, for which the case ought to be reversed, and remanded for a new trial.

STAYTON, C. J. The report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

NOTE.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NOTICE. To render a municipal corporation liable for injuries caused by defective streets, it is not necessary that it should have actual notice of the defect. If a state of facts exists such that ignorance can only arise from a failure to exercise reasonable official care, notice will be presumed. *Dorton v. Common Council*, (Mich.) 15 N. W. Rep. 46; *City of Boulder v. Niles*, (Colo.) 12 Pac. Rep. 632; *City of Chicago v. Dalle*, (Ill.) 5 N. E. Rep. 578; *Hanscom v. City of Boston*, (Mass.) Id. 249; *Cook v. City of Anamosa*, (Iowa,) 28 N. W. Rep. 907. In order to be constructive notice, the defect need not be so obvious as necessarily to attract the attention of passers-by. *Squires v. City of Chillicothe*, (Mo.) 1 S. W. Rep. 23. Actual notice need not be proved where the injury arises from a defective construction by the defendant. *Montgomery v. City of Des Moines*, (Iowa,) 7 N. W. Rep. 481. A city cannot be charged with notice of a particular defect in a sidewalk causing injury by evidence that there were other defects in other portions of the sidewalk. *Ruggles v. Town of Nevada*, (Iowa,) 18 N. W. Rep. 866; *Goodson v. City of Des Moines*, (Iowa,) 28 N. W. Rep. 655. But, where a walk was continuously unsafe for some distance, evidence of such fact was held admissible, in an action for injuries caused by a loose board in the unsafe portion of the walk, for the purpose of showing that the defendant should have known of its condition. *Armstrong v. Town of Ackley*, (Iowa,) 32 N. W. Rep. 180.

Evidence is admissible of the condition of a portion of a walk so near the place of an accident that a person in examining such portion would be likely to discover the defect at the spot where the accident occurred. *Osborne v. City of Detroit*, 82 Fed. Rep. 86. And in *City of Plattsmouth v. Mitchell*, (Neb.) 29 N. W. Rep. 598, proof of notice of the bad condition of the sidewalk in general where an accident occurred, was held sufficient to render the defendant liable, without notice of the looseness of a particular plank causing the injury. Actual notice given to an officer who is not charged with any duty with reference to the inspection or repair of streets and sidewalks is not sufficient. *Cook v. City of Anamosa*, *supra*.

NOTICE—CONSTRUCTIVE. It is for the jury to determine, under all the circumstances of the case, how long the defect must have existed in order to charge the city with constructive notice. *Sheel v. City of Appleton*, (Wis.) 5 N. W. Rep. 27. As to what degree of notoriety necessary, see *Thomas v. Town of Brooklyn*, (Iowa,) 10 N. W. Rep. 849. Defect of three weeks' standing held sufficient, in *Sullivan v. City of Oshkosh*, (Wis.) 13 N. W. Rep. 468. Proof of existence for one day, not sufficient to fix liability without actual notice. *Sheel v. City of Appleton*, (Wis.) 5 N. W. Rep. 27. Notice presumed, when ignorance not compatible with exercise of reasonable official care. *Dotson v. Common Council*, (Mich.) 15 N. W. Rep. 46. Evidence that sidewalk was in bad condition at the point where plaintiff was injured, for considerable time, sufficient. *City of Chicago v. Dalle*, (Ill.) 5 N. E. Rep. 573; *Gude v. City of Mankato*, (Minn.) 15 N. W. Rep. 173. Presumed, when defect is open and notorious, *Kelleher v. City of Keokuk*, (Iowa,) *Id.* 280; but must be identical defect which led to injury, *Ruggles v. Town of Nevada*, 18 N. W. Rep. 566. As to the admissibility of evidence of former injuries received at the same point, see *District of Columbia v. Arms*, 2 Sup. Ct. Rep. 840; *Bullock v. City of New York*, (N. Y.) 2 N. E. Rep. 1.

HOWARD *et al.* v. KELLAM *et al.*

(*Supreme Court of Texas. April 24, 1888.*)

LIMITATION OF ACTIONS—ADVERSE POSSESSION—OVERLAPPING DEEDS.

In trespass to try title, it appeared that defendants were in constructive possession of land under a good paper title; that plaintiffs claimed under a later deed which overlapped on defendants' land, and were in actual possession of part of the land called for in their deed, but had not inclosed or improved any part covered by defendants' deed. *Held*, that plaintiffs' possession was not adverse to that of defendants.¹

Appeal from district court, Guadalupe county.

Trespass to try title to a portion of the Campbell league, by Moses Howard and wife against John P. Kellam and others. Judgment for defendants, and plaintiffs appealed.

Rust & Ehringhaus and *Storey, Nix & Storey*, for appellants. *W. O. Hutchison*, *W. H. Burges*, and *T. H. Franklin*, for appellees.

WALKER, J. There is testimony in the record of itself sufficient to support the finding of the judge as to the locality of the south line of the Campbell grant. The testimony to the locality of the line as claimed by the plaintiffs is not sufficiently convincing to require the judgment of the district court to be reversed.

The supplemental petition asserts title by limitation of more than 10 years before eviction in 1888. The allegations do not make claim under deeds recorded. The possession of the Howards began in 1868. They bought of Francis, February, 1875. The deeds under which plaintiffs claim were for lands fronting on the San Marcos on the north, and extending south the entire length of the Campbell league, and to the south side as insisted upon by plaintiffs, and across the Wells survey claimed by the defendants. The character of the possession is indicated by plaintiff Howard in his cross-examination; and, after he had testified to having had possession of the lands claimed by him and wife for many years, he adds: "I had no fence or improvements on the land claimed by defendants." The actual possession must therefore have been upon the Campbell grant, as ascertained by the court below. This

¹As to what constitutes adverse possession, see *Bridges v. Johnson*, (Tex.) 7 S. W. Rep. 506, and note.

possession upon that part of the land not in conflict, would not, by construction, extend beyond the limits of the Campbell grant and upon the Wells survey. The land covered by the Wells survey at the entry by plaintiffs is held to have been vacant. As to it, the Wells is the first and older title. The constructive possession, following the legal title, would not be broken until an actual adverse entry upon and occupation of some part of it is shown. The rule is: "The statute will not run in favor of an adverse occupant under a junior title if his possession does not extend to that part of the land in dispute which is within the conflict." *Peyton v. Barton*, 53 Tex. 303. For a stronger reason will it be required that the land in conflict be, in part at least, occupied when the only claim to the land asserted by the party invoking the aid of the rule of constructive possession is founded upon possession. There is no error in the record for which reversal can be had. The judgment is affirmed.

TARRANT COUNTY v. McLEMORE *et al.*

(*Supreme Court of Texas. April 24, 1888.*)

1. DEED—DESCRIPTION—LIMITATION OF ACTION—ADVERSE POSSESSION.

A petition alleging the execution to plaintiff of a deed in fee-simple, in which the description of the land intended to be conveyed was left blank, and authority given by the grantor to another to select the lands desired, and insert their description in the deed, and that the selection was made, though the blank was not filled, and that plaintiff went into possession thereunder, and continued therein for 10 years, shows title under the statute of limitations.

2. SAME.

While a deed in fee-simple, in which the description of the land intended to be conveyed is left blank, parol authority being given to select the lands desired, and insert their description in the deed, cannot be used as evidence of title, the description not having been inserted in the grantor's life-time, it may be used as evidence of the character of the grantee's holding where the selection was made, and he went into possession under it.

3. SAME—BLANKS IN DEED—DEATH OF GRANTEE.

Where one intending to donate to a county land for jail purposes executed a deed in which the numbers of the lots and block of the land proposed to be granted were left blank, and gave parol authority to another to select the lots desired, and insert their description in the deed, but the blanks were never filled, neither the agent nor the court, after the donor's death, can perfect the deed.

4. EQUITY—REFORMATION—LACHES.

Where one, in 1855, executed a deed in which the description of the land intended to be conveyed was left blank, and gave parol authority to another to select the land desired, and insert the description in the deed, and the grantor died in 1866, an action to perfect the deed, brought in 1885, is barred.

Commissioners' decision. Appeal from district court, Tarrant county.

Suit by Tarrant county against Elizabeth McLemore and others, heirs at law of M. T. Johnson, and against J. P. Smith and M. J. Brinson, administrators of Johnson, to recover possession of a tract of land 100 feet square, being lots 1 and 2, in block 11, in the city of Fort Worth; to remove the cloud from plaintiff's title, and have the title quieted; to reform and have certain blanks filled in a written instrument executed and delivered by Johnson to Tarrant county, of which the following is a copy:

"*State of Texas, County of Tarrant:* Know all men by these presents that I, M. T. Johnson, of the county and state aforesaid, have this day given, granted, released, sold, and donated, and by these presents do give, grant, sell, release, and donate, to William Quayle, chief justice of said county of Tarrant, and to his successors in office, forever, for the use and benefit of said county of Tarrant, the following described lot or parcel of land, situated in the town of Fort Worth, in said state and county, to a lot of one hundred feet square, being ———, in block No. ———, for the purpose of building a county jail thereon for the said county of Tarrant, to have and to hold said premises, together with all the rights, tenements, and hereditaments and appurtenances

thereunto belonging, or in anywise appertaining to the same, to the said chief justice and his successors, forever, for the uses hereinbefore expressed. And I hereby warrant and defend the title to the same against the claims of every person whatsoever, claiming, or lawfully to claim, the same through, by, or under me.

"Witness my hand, and scroll for seal, this 16th day of December, A. D. 1858.

M. T. JOHNSON. [Scroll.]

"*The State of Texas, County of Tarrant*: Personally appeared before me M. T. Johnson, well known to me, who signed this conveyance in my presence, and acknowledged that he signed it for the purposes therein specified on the day the same bears date, to witness which I have hereunto set my name and affixed my seal. Official, this 16th day of December, 1858.

"JAMES W. SMITH, Notary Public, T. C., Texas."

The petition alleges that Johnson left the blanks in said written instrument to be filled up by the plaintiff, with property to be selected and more fully described by the plaintiff, and authorized plaintiff to make any such selection and insertion out of land owned by him in and near block 11, in the city of Fort Worth; that plaintiff selected, accordingly, the land described in plaintiff's petition, being lots 1 and 2, in said block 11, and straightway built thereupon a jail, and continuously used the same as a county jail until November, 1854, when it caused to be built another larger and more convenient jail, by reason of the wants of the county, and abandoned the former jail for jail purposes, but continued the use and possession of the lot upon which the former jail was situated; that Johnson died in 1866; that the blanks in the written instrument have never been filled; that Johnson ratified and confirmed the selection by plaintiffs, and its possession and use of the lots. One of the allegations in plaintiff's petition is that it became seized and possessed of the lots by reason of the written instrument, and, while so seized and possessed, was unlawfully and forcibly ejected by defendants in May, 1885; and plaintiff also alleges that no objection or adverse claim was set up to plaintiff's right to the lots until May, 1885, and that then and thereafter defendant claimed that the lots had been forfeited by reason of their non-use for a jail, and had reverted to the heirs at law of Johnson. Plaintiff also claimed title to the lots under the statute of limitations of three and ten years. The suit was brought in 1885. Defendants answered—*First*, general demurrer; *second*, special demurrer to that portion of plaintiff's petition which seeks to reform and add to the supposed deed, on the ground of the statute of limitations of four and ten years; *third*, special demurrer on the ground of plaintiff's negligence and the staleness of its demand; *fourth*, special demurrer on the ground that plaintiff's allegations were inconsistent, in this: that plaintiff claims title by virtue of an alleged deed in one place, and in another place states that, at the time said alleged deed was executed, the lots claimed had not been selected; *fifth*, special demurrer on the ground that plaintiff's petition shows an action for a specific performance of a contract to convey land, and that the action is barred by the statute of limitation of ten years; *sixth*, general denial; *seventh*, not guilty. The court sustained the exceptions of defendant, plaintiff declined to amend, the cause was dismissed and plaintiff took this appeal.

Boykins & Finch, for appellant. *Hogsett & Greene*, for appellees.

COLLARD, J. If the deed executed in blank by M. T. Johnson to the chief justice for the benefit of Tarrant county had been filled up by the chief justice before the death of Johnson, it would have been a conveyance to the county of the lots in fee. There is no condition annexed to the grant by which a forfeiture would be made to occur, nor would it be implied from the fact that the conveyance was for a jail, or for purposes of a jail. The terms of the deed are such as will, unless qualified by a cause of defeasance, convey a fee-simple es-

tate. They vest the title in the county forever. The deed is not a mere dedication for public uses; it is a deed to the county. A condition subsequent that would work a forfeiture of the estate must be certain and clearly expressed. It must appear to be the manifest intention of the grantor by some provision in the instrument distinctly imposed. *Ryan v. Porter*, 61 Tex. 107; 2 Washb. Real Prop. 5-12. It is alleged that William Quayle, chief justice of the county, was, at the time the instrument was executed, authorized by the grantor or donor to select the lots desired for a jail, and to insert their description in the deed, the blanks being left for that purpose, and that Johnson died in 1866. The parol authority was sufficient; and, if the blanks had been filled by the agent before the death of Johnson, the statute of frauds would not have affected it; it would have passed the title to the lots. *Threadgill v. Butler*, 60 Tex. 600; *Wiley v. Moor*, 17 Serg. & B. 438. The blanks were never filled, however, and could not have been by the person appointed for that purpose after the death of the principal. The allegations of the petition show that Johnson appointed, by parol, an agent to perfect a defective deed by designating and filling in the description of the property conveyed. An agent could exercise such authority verbally given; but, the agent failing to execute the power, the courts will not execute it for him. Besides, if such a case were presented that would justify the court in adding to and correcting the deed, the right in this case would be barred by lapse of time. *McCown v. Wheeler*, 20 Tex. 372.

Plaintiff claimed title to the premises by possession under the 10-years statute of limitation. We are at a loss to know upon what ground this part of the petition was held insufficient. If the possession should be shown by the proof to be permissive, or was to continue only during the time the property was used as a jail, the title to the fee could not be acquired, and the plea of 10-years' occupancy would not be available. There is nothing in the allegations to indicate that the county claimed an incorporeal right, or any estate less than the fee. The county can acquire an estate in fee by possession, just as a natural person could, if the holding is under such a claim. The character of the holding is a matter of evidence. The court, by its ruling upon sufficient averments to constitute full title by possession, precluded an inquiry into the facts. This was error. The question of fact presented, should have been submitted to the jury for their determination under instruction explanatory of the rights of the parties as developed by the facts. It may be necessary, in this connection, to refer to the defective deed again. While it cannot be used as evidence of title to any interest in the land, it may be used as evidence to show the character of plaintiff's holding, if the plaintiff is shown to have entered and claimed possession under it. It cannot be used for any other purpose. If, then, plaintiff's possession was, as alleged, for 10 years, and was otherwise characterized by the incidents enumerated in the statute, and is shown to have been based upon the defective conveyance, the conclusion is inevitable, according to the construction we have given the instrument, that the county would be entitled to recover the property in controversy. *Moody v. Holcomb*, 26 Tex. 719. Because of the error of the lower court in sustaining defendants' exceptions to plaintiff's claim of title under the statute of limitations of 10 years, we conclude the cause should be reversed and remanded.

STAYTON, C. J. Report of commission of appeal examined, their opinion adopted, and judgment reversed, and cause remanded.

CASSIN v. ZAVALLA COUNTY.

(Supreme Court of Texas. April, 1888.)

1. OFFICE AND OFFICER.—COUNTY COMMISSIONERS MAY QUALIFY WITHIN WHAT TIME.

Under Rev. St. Tex. art. 1718, which provides that, at the expiration of 30 days from an election, and from time to time thereafter as the officers-elect may qualify, each county judge shall certify to the secretary of state a statement showing who were elected, to what offices, and the date of their qualification, county commissioners have at least 30 days within which to qualify for office.

2. COUNTIES.—COUNTY BOARD OF NEWLY-ORGANIZED COUNTY.—AUTHORITY TO ACT BEFORE ALL THE MEMBERS HAVE QUALIFIED.

A meeting of the county commissioners' court held less than 30 days after the first election in a county previously unorganized, at which meeting two commissioners, who had not then qualified, were not present, and of which they had no notice, is illegal, though a majority of the commissioners were present; and acts done at such meeting, when subsequently revoked at a legal meeting of the court, are not binding upon the county.

Appeal from district court, Zavalla county.

Suit by William Cassin against Zavalla county. Plaintiff appeals.

Jus. H. Burts, for appellant.

GAINES, J. Previous to the year 1884, Zavalla county was unorganized, and was attached to Frio county for judicial purposes. With a view to its organization, an election of officers was ordered, which took place on the 25th of February, 1884, when I. M. Downs was elected county judge, and V. M. West, G. B. Kinney, Wiley Mangum, and E. P. Waller were elected commissioners of the county. Downs, West, and Kinney duly qualified as such judge and commissioners prior to the 20th day of March, 1884, but Waller did not take the oath and give bond until the 22d of that month, and Mangum did not qualify under the election at all. The county judge told West and Kinney that a session of the commissioners' court would be held on the 20th of March, and requested the county judge of Frio county to notify the other two commissioners of the session when they came in to qualify. But neither received the notice. The session was accordingly held on the 20th and 21st days of the month; and an order was made, and entered on the minutes, accepting a proposition submitted to the court by appellant for the purchase of the four leagues of school land belonging to the county, for the sum of \$10,000, payable 10 years after date, but to bear interest from date at 7 per cent. per annum, payable semi-annually; and authorizing the county judge to convey the lands to appellant in accordance with the terms of the proposition and order. At a regular meeting of the court in May following an order was entered, setting aside the order previously made in March.

On the 5th day of May, 1885, appellant brought this suit against the county to enforce a specific performance of the alleged contract for the sale of the land; and the cause, having been submitted to a jury, resulted in a verdict and judgment for the defendant. The court charged the jury to the effect that 30 days were allowed the officers elected on February 25, 1884, by law, within which to qualify, and that if, at the time the session of the court was held, two of the commissioners had not qualified, and had received no notice of the session, the action of the county judge and the other two commissioners was illegal, and their order accepting the proposition of appellant was void, and that the jury should therefore find for the appellee. This charge is assigned as error, and the determination of the question presented by the assignment we think decisive of this appeal. The statute provides that "any three members of the [commissioners'] court shall constitute a quorum for the transaction of any business except that of levying a county tax," (Rev. St. art. 1511;) and it would seem that, as to organized counties, this would be applicable as well to the period of time intervening between the election and the qualification of the members of the court as after their qualification. In

such cases the old officers hold on until their successors are qualified, (Const. 1876, art. 16, § 17;) so that in organized counties, except in cases of occasional vacancy, (which the county judge is authorized immediately to supply,) the court is always full. But, as to the court elected with a view to the organization of an unorganized county, the case is different. Each member has, as we construe the law, at least 80 days within which to qualify by taking the oath and giving the bond required by law. Rev. St. art. 1718. In our opinion, it is not competent for county judge and any two of the commissioners elected to organize the court before the others have qualified, and before the expiration of the time contemplated by law for such qualification. If this were permitted, it would put it in the power of three of the members-elect of the court to deprive their fellows of the time allowed for their qualification, or temporarily of the right to sit upon the court, and, for the time being, to take away from the constituency which elected them the right of representation in the body which is to manage the affairs of the county. We do not think our statutes were intended to lead to such a result. The inexpediency of the construction contended for by appellant is illustrated by the case before us. Here, in a few days after the election of officers preliminary to the organization of the county, the county judge and two commissioners qualify, meet together without notice to the others, and, before the time had elapsed in which they were allowed to qualify, make an order authorizing a sale of the four leagues of school lands belonging to the county. This action was hasty, inconsiderate, and unnecessary, as is shown by the fact that, at the first regular meeting of the court, the order was revoked. If all the members of the court had been present, it is probable the order would not have been passed.

We conclude that the meeting of the county judge and the two commissioners, without notice to the others, and before the qualification of the latter, was not legal, and that therefore the contract under which appellant claims is void. The facts in relation to this matter are undisputed; and no other proper verdict could have been returned under the evidence except a finding for the defendant. This is necessarily decisive of the case, and the judgment is affirmed.

TEXAS W. RY. CO. v. GENTRY.

(*Supreme Court of Texas. February 7, 1888.*)

1. NOVATION—ESTOPPEL TO DENY—ACCEPTING BENEFIT OF CONTRACT.

In an action against a railroad company for the price of certain property, it appeared that plaintiff's intestate sold the property to H.; that H. assigned his interest to a construction company, and that intestate, at the special request of such company, transferred the property to defendant; that defendant accepted the conveyance, in consideration therefor, by a resolution of its board of directors entered on its minutes, and agreed to pay money and deliver certain stock and bonds. *Held*, that defendant, by accepting the conveyance, and agreeing to provide the consideration, takes upon itself the fulfillment of the original contract, and was estopped to deny the consent of the construction company to its substitution.

2. CORPORATIONS—CONTRACTS IN WRITING—ENTRY ON CORPORATE MINUTES.

In an action against a railroad company for the purchase price of certain property, it appeared that defendant, by resolution of its board of directors, accepted a conveyance of such property from plaintiff's intestate; that the acceptance was entered on the corporate minutes, and signed by the president and secretary. *Held*, that such minutes constituted a contract in writing, and that an action could be brought thereon within four years; Rev. St. Tex. art. 3205, enacting that an action for debt, where indebtedness is evidenced or founded on any contract in writing, shall be commenced and prosecuted within four years from accrual of cause of action.

3. RAILROAD COMPANIES—AUTHORITY TO EXECUTE MORTGAGE—ESTOPPEL TO DENY.

Rev. St. Tex. art. 4230, enacts that no mortgage of a railroad company shall be valid unless authorized by resolution adopted by a vote of two-thirds of all the stock of such company. Yet where, in pursuance of a resolution to issue bonds secured on mortgage not so adopted, a contract has been executed and the company has had the benefit thereof, it is estopped from denying its authority to make the contract.

4. SAME—BONDS FOR PURCHASE MONEY—AMOUNT RECOVERABLE BY VENDOR.

Where plaintiff's intestate conveys a railway to defendant, and agrees to accept, as part of the purchase money, bonds secured by mortgage on the line, plaintiff is entitled, the bonds having never been given, to recover the full par value of the bonds, though they might be below par in the market.

5. VENDOR AND VENDEE—ASSIGNMENT OF PURCHASE-MONEY BONDS—RIGHT OF VENDOR TO SUE.

In an action against a railroad company for the amount of certain bonds which defendant agreed to execute in consideration of the conveyance of certain property by plaintiff's intestate, it appeared that intestate had assigned his interest in the bonds, which were never delivered, to third persons, that the petition alleged insolvency of defendant, and asked that a receiver be appointed. *Held*, that the court properly granted the relief asked, and ordered a sale of the property, holding the proceeds until the equitable owners of the bonds could set up their title thereto, though such equitable owners were not made parties to the suit.

6. SAME—NOTICE OF INCUMBRANCES—ACTION FOR PURCHASE MONEY.

In an action against a railroad company to foreclose a mortgage, it appeared that plaintiff's intestate sold to defendant a certain railway as unincumbered when there was a right of way still unacquired. The evidence showed that the directors of the defendant company knew that all the rights of way had not been paid for, and that there were small claims that the intestate had been unable to settle, and that the line had been operated for 10 years, and no action for the land over which it ran or for damages had ever been brought. *Held* that, under the circumstances, the court properly gave judgment for plaintiff for full amount claimed.

7. SAME—VENDOR'S LIEN—PROPERTY SUBSEQUENTLY ACQUIRED.

In an action against a railroad company to foreclose an equitable mortgage, it appeared that plaintiff's intestate conveyed a certain line of railway property to defendant, the purchase money to be secured by mortgage upon the line conveyed, and "upon such proposed extensions as the company owning and operating the same may elect to include in such mortgage." At a stockholders' meeting it was voted to issue bonds of the same character as those sued on, to be secured on all the property, etc., of the company from H. to P., both constructed and to be constructed, which included the only extension made by the company. *Held*, that plaintiff's equitable mortgage extended to the part of the line subsequently constructed.

8. APPEAL—ASSIGNMENTS OF ERROR—TIME OF FILING.

The court will not refuse to consider assignments of error on the ground that the same was filed after the filing of the writ of error bond, where doing so would not operate to the prejudice of the opposite party.

Error from district court, Harris county; **JAMES MASTERSON**, Judge.

Mary F. Gentry, as administratrix of A. M. Gentry, deceased, brought an action against the Texas Western Railway Company for foreclosure of a vendor's lien, an equitable mortgage, and for a money judgment. Verdict for plaintiff. Defendant brings error.

Stuart & Breaker and Ballinger, Mott & Terry, for plaintiff in error.
Hutcheson, Carrington & Sears, for defendant in error.

GAINES, J. The defendant in error, Mary F. Gentry, as administratrix of the estate of A. M. Gentry, deceased, brought this suit against the plaintiff in error, a railroad corporation organized under the general laws of this state, alleging, in substance, that her intestate in his life-time entered into a contract with one Honoré, by which he agreed to transfer to the latter the property and franchises of the Texas Western Narrow-Gauge Railway Company free from all incumbrances; that Honoré, in consideration of the transfer, was to pay her intestate certain sums in cash, and to deliver to him certain shares in a new company to be organized to operate the railroad, and that, in addition thereto, he was to receive bonds of the new corporation to the amount of \$200,000, secured by a mortgage upon its property, running 20 years, and bearing 6 per cent. interest, payable semi-annually. It was also alleged that Honoré assigned his interest in this contract to the Texas Western Construction Company, and that, at its request, Gentry executed the contract on his part by transferring the property described therein to the plaintiff in error, and that the latter accepted the conveyance by a resolution of its board of directors entered in its minutes on the books of the corporation; paid the cash, and delivered the stock, according to the terms of the contract, and stipulated

in the resolution to immediately deliver the bonds. It was also averred that the bonds had never been delivered, though often demanded; that the affairs of the company were being negligently and fraudulently mismanaged, and that it was insolvent. The petition claimed an equitable mortgage upon the property of the defendant for the amount of the bonds and interest, and also a vendor's lien upon the same, and prayed judgment and foreclosure. There was also a prayer for the appointment of a receiver, and an appointment was made by an interlocutory order. Upon the trial a judgment was rendered in favor of defendant in error, Mary F. Gentry, as administratrix, for the full amount of the bonds and interest, and this was decreed to be a prior lien upon the property of plaintiff in error, which was ordered to be sold by the receiver as special commissioner, and the proceeds paid into court. No appeal having been perfected, the property was sold, and realized the sum of \$140,500. Subsequent to the sale of the property, and a decree distributing the proceeds, this writ of error was sued out.

The petition was excepted to on the ground "that it shows no contract existing between A. M. Gentry and defendant for the payment or delivery by defendant to Gentry of any cash, bonds, or stocks, but that the contract was between said A. M. Gentry and the Texas Western Construction Company, and that plaintiff's right of action * * * is against said construction company, and not against this defendant." This and other exceptions raising the same question were overruled by the court, and that ruling is assigned as error. The conveyance of the property transferred to the defendant by Gentry's deed was certainly a sufficient consideration for its promise to deliver the bonds; and hence we presume the exception is based upon the theory that Gentry having promised to convey the same property to the construction company, and that contract being still in force, he had no power to convey to defendant. But the construction company could have released Gentry from the agreement which had been assigned to it, or, at least, with Gentry's consent, could have substituted defendant to its rights under the agreement. The petition avers that he "executed the deed to the Texas Western Railway Company at the special instance and request of the Texas Western Construction Company." Such being the fact as admitted by the demurrer, the latter company is clearly precluded from objecting to the conveyance as made. A similar question is presented by the assignment that the evidence was insufficient to support the finding of the court, because it showed no consideration for the promise of the defendant to deliver the bonds to Gentry. The minutes of the proceedings of the meeting of the directors of the Texas Western Railway Company, relating to this matter, was read in evidence, and is as follows: "Judge Ballinger, as counsel for the Texas Western Construction Company, at the request of the president, explained to the board the nature of the negotiation which had been for some time pending concerning the sale of the Texas Western Narrow-Gauge Railroad, stating that he had prepared a resolution, which, if adopted, would complete the transaction." The minutes then show that the resolution was then read, and was unanimously adopted. We quote a part of the resolution: "Resolved, that the Texas Western Railway Company does now make and conclude the purchase from the said Gentry of and acquire the title to all and singular the property and premises, and that the conveyance from A. B. Stone, J. L. Spoffard, and J. C. Chew, styled 'Reorganization Executive Committee,' made the 11th day of May, 1881, to this company, delivered this day by the said Gentry, and the conveyance from the said Gentry, made 3d day of June, 1881, to this company, also delivered this day, from him to this company, are hereby accepted as conveyances therefor; * * * that, in consideration therefor, the treasurer of this company shall pay to the said Gentry, [here follows a description of the money and stock to be paid:] that this company will issue, immediately on the execution thereof, and release to the said Gentry, one hundred and sixty thousand dollars (\$160,000) in its first mortgage bonds,

and forty thousand dollars (\$40,000) in its income bonds, said bonds at par, in accordance with and in fulfillment of the terms of the agreement between him and H. H. Honoré, assigned to the Texas Western Construction Company." The evidence does not clearly disclose the relations between the construction company and the railway company; but the inference is clear, from these proceedings, that Honoré had assigned his contract to the former for the benefit of the latter, or that some subsequent arrangement had been made by which the railway company had acquired the rights of the construction company under the Honoré contract. At all events, the defendant company, having accepted a conveyance of the property in fulfillment of that contract, and having impliedly asserted the assent or request of the construction company to the arrangement; and having agreed to pay the money, and deliver the stock and bonds, which were agreed to be paid and delivered as a consideration therefor, is estopped to deny the consent of the construction company to the substitution. The agreement to deliver the bonds was the promise of the defendant corporation, and was supported by a valid consideration, as appears both by the pleadings and evidence; and the court did not err in so holding.

The resolution accepting Gentry's conveyance was passed June 3, 1881, and this suit was instituted June 24, 1884. The statute of limitations of two years was pleaded in the court below both by exception and by answer, and it is now insisted that the court erred in not sustaining that defense. The minutes of the meeting at which the resolution was passed was signed by the president and secretary of the corporation. A copy, attested and duly acknowledged by the secretary, was delivered to Gentry, and was subsequently placed upon record. The question is, was this "a contract in writing," within the meaning of article 3205 of the Revised Statutes, upon which an action may be brought at any time within four years? It is held in several cases that a resolution of the board of directors, or other lawfully constituted governing body, of a corporation, duly entered upon their minutes, and signed by the proper officers, if intended as the completion of a contract, is a memorandum in writing as required by the statute of frauds, and that, as such, it can be lawfully enforced. *Argus Co. v. Mayor*, 55 N. Y. 495; *Johnson v. Church*, 11 Allen, 123; *Furnace Co. v. Railroad Co.*, 22 Ohio St. 457; *Tufts v. Mining Co.*, 14 Allen, 411; *Chase v. Lowell*, 7 Gray, 35; *Grimes v. Hamilton Co.*, 37 Iowa, 294. In the few cases which seemingly hold a contrary doctrine the resolutions were deemed rather propositions for a contract than final acceptances of an agreement. See *Wade v. Newbern*, 77 N. C. 460; *Dunham v. Boston*, 12 Allen, 376; *Flint v. Pierce*, 99 Mass. 69. If a resolution duly entered and signed be a writing under the statute of frauds, it must be a contract in writing within the meaning of the statute of limitations, where it shows upon its face that it is intended as the final acceptance of a previous agreement. This intention is most clearly expressed in the resolution under consideration. We therefore hold that the action was not barred by limitation.

It is also insisted that the court erred in giving judgment for the plaintiff in the court below, because the evidence showed that her intestate had sold the larger part of the bonds in his life-time. No bonds ever issued, and hence Gentry could not have assigned the bonds themselves. It appears, however, from the evidence, that he did assign to different persons the right to each to receive a certain number of the securities. A partial assignment of a chose in action is good in equity, though the legal title remains with the assignor. *Harris Co. v. Campbell*, 68 Tex. 22, 3 S. W. Rep. 243. But it is well settled in this state that the holder of the legal title of a chose in action may bring suit upon it in his own name, although the equitable right may be in another. *Rider v. Duval*, 28 Tex. 623; *Wimbish v. Holt*, 26 Tex. 674; *Butler v. Robertson*, 11 Tex. 142; *Thompson v. Cartwright*, 1 Tex. 87; *Insurance Co. v. Ray*, 50 Tex. 511. The equitable owner is a proper but not a

necessary party, unless the debtor have some legal defense as against him alone. But in this case the petition alleged the insolvency of the corporation, fraud and mismanagement on the part of its officers, and prayed a receiver, and a receiver was appointed. This brought the administration of the entire assets of the corporation under the control of the court. Judgment was given for the plaintiff, and the property ordered to be sold, but the proceeds of the claim sued on were decreed to be held until the parties claiming an interest in the bonds could set up their title to them. The property having been sold, the court proceeded to adjust the equities as between the claimants of the fund, and in its final order distributed it among them; the plaintiff receiving but about one-third of the amount. These distributees are not appealing, and the plaintiff in error cannot complain.

But it is further insisted that the resolution as a contract to issue bonds secured by a mortgage was void, because it was never authorized or ratified by a two-thirds vote of the stock of the corporation, as required by our statute. Rev. St. art. 4220. There is some conflict among the authorities upon the question of the validity of the contract of a corporation when made in excess of its powers. When the contract is executed, and the corporation has received the benefit, the weight of authority seems to be that the corporation should be held estopped to deny its authority to make it. *Jones v. Guaranty Co.*, 101 U. S. 622; *Bank v. Matthews*, 98 U. S. 621; *Railway Co. v. McCarthy*, 96 U. S. 258; *Arms Co. v. Barlow*, 68 N. Y. 62; *Perkins v. Railroad Co.*, 47 Me. 578; *Manufacturing Co. v. Carney*, 54 N. H. 295; *Railroad Co. v. Proctor*, 29 Vt. 93; *Bank v. Globe Works*, 101 Mass. 57; *Bank v. Rogers*, 125 Mass. 389; *Railroad Co. v. Transportation Co.*, 83 Pa. St. 160; *Bank v. Hammond*, 1 Rich. Law, 281; *Insurance Co. v. Carrugi*, 41 Ga. 660; *Insurance Co. v. Lanier*, 5 Fla. 110; *Littlewort v. Davis*, 50 Miss. 403; *Underwood v. Lyceum*, 5 B. Mon. 129; *Hays v. Gas-Light Co.*, 29 Ohio St. 330; *Board v. Railway Co.*, 47 Ind. 407; *Darst v. Gale*, 83 Ill. 136; *Thompson v. Lambert*, 44 Iowa, 239; *Foulke v. Railroad Co.*, 51 Cal. 365. The rule is correctly stated in a recent work on estoppel: "Where a contract has in good faith been fully performed, and nothing remains to be done by * * * the party seeking relief, and all the stockholders have acquiesced in its performance, the plea of *ultra vires*, or mere want of power, is not available by the corporation in an action brought against it for not performing its portion of the contract. 2 Herm. Est. § 1179, and the numerous cases there cited. There are some decisions which hold that a contract by a corporation *ultra vires* is wholly void, and cannot be enforced either by or against it; but if the contract be within the general scope of the corporate authority, and the prohibition be merely against the mode of its execution, it is valid as against the corporation who has received its benefits, in favor of a party who has fully complied with the obligations on his part. In the case before us the railroad company had power to make a mortgage, but the statute provides it must be authorized by a vote, in meeting, of two-thirds in value of the stockholders. This provision is evidently for the protection of the latter. It seems from the evidence in this case that the defendant corporation was organized for the purpose of extending and operating the railroad acquired, or then about to be acquired, by Gentry. It is fully shown that it made the purchase, promised the bonds and mortgage as a part of the consideration for the property, and had operated the road for about three years when this suit was brought. It does not appear that it ever had any other assets save the property so acquired, and a short extension of the line. Under these circumstances the corporation must be held estopped to deny the want of assent of its shareholders. The promise to make a mortgage under these circumstances is deemed in equity equivalent to a mortgage as between the original parties to the transaction. *Miller v. Moore*, 8 Jones, Eq. 431; *Daggett v. Rankin*, 81 Cal. 322.

It is also complained that the court erred in decreeing a foreclosure of the

mortgage upon that part of the road which was constructed after the defendant company's purchase from Gentry. The resolution above quoted shows that the bonds were to be issued, and the mortgage executed, "in accordance with and fulfillment of the terms of agreement between him [Gentry] and H. H. Honoré." By this agreement the bonds to be delivered to Gentry were to be secured upon the line of railway then "belonging to the Texas Western Narrow-Gauge Railway Company, and upon such proposed extensions and branches thereof as the company owning and operating the same may elect to include in such mortgages." At a meeting of the stockholders held after the acceptance of the conveyance from Gentry, the stockholders, by a unanimous vote of all present, a majority in value of the stock being represented, authorized the issue of bonds of the precise character of those agreed to be delivered in the Honoré contract, and directed that they should be secured by mortgages upon "all of the property, rights, and franchises of the company from Houston to Presidio, both that actually constructed and acquired from A. M. Gentry * * * and that to be constructed" by the company. The contract evidently intended that bonds should be used for a much larger amount than was necessary to discharge the obligation to Gentry, and that they should embrace some extension or some branch in addition to the road already constructed and in operation. An extension of the railroad, either upon its main line or upon some one or more branches, was evidently contemplated. There would have been a material difference in value between bonds to the amount of \$18,000 per mile upon the 20 miles of road already built and similar bonds covering a longer line. If the company had projected more than one extension, it certainly had the right to choose upon which to give the mortgage. It could not elect to give it upon neither. Having made but the one extension, this must be held to be embraced in the mortgage which it was Gentry's right to demand. Though the votes of the stockholders at their meeting in 1882 may be insufficient to authorize the execution of a mortgage, yet it shows the contemplated extension, and the property selected by the management for the security of such bonds as they proposed to issue.

The evidence showed that, although Gentry agreed to convey the property of the Texas Western Narrow-Gauge Company free from incumbrance, that portions of the right of way had not been paid for. A witness testified that it would probably cost \$10,000 to secure so much of this as had not been acquired; but as to the amount required for this purpose the evidence is conflicting,—other witnesses placing it at a much less sum. It is assigned that the court erred in giving judgment for plaintiff for the full amount of her claim, and in not making a deduction for the unacquired right of way. It was proved, however, that, when the conveyance was accepted, it was known to the directors that all the right of way had not been paid for, and that there were other small claims Gentry had been unable to settle; but that it was agreed that the property should be accepted as it then stood, and that he was to be released from any further obligation to discharge their claims. It also appeared that although the road, at the time of the trial, had been operated for over 10 years, yet no one had brought suit for the land over which it was run, or for damages thereto. Having accepted the deed with the full knowledge of the facts, the grantee must await the establishment of claims existing at the time of the conveyance against the property before it can set up a breach of the warranty. But, if the defendant were entitled to a deduction from the amount of the judgment on account of unadjusted demands for the right of way, this would be no reason for reversing the judgment. All the property of the corporation has been sold to a third party, and the proceeds are sufficient to pay but little more than half of the judgment. The result would have been the same if the recovery had been but for two-thirds of the amount.

Twentieth assignment of error is that "the judgment is contrary to the law, and unsupported by the evidence, in that it finds for and allows plaintiff the

full par value of the bonds claimed by her in said petition; whereas, there was no evidence of the value of said bonds, or that said bonds were of any value." The twenty-first assignment raises substantially the same question. The plaintiff did not sue for damages for not delivering the bonds, but for her debt; and, after setting forth all the facts in her petition, she prays for judgment for "the interest and principal," and for a foreclosure of her equitable mortgage. If the bonds did not become due upon the payment of the interest, there was, at the time she brought suit, interest due amounting to many thousands of dollars, for which she was entitled to a foreclosure. The proper practice in such a case was to decree a sale of the property, and to apply the proceeds to both the matured and unmatured debt secured by the mortgage. The bonds, if issued, may have been below par in the market; but, as against the defendant, they were evidence of debt to their full amount.

Defendant objects to the consideration of the thirty-first assignment, upon the ground that it was not filed at the time of the filing of the writ of error bond as required by the rules. There seems to be some misapprehension in regard to the practice in this matter. We therefore take occasion to say the court does not refuse to consider assignments filed after the filing of the bond, unless it appears that it has operated to the prejudice of the opposing party. Motions to strike them out have been frequently refused by this court in oral opinions. This assignment submits the propositions that the contract sued on is illegal, because it shows upon its face that it is a contract for an issue of stocks and bonds to a fictitious amount, in contravention of the provisions of the statute. We are not prepared to say, from the evidence, that the amounts of stocks and bonds proposed to be issued to Gentry were fictitious. It may be suspected, but we do not think it proved. No issue of this kind was presented in the court below; and, if it could properly be considered here, we cannot say that the testimony was sufficient to warrant a finding that the contract was illegal. But, were it so, can the defendant be permitted to set up its illegality, after receiving the property under it in order to defeat the payment of the consideration? What we have already said we think a sufficient answer to this question. See *City of Natchez v. Mallory*, 54 Miss. 499. We find no error in the judgment, and it is affirmed.

PARKS v. O'CONNOR.

(*Supreme Court of Texas. March 27, 1888.*)

1. SALE—CONTRACT—"GOOD AND MERCHANTABLE CATTLE."

A contract for the delivery of "good and merchantable cattle" calls for the delivery of cattle not simply good for the purposes of sale, but inherently sound.

2. SAME—ACTION FOR PRICE—EVIDENCE—"YEARLING CATTLE."

In an action on a contract for the delivery of "yearlings," it is admissible to prove by persons engaged in the cattle business that when a contract is made between cattle-men, in the section of country where the contract sued on was made and to be executed, for the delivery of "yearlings," that they are expected to deliver cattle born at any time from January 1st to June 1st of the year previous.

3. SAME—VENDOR'S LIEN—WAIVER—AUTHORIZING PURCHASER TO SELL.

A purchaser contracted to give the seller a mortgage on certain cattle purchased, and on certain land, and the seller, without consideration, agreed that the purchaser might sell that portion of the cattle sold which had been delivered. The purchaser, after selling the cattle delivered, refused to execute the mortgage or receive the other cattle. *Held*, that the seller did not, by his permission to sell a portion of the cattle, waive his lien.

4. SAME—REFUSAL OF PURCHASER TO ACCEPT GOODS—RIGHTS OF SELLER.

Plaintiff contracted to deliver a large number of cattle to defendant under an agreement that defendant should secure the payment therefor by giving his note, bearing interest at 12 per cent. after a certain date, and executing a mortgage on all the cattle and on certain land. After the delivery and acceptance of a portion of the cattle, defendant refused to receive the balance, or to execute the note and mortgage. *Held*, that plaintiff is entitled to recover damages as to the cattle delivered and accepted, for the contract price, and interest thereon at the rate and from the date agreed upon.

5. SAME—EXAMINATION BY PURCHASER—ESTOPPEL.

When a purchaser under an executory contract for the sale and delivery of personal property inspects the same before its delivery and acceptance, he is estopped, so far as all visible defects are concerned, to set up that it is not such as the seller agreed to deliver.

6. INJUNCTION—BY LIENOR TO RESTRAIN SALE—DAMAGES.

A defendant is not entitled to damages for the suing out of an injunction where the plaintiff has a lien on the property which the defendant was enjoined from selling.

Appeal from district court, Goliad county; H. C. PLEASANTS, Judge.

Action by Thomas O'Connor, appellee, against the appellant, Solomon Parks, to recover the price of cattle sold appellant.

A. B. Petcolas, D. D. Claiborne, and C. H. Morris, for appellant. *Glass & Callender, Stockdale & Proctor, and E. W. Stayton*, for appellee.

GAINES, J. This suit was brought by appellee to recover of appellant the price of 5,384 head of cattle delivered by appellee to appellant under a contract which is in writing, and which, in substance, is as follows: Appellee agreed to sell and deliver to appellant "8,000 head of mixed yearlings, (steers and heifers,) all to be good merchantable cattle," in three herds; the first herd to be delivered May 15, 1885, and the other two as soon thereafter as practicable; in consideration of which appellant agreed to pay appellee eight dollars per head for the cattle so delivered, and for the purchase money so promised, to execute to appellee two promissory notes payable on or before a date 12 months after the delivery of the first herd; the notes to bear 12 per cent. per annum interest from date, and to be secured by a mortgage upon certain lands and cattle belonging to appellant, and also upon the cattle so sold. Appellee alleged in his petition the delivery and acceptance of 5,384 cattle under the contract, and a tender of 2,616 yearlings such as were called for in the contract, and appellant's refusal to accept the latter. He also alleged appellant's failure to pay for the cattle received by him, and his refusal to execute the note and mortgage stipulated for in the agreement. He prayed a judgment for the purchase money of the cattle delivered at the contract price, with interest at 12 per cent. per annum from the time of the delivery, and for a decree enforcing the lien upon the property described in the agreement.

By the first assignment or error it is complained that the court erred in overruling defendant's exception to so much of the petition as sought to recover the conventional interest of 12 per cent. The fourteenth assignment is to the effect that the court erred in charging the jury to allow interest at the stipulated rate. These are based upon the proposition that, because the contract was not fully consummated, and the notes were not given, interest at the rate agreed upon could not be recovered. But the proposition is not sound. The plaintiff alleged an offer fully to comply with the contract on his part, and the defendant's refusal; and, clearly, the measure of his damage as to the cattle delivered and accepted was the contract price, and interest at the rate and from the date set forth in the agreement. *Heidenheimer v. Ellis*, 67 Tex. 426, 3 S. W. Rep. 666; *Bank v. Satchleben*, 67 Tex. 420, 3 S. W. Rep. 733.

It is also complained that the court erred in not striking out, upon defendant's exception, so much of the petition as sought to enforce a lien upon the property therein described. This assignment is not well taken. The plaintiff averred a substantial compliance with the contract upon his part. This entitled him to have it enforced according to its terms, to the extent that defendant had actually received cattle under it. A written agreement to give a mortgage, with which the party entitled thereto has complied, is treated in equity as a mortgage, and will be enforced as such between the parties to the original transaction. *Railway Co. v. Gentry*, ante, 98, (decided at this term.)

Defendant pleaded in his answer that, after the execution of the contract, plaintiff agreed that he could sell or ship a portion of the cattle upon which the mortgage was to be executed; and also that plaintiff, after the delivery of the second herd, never delivered or tendered the additional cattle required for the completion of the contract on his part, and claimed that thereby the lien was waived and discharged. Exceptions to these allegations were sustained by the court, and the ruling is assigned as error. It is undoubtedly true that if a party who has a lien upon property consents to an absolute sale of the same, and it is accordingly sold, the lien is thereby waived as to the property so sold; but it does not follow that if he consents to a sale of a part of it merely, that he relinquishes his lien upon the part to the sale of which he did not consent, or upon so much of it as is not actually sold. The defendant does not allege any consideration for plaintiff's agreement that he might sell or ship the cattle, and we think it clear that the agreement was not binding, and that plaintiff did not thereby waive his right to a mortgage as to any of the property which was not actually disposed of by his permission. As to so much of the answer as claims a discharge of the lien by reason of plaintiff's failure to deliver the full number of cattle, this is to be said: that, if he did make such failure, it was defendant's right to tender back the cattle, and claim a rescission of the contract. He cannot hold the cattle already delivered under the agreement, without paying according to its terms. To hold that he can retain what he has already received, and be held to account merely for the value as a simple debt discharged of any lien, would be to hold the plaintiff to a contract to which he never agreed. If he has suffered damage by plaintiff's failure, his damages would be a proper subject of counter-claim, and could be set off against plaintiff's demand.

In regard to the third assignment of error, it is sufficient to say that it does not appear, from the allegations of the answer which are there brought in question, that the losses there claimed by defendant were in the contemplation of the parties at the time the contract was entered into. *Express Co. v. Darnell*, 62 Tex. 639. The inference from the averments is that the contract to deliver a part of the cattle to Shiner and Williams was made after the execution of the contract with plaintiff; so that, in our opinion, the latter would not be liable for any damage incurred by defendant by reason of his failure to make a timely delivery to them, although such failure was caused by plaintiff's dereliction in failing to make delivery according to the terms of his agreement with defendant.

It was urged by defendant below, and is insisted here, that the second herd of cattle delivered by plaintiff were not in accordance with the terms of the contract, and that he should not be compelled to pay for the same according to the contract price. He admits, however, that he received the cattle, though under protest; claiming that he was forced by the exigencies of his business to take the cattle for delivery upon contract with third parties, which he then had outstanding. But if the cattle tendered him were not such as were called for in his agreement with plaintiff, and he knew this, he should have rejected them. When a purchaser, under an executory contract for the sale and delivery of personal property, inspects the same before delivery, he is estopped to set up that it is not such as the seller has agreed to deliver, so far as all visible defects are concerned. His mere protest, in the face of his acceptance, amounts to nothing. If the property is not such as his contract calls for, he can refuse to receive it, and sue for such damages as he suffered by the breach of the agreement. He must take the property under the contract, or not at all. What we have just said we think sufficient to dispose of appellant's fourth, ninth, sixteenth, and seventeenth assignments of error, so far as the purposes of this opinion render such disposition necessary.

During the progress of the trial, the plaintiff was permitted, over objections by defendants, to prove, by persons engaged in the cattle business, that

when a contract is made, between cattle-men in the section of country where this was made and was to be executed, for the delivery of "yearlings," that they are expected to deliver cattle born at any time from the 1st of January to the 1st of June of the previous year, and that, by the custom of the country, in the term "yearlings," cattle from 10 to 15 months old were included, provided their average age was one year. In the admission of the evidence we think there was no error. It is apparent that it would be impracticable for any one to deliver, on a day certain, a thousand or more cattle, each one of which should be precisely 12 months old; and that, therefore, in a contract of this character, the term "yearlings" cannot be literally applied. Some deviation must be allowed from the literal import of the record; and, if the limits are not prescribed in the contract itself, the custom of the country and trade, when such custom exists, may be appropriately resorted to in order to define its meaning. Such a custom is reasonable, and is usual in most branches of commerce. The objections to the testimony were—*First*, because the word was not ambiguous; *second*, "because parol evidence of custom was not admissible to vary a written contract;" and, *third*, "because proof of such custom as was alleged in the petition would add the word 'average' to the written contract." These objections were not well taken. The court's charge upon this subject was in accordance with the views we have expressed, and, in our opinion, was not erroneous.

In the nineteenth and twenty-first paragraphs of his answer, defendant sought to claim damages for the wrongful suing out of the writ of injunction. These parts of the answer were excepted to, and the exception sustained; and the ruling of the court thereon is assigned as error. In support of the ruling, appellee insists that damages for the wrongful issue of a writ of injunction can only be recovered after the injunction has been dissolved, either in whole or in part. It may be that, if there was no other ground for reversal of the judgment,—the injunction having been perpetuated,—the ruling of the court upon the matter might be deemed harmless. But if the proposition be that a defendant in a suit in which an injunction has been wrongfully issued cannot set up for damages growing out of the abuse of the writ, we cannot assent to it. But it is not clear upon which ground the defendant claims that the writ was wrongfully issued in this case. His contention that plaintiff had no lien cannot be maintained. The agreement that he might sell was without consideration, and cannot be held to operate as a waiver of the stipulation in the contract to give a mortgage. As long as the lien exists, defendant could not lawfully sell more than the equity of redemption in the property which was subject to it. Hence it is not seen that he could have been damaged by being restrained from doing that which he had no right to do. If the averments in the pleas in reconvention had shown that the lien had been discharged, or that defendant owed plaintiff nothing under the contract sued upon, they would have presented a case which would have entitled defendant to damages. But this, as we construe them, they failed to do, and we therefore conclude that the court did not err in sustaining the exceptions.

The twelfth and thirteenth assignments of error present the most important question in the case, and will be considered together. They are as follows: "(12) The court erred in his third charge in instructing the jury that the defendant could not recover for cattle that were diseased at the time of delivery, and afterwards died of said disease, unless the plaintiff knew, at the date of delivery, that they were so diseased; and in not charging, as requested by defendant in his fourth charge asked, that plaintiff was liable if, by use of reasonable diligence, he might have known they were so diseased before delivery. (13) The court erred in instructing the jury in his third charge that 'upon sale of animals, where both buyer and seller inspect the animals, and they are then and there infected with a latent disease unknown to both

parties, if the animals afterwards die of disease, the loss falls upon the buyer, and not the seller, unless the latter has given a special warranty to the former; and in not charging, as requested by defendant in his second charge, that the words 'good, merchantable yearlings,' in the contract, are a special warranty of condition." The contract stipulates for the delivery of "good, merchantable cattle." The defendant introduced evidence which tended to show that, at the time the cattle were delivered, they were infected by a disease which was not discoverable by inspection, and that, by the reason of this disease, many of them died. This applies both to the cattle which were sold by defendant to Shiner and Williams, and those which he retained in his own pasture. The question is, if the cattle were affected with a latent disease when they were delivered, and this was known to neither party, must defendant bear the loss which resulted from the unsoundness? It is insisted, on behalf of appellee, that the rule of *caveat emptor* applies in its full force, and that he is not responsible; while appellant claims that the words "good, merchantable" imply a warranty, and that plaintiff must make good his losses from the disease. These words are descriptive of the cattle to be delivered, but can hardly be held to imply a warranty in its technical sense. The distinction between representations which are held to warrant an article, and words which merely describe property which is contracted to be sold, is clearly recognized in *Jones v. George*, 61 Tex. 345, and is sound in reason, and supported by the authorities, which are there cited. The buyer may accept an article sold with a warranty, though he know it is not such as is warranted, and may recover damages for the breach; but if there be no warranty, and the article tendered be not such as is described in the contract, and this be known to the purchaser, he must either refuse it and rescind the contract, or accept it and abide by the agreement. If, however, the property be not such as is described, and the defect be such as cannot be discovered by the exercise of reasonable care, and the buyer does not discover it until he has made such disposition of the property that he cannot return it to the seller, then he may recover his damages by reason of the seller's failure to comply with the terms of his contract. *Jones v. George, supra*. This brings us to the question, what is meant by the words "good, merchantable cattle" in the contract under consideration? Do they mean cattle which, at the time of the delivery, were merely in such condition and of such appearance as to be salable? or do they mean cattle which were not only salable, but also sound? If the word "merchantable" stood alone, the question would be more difficult; but even in that case it might seriously be doubted whether cattle inflicted with a latent disease, which was likely to be developed in a short time, could be deemed merchantable for the purposes indicated in this contract. It was probably not contemplated by the parties to the agreement when it was entered into that the cattle would be immediately sold. The credit which was extended, and the lien which was retained, are inconsistent with that idea. But, at all events, it is our opinion that some meaning must be attached to the word "good," and that we must interpret the contract as if it read "good and merchantable cattle." Can live-stock which are infected with a disease, though it be not discoverable by a buyer upon inspection, be said to be "good" in any proper sense of that term? We think not. The word is very comprehensive in its meaning; and, as applied to cattle bought for purposes of breeding and sale, implies freedom from existing disease. In *Moore v. Morris*, 20 Ill. 255, the meaning of the word "good" in the phrase "good current money" came up for determination, and it was there held that the phrase meant not merely money which was good as currency, but money which was good under the constitution and the then existing laws; namely, such gold and silver coins as were then a lawful tender. So here we hold that the contract in this case calls for the delivery of cattle not simply good for the purposes of sale, but also good in fact; that is to say, for cattle inher-

ently sound. We therefore conclude that the court erred in giving and refusing instructions as appellant complains in the assignments under consideration. For these errors the judgment is reversed, and the cause remanded.

CITY OF HOUSTON v. VOORHIES.

(Supreme Court of Texas. March 28, 1883.)

1. MUNICIPAL CORPORATIONS—LIABILITIES AND INDEBTEDNESS—PAYMENT OUT OF SPECIFIED FUND.

In a proceeding to revive a judgment, and for *mandamus* to enforce a judgment for past-due interest on city bonds payable out of certain specified funds, a large part of which had been diverted to other uses, the city cannot defend on the ground that plaintiff's claim was but a small part of the past-due indebtedness of the city which was payable out of the same funds; and that plaintiff was only entitled to *pro rata* payment, the revenues of the town being all it could collect by law, and insufficient to pay all creditors in full.

2. SAME—LIABILITIES AND INDEBTEDNESS—POWER TO RAISE MONEY.

In a proceeding against a city to compel payment of a judgment in full by peremptory *mandamus*, it is no defense that the city had provided a revenue by a proper levy, which had not been collected, where it was shown that the city authorities had full power to require the collector to pay over moneys in a reasonable time if collected, or, if not, to remove him, and appoint another collector.

3. SAME—LIABILITIES AND INDEBTEDNESS—PRO RATA PAYMENT.

In a proceeding to revive a judgment against a city, and for *mandamus* to compel payment in full, the city defended that plaintiff was only entitled to a *pro rata* payment, there being other creditors, and the revenues on hand insufficient to pay all; that his right to only a *pro rata* share was determined in the original judgment, and was therefore *res adjudicata*. Held, that plaintiff was not precluded by the former judgment, where it appeared that the judgment only determined the validity of plaintiff's claim, and how much of the city funds then on hands he was entitled to have appropriated to his judgment.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

This action was brought by the appellee to revive a judgment, rendered in his favor, against the appellant by the district court for Harris county on December 6, 1881, for \$9,706.64. That judgment was rendered on the coupons of bonds issued by the appellant to realize funds necessary to build a market-house. The bonds were issued in pursuance of an ordinance passed May 11, 1871, which, among other things, provided as follows: "Be it further ordained that all the money and other revenues which may accrue to said city of Houston from and after the 1st day of January, 1872, in any manner, from the public market-house, and market-houses now established, or which may be hereafter established and constituted anywhere within the limits of said city, by renting, leasing, or otherwise conducting same, or any right or privilege belonging or pertaining to same by virtue of any existing laws or ordinances of said city, or by any law or ordinance that may be hereafter passed by said city for that purpose, be, and same is hereby, appropriated, set apart, and solemnly pledged as a special fund to pay the interest as it accrues on said bonds, and to create a sinking fund to pay the principal of said bonds, which fund, so raised by the revenues aforesaid, shall be known as the 'Market-House Bond Fund,' which shall not be used for any other purpose whatever until the interest and principal of all said bonds are paid." The ordinance then requires the depositing of this fund in bank to the credit of the market-house bond fund, and reiterates that it shall not be applied to any other purpose whatever than the payment of the interest and principal of said bonds. The ordinance further provides: "It shall be the imperative duty of the mayor and city council of said city to see that said public market and market-houses are properly managed, and the revenues thereof promptly collected and faithfully applied to the purposes aforesaid." Section 3 of said ordinance or resolution reads as follows: "Be it further ordained, in addition to the provisions in the preceding section of this ordinance, for the purpose of paying the interest and creating a sinking fund for the payment of the principal and interest of said

bonds, that a special annual tax of one-fourth of one per cent. *ad valorem* is hereby assessed upon all property, both real and personal, within the corporate limits of said city, which said tax shall be collected annually, as other taxes of said city; and the proceeds of said special tax shall be kept separate by said city as a special fund to be known as the 'Revenue Fund.' And if, at any time, the revenues which constitute the market-house bond fund be insufficient to pay the interest and to provide the sinking fund to redeem the principal of said bonds, then and in that case the money constituting the reserve fund, as provided in this section, shall be applied by said city in paying the interest, and creating a sinking fund for the payment of the principal of said bonds. Should said reserve fund be at any time more than sufficient to pay off and make good the market-house bond fund, then the excess shall be credited to the general tax fund of the city." The appellee seeks also a writ of *mandamus* to compel the appellant to pay the judgment, in this case sought, out of any fund on hand raised under the ordinances referred to, or out of the first moneys so accruing; and, if this cannot be done, that the appellant be compelled to collect the uncollected taxes alleged to be due the city from the year 1879 to the year 1884, inclusive, and thereupon to pay the judgment, interest, and costs in full. The amount of this uncollected tax was shown to be \$112,686, which was levied as a general tax of 1 per cent. to meet the interest, and create a sinking fund on all the bonded indebtedness of the appellant. The tax of one-fourth of 1 per cent. provided by the ordinance before set out, and by the contract under which the bonds held by appellee were issued, was never separately levied and kept as a distinct fund. It was claimed and shown that one-half of the revenue arising from the market-house was appropriated to other purposes than the payment of the interest on the market-house bonds. It was also claimed and shown that no part of the revenue derived from the market-house, other than that derived from the renting of the lower story, was in any way applied or set apart to meet the interest on the market-house bonds, although other parts of the house seem to have been used for purposes other than offices in which the municipal business was conducted. The judgment on which this action was founded, was rendered in a case in which a *mandamus* was sought to compel the appellant to pay the debt, then sued on, out of funds then on hand, and by the contract under which the market-house bonds were issued subject to such claim. A judgment was rendered in that case for the sum due on the coupons sued on, and a writ of *mandamus* was issued, commanding the appellant to pay to the appellee the sum of \$1,600 out of the fund so in hand, and this sum was paid and credited on the judgment. The defense in this action is thus summarized by counsel for appellant: The defendant admitted the judgment was recovered, but alleged that it was a very small portion of the debt past due and owing by the city; that the total amount of the city debt was some \$1,500,000, all of which had been defaulted on, and that there was \$100,000 of past-due interest on the coupons of the same series as plaintiff's, and \$250,000 of past-due interest unpaid on the entire debt of the city; that the revenues of the city were wholly inadequate to pay the entire current or past-due interest, and that they were, and always had been, willing to pay plaintiff his *pro rata* share, and that that was the measure of his right to recover, and to *mandamus* them to pay. The defendant set out the complications of its various issues of debt, and that, by various and conflicting decisions and *mandamus* proceedings, all the funds in the hands of the city had been paid away to other creditors, exhausting the funds in their hands; that they had faithfully applied funds collected to the payment of their debts, *pro rata*, except where the court's process came in, and wrenched the funds from their hands; that they were then without any funds; that they had made all levies of taxes to the limit of the laws of the state, and they were diligently and vigorously endeavoring to collect same, and the rolls were in the hands of their collector, and they were in no default

regarding same; that plaintiff was concluded from his claim of priority over other creditors of the city, or right to collect his entire debt, or anything in excess of his *pro rata*, by previous decision on that point in the rendition of the judgment sought to be revived of date December 6, 1881, in which he was held and adjudged to be entitled to be paid, and was to be paid, only *pro rata* in the proportion that his debt bore to the entire outstanding debt of the city; and that whether this were the law and a proper decree could not now be contested, nor a different judgment rendered him—was *res adjudicata*. It pleaded that, by legislative sanction, it had issued what was known as a “consolidated bond,” and into which all its bonds were to be merged, and that it levied, in pursuance of said legislative sanction, 1 per cent. for current expenses, and that these levies were all the law allowed of being made, and that all its creditors were entitled to share in this fund *pro rata*, and that there was no fund out of which to pay plaintiff otherwise. The case was submitted to the court without a jury, and the court revived the judgment, and issued a peremptory writ of *mandamus* against the appellant. So much of which as is important in the consideration of this case is as follows: “It appearing to the court that the judgment rendered herein was for interest on market-house bonds of defendant, and it appearing to the court that the ordinances under which plaintiff’s bonds in judgment issued is a part of defendant’s contract with plaintiff, therefore no subsequent issuance of bonds or debts can interfere with plaintiff’s rights under said contract; and that enough of the revenue arising from the one-quarter of 1 per cent. levied by the ordinance under which said bonds were issued, and from the market-house bond fund, had been collected by defendant to pay plaintiff’s said debt, and by it applied to other purposes than as contemplated by said ordinances, therefore the court decrees a peremptory writ of *mandamus* against the defendant, ordering it to pay exclusively the debt of plaintiff out of the first moneys collected from market-house revenues, and from the one per cent. bond tax levied for the years 1879 to 1884, both inclusive.” The record shows that the sum received from the market-house has not exceeded annually the sum of \$6,000, and that there are past-due coupons on market-house bonds aggregating the sum of \$76,800. The record further shows that an *ad valorem* tax of 1 per cent. has been levied and appropriated to the *pro rata* payment of all the bonded indebtedness of the city, and that of this tax only about \$112,000 remained uncollected; that the interest on the bonded debt of the city due and unpaid exceeded \$250,000, for which no provision had been made other than the levy of a tax of 1 per cent., which is inadequate to meet the interest annually falling due. Besides this, it appears that a tax of 1 per cent. on all property within the city is necessary to raise money to pay current expenses of the city. The first assignment of error is: “The court erred in its judgment in holding priority for this debt; that no subsequent issuance of bonds or other debts by defendant could interfere or rank with plaintiff’s rights under the ordinances of defendant for the issuance of the bonds on which plaintiff’s judgment was based,—because the charter under which said ordinances were framed authorized the creation of other debts and the issuance of other bonds of the defendant, which were entitled to equal rank with plaintiff’s debt, and the plaintiff took said bonds subject to such right of the city of Houston to create other debts; and the subsequent creation of other debts, and the issuance of other bonds, was no violation of plaintiff’s contract, but said contract was made with reference to such right.”

Hutcheson, Carrington & Sears, for appellant. *W. C. Oliver*, for appellee.

STAYTON, C. J., (after stating the facts as above.) In the case of *Voorhies v. Mayor, et al.*, 7 S. W. Rep. 679, (this day decided,) it was held that the appellant has full power, under section 6, art. 11, of the constitution, now in force, to levy, assess, and collect such taxes as may be sufficient to pay the

interest and provide a sinking fund to satisfy any indebtedness lawfully incurred and existing at the time the constitution now in force was adopted. The debt of which the appellee seeks payment is of that character. The assignment copied, as well as the third, fourth, fifth, and sixth, in effect, question the correctness of the judgment, in that it did not direct only a *pro rata* payment to the appellee. This question was considered in the case before referred to, in which it was held that the appellant could not question the correctness of the judgment in this respect; and, further, that a case is not shown in which a court would be compelled to direct a *pro rata* payment, as it would be in a case in which many creditors, having some specific claim on it, could look only to one particular fund, and that insufficient to pay all in full. It becomes unnecessary to consider that question further. The fact that the judgment gives to the appellee, as against the appellant, right to be paid out of the first moneys received from named sources cannot in any manner affect its rights. It neither makes its indebtedness more nor less. If it had shown the same solicitude to protect the holders of the several series of bonds which it now asks the court to feel and exercise, the appellee would doubtless have received the sum he now seeks to collect, when it became due. The agreement of the appellant was that it would appropriate the revenues of its market-house and markets to the payment of the series of bonds of which the appellee holds a part. This it has not done; but, on the contrary, has used one-half of the sum received from the rents of the lower story of the market-house for other purposes, and what it may have received for rent of parts of the upper story seems to have been used also for other purposes. It also contracted to levy, collect, and set aside for the payment of the series of bonds of which appellee holds a part, a tax of one-fourth of 1 per cent. upon all the real and personal property subject to taxation by the city, and this to do annually. This it has not done. The record shows that, if this had been done, the debt appellee now seeks to collect would have been paid, or the money on hand to pay it. In this connection, we deem it proper to say that it seems to us that the ordinance under which the bonds were issued did not contemplate that the appellant should not pay rent on such rooms or parts of the market-house as were constructed and used for offices of the several municipal officers, or for like municipal purposes. There was no error in the finding of fact questioned by the second assignment; but, had there been, it could not have affected the result.

The levy of an *ad valorem* tax of 1 per cent. to raise money to pay interest, and create a sinking fund to satisfy all its bonded indebtedness, was not a compliance with the contract made with the holders of market-house bonds; but, had it been, the duty of the appellant did not cease with a mere levy of even sufficient taxes to meet obligations. The appellant was under further obligation to see, and, if necessary, to compel, the collection of taxes levied so far as this could be done. Its charter declares "that the city council may assess and collect an annual and direct tax," etc.; and it provides a procedure through which this may be done if the taxes are not promptly paid to its collector. If this were not so, it could not be held that the mere levy and assessment of a tax, and placing of the tax-roll in the collector's hands, was a full performance by the city of its duty to creditors. Under the charter a collector who failed to do his duty in the prompt collection of taxes might be removed by the city council, and another appointed in his place. Such an officer could be required to give a bond for the faithful discharge of the duties of his office, and on his failure to pay over taxes collected, or to collect within a reasonable time such taxes levied and assessed as could be collected, an action on his bond could be maintained by the corporation. This action was tried in December, 1887, and it is made to appear that there were then uncollected taxes running from the year 1879, and there is nothing to show that the city had taken the steps which it might have taken to bring those taxes

into the treasury. Such facts do not show duty to creditors performed, and the city cannot shield itself from the peremptory writ of *mandamus* under the plea that one of its officials has failed to perform his duty when it had the power to do so, or appoint some person who would.

It is urged that the judgment made the basis of this action, wherein the appellant was commanded to pay to the appellee the sum of \$1,600 as his *pro rata* of the fund then on hand, subject to the payment of market-house bonds, which operates as a bar to the relief now sought. There are no facts shown which could give that judgment such effect. That judgment simply determined the validity of appellee's claim, and how much of the fund then on hand he was entitled to have appropriated towards its payment. So far as it looked to the satisfaction of appellee's claim, and directed a peremptory *mandamus* to issue to enforce the payment, this was in the nature of process which could not deprive him of the right to any other or further legal process found to be necessary to enable him to enforce the payment of debt adjudged to be due him.

There is no error in the judgment of which the appellant can complain, and it must be affirmed.

TEXAS & N. O. RY. CO. *et al.* v. DILLARD.

(*Supreme Court of Texas. February 21, 1888.*)

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCES—EVIDENCE.

Where plaintiff, a brakeman in the employ of defendant, was thrown from the tender by an alleged low joint in the track, and it was shown that none of the other employes on the train felt any unusual jolt, nor was any defect found in the track by the track inspectors afterwards, there was no sufficient evidence of negligence by defendants to sustain a judgment for plaintiff, who had assumed the risks incident to such employment.¹

Commissioners' decision. Appeal from district court, Harris county; JAMES MASTERSON, Judge.

Joseph P. Dillard, plaintiff, sued the Texas & New Orleans Railway Company *et al.* for injuries received while a brakeman in their employ. Judgment for plaintiff for \$1,250, and defendants appeal.

W. N. Shaw, for appellants. *Jones & Garnett*, for appellee.

COLLARD, J. After a careful examination of the evidence in this case, we have concluded it is not sufficient to sustain a verdict against the railroad. The appellee was a brakeman on one of defendant's freight trains that came in from Galveston to Houston in the first part of the night, and returned to Galveston in the latter part of the night, leaving Houston on the return trip at 3:35 A. M. On going out of the yard at Houston, the train being a little behind time, the plaintiff was thrown or fell from the tender, (where he was standing in the discharge of his duties,) causing the injuries complained of, for which the jury gave him damages \$1,250. Plaintiff says that the accident was caused by a low joint in the track. It appeared from the evidence that low joints are not uncommon on all roads, and plaintiff testified that low joints are frequent on a road in wet weather. Brakemen, as well as other servants of a railroad, assume the risk of casualties naturally arising from the nature of their employment. Such risks the employe is presumed to have taken into account at the time of his employment. If low joints, causing jolts or jars, are to be expected by a brakeman, because of their frequency, damages are not recoverable on that account by an employe who subjects him-

¹On the general subject as to the risks of employment assumed by an employe, see *Tabler v. Railroad Co.*, (Mo.) 5 S. W. Rep. 810, and note; *Hawk v. Railroad Co.*, (Pa.) 11 Atl. Rep. 459, and note; *Wuotilla v. Lumber Co.*, (Minn.) 83 N. W. Rep. 551, and note; *Hewitt v. Railroad Co.*, (Mich.) 34 N. W. Rep. 659, and note; *Heating Co. v. Rohan*, (Pa.) 11 Atl. Rep. 789, and note.

self to such occurrences, unless it is made to appear that the company has been guilty of negligence such as would increase the danger which the employee assumes. *Railway Co. v. Hester*, 64 Tex. 401, and references. All the employees on the train, at the time of the accident complained of, testify that they noticed nothing unusual in the way of a jar or jolt when the train passed over the place where plaintiff was injured. The train was immediately stopped, and, after plaintiff was put aboard, was backed over the same ground into Houston, and the employees testify that they still noticed no unusual jar. As soon as the "News" train came in, the freight moved on out towards Galveston, and still there was no more jar at the point where plaintiff fell than was usual at other places on the road. It was proved that this part of the track had not been repaired for some time afterwards, and trains continued to pass as usual over the same point, without accident and without notice of the alleged defect. These facts were established by a number of witnesses. Plaintiff only knew from his sensations that he was thrown from the tender by a bad joint. He had never examined the track before or since he was injured. He had never noticed any peculiar jar there before; and, while coming in on a train a few hours before, he had not discovered the alleged defect, though he says it could not have occurred instantly. The alleged defect was not noticed afterwards by any one, by train-men or by persons whose duty it was to inspect and repair the road. At least, the evidence does not show that it was, and all the testimony offered upon the subject is against the fact. As the evidence is now presented to us, we cannot conclude that plaintiff's fall was caused by a low joint so unusual as to amount to negligence on the part of the company, or as would not be included in the ordinary risks of plaintiff's employment. There are necessarily jars and jolts on railroad cars, more severe upon a brakeman whose duty requires him to be on top of moving freight trains than upon persons inside a coach or caboose. He is held to assume the risk incident to such a dangerous employment. If the risk is increased by failure of the company to construct its road properly, or to keep it in suitable repair, damages would be recoverable by an employee, occasioned by such neglect, unless he was himself guilty of negligence that contributed to the accident. *Railway Co. v. Hester, supra*. While such negligence may exist on the part of the company in this case as would authorize a recovery, the evidence so far fails to establish it that we have no hesitancy in declaring it insufficient to sustain the verdict. We therefore conclude that the cause must be reversed, and remanded for a new trial. *Railway Co. v. Schmidt*, 61 Tex. 285, and references.

WILLIE, C. J. Report commission appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

COSTLEY v. GALVESTON CITY R. CO.

(*Supreme Court of Texas*. February 24, 1888.)

1. TRIAL.—INSTRUCTIONS—CHARGING UPON WEIGHT OF EVIDENCE.

In an action for personal injuries, the court charged, in effect, that, though plaintiff was knocked down by defendant's street car, and was seen by the driver in time to stop the car before it ran over him, yet, if the emergency was sudden, it must appear that the negligence of the driver in failing to stop the car was more than slight to make him guilty of negligence. *Held*, this is a charge on the weight to be given to the driver's omission, and violates the Texas statute providing that a judge "shall not charge or comment on the weight of evidence."

2. SAME.

Where it appears that a party has been convicted of a felony, and thereby disqualified from testifying in his own behalf, an instruction that a pardon makes such party a competent witness, whose credibility is for the jury to determine from all the facts in the case, is not a charge upon the weight of evidence, but is only informing the jury what was the effect of the pardon.

Appeal from district court, Galveston county; W. H. STEWART, Judge.

Action by Robert Costley against the Galveston City Railroad Company for personal injuries. Judgment for defendant, and plaintiff appeals.

Waul & Walker, for appellant. *F. Charles Hume*, for appellee.

STAYTON, J. This action was brought by the appellant to recover damages for a personal injury alleged to have been received by him through the negligence of the employe of appellee in operating its street railway. On the trial the appellant offered to testify in his own behalf, and this was objected to, on the ground that he had been convicted of a crime which disqualified him. In support of this objection, a transcript of the proceedings of the district court for Travis county showing his conviction of a felony was offered. The appellant then showed a pardon, which removed the disqualification. The court instructed the jury as follows: "The proclamation of the governor renders the plaintiff a competent witness, leaving his credibility to be determined by you from all the facts and circumstances in evidence." It is urged that this was a charge upon the weight of evidence. The fact that the witness had been convicted of a felony, and was at one time disqualified, had evidently been proved in the presence of the jury, and the charge did no more than to inform the jury what the effect of the pardon was, and to leave the credibility of the witness to the jury, as the credibility of every witness. The charge was correct as a legal proposition, and evidently intended to remove any impression the jury may have received from testimony affecting his competency introduced during the trial.

The testimony for the plaintiff tended to show that, in attempting to cross the street, in advance of the street car, he was knocked down by the mule drawing it, and then run over by the car. The evidence for the defendant tended to show that the plaintiff was intoxicated, and lying on the railway in the night-time, and not seen by the car-driver until it was too late to stop the car before it passed over him. So standing the case, the court gave the following charge: "If you believe from the evidence that the plaintiff was knocked down by the mule, and that the car-driver then saw him down on the track, and was guilty of palpable negligence in not stopping the car before it ran over plaintiff, then, although the plaintiff may have been also guilty of negligence in going on the track, the plaintiff would be entitled to recover; but, in cases of such momentary emergency, it must be made to appear that the negligence of the car-driver was more than slight negligence in failing to stop the car. The mere fact that the car could have been stopped by applying the brake is not sufficient to establish negligence of the car-driver, but all of the facts must be taken into consideration in determining what would be negligence in such an emergency." In the state of facts supposed by the charge it is true that the jury should look to all the evidence to determine whether there was negligence on the part of the driver, but the charge, in effect, informed the jury that, although the appellant may have been knocked down by the mule, and seen on the track by the driver in time to have stopped the car before it ran over him, that such failure to stop the car would not constitute negligence. We know of no rule of law which declares that the failure to stop a car when it might be done, under such facts as are assumed in the charge, is not negligence. When a court instructs a jury that the omission to do an act which may constitute negligence is or is not sufficient to establish it, it necessarily passes upon the weight to be given to the fact that the omission occurred when it might have been avoided. Such a charge, we think, violates the statute which declares that the judge "shall not charge or comment on the weight of evidence." The word "palpable," used in the charge, was doubtless used and understood to mean the same as the word "gross," and it becomes unnecessary to minutely consider the residue of the charge; for it was as favorable, if not more so, to the appellant than his own

theory of the case justified. The rules applicable to such cases have been so often stated that it is unnecessary now to repeat them.

For the error in the charge, the judgment will be reversed, and the cause remanded.

NEW ENGLAND LAND & LIVE-STOCK CO. *et al.* v. CHAMBERLAIN.

(*Supreme Court of Texas.* February 28, 1888.)

APPEAL—PRACTICE—BRIEFS—SPECIFICATION OF POINTS RELIED ON.

Under Rules Sup. Ct. Tex. 29, providing that the appellant shall file a brief of the points relied on, confined to distinct specifications of error contained in the assignments of error, each ground of error being separately presented and numbered as are the assignments of error, the judgment of the lower court will be affirmed, where the assignments in the record do not contain such "distinct specifications," and the propositions in the brief are not numbered as such assignments are, so that it is impossible to tell under which assignment either or any proposition is made.

Commissioners' decision. Appeal from district court, Cameron county; JOHN C. RUSSELL, Judge.

Action by William C. Chamberlain, to cancel a mortgage, against John Lord, the mortgagee, as agent of the New England Land & Live-Stock Company. John Beattie purchaser under foreclosure of the same, and the land and live-stock company. Judgment for plaintiff, and defendants appeal.

F. E. Macmanus and *R. B. Reutfro*, for appellants. *A. McN. Turner* and *Coopwood & Coopwood*, for appellees.

ACKER, J. Rule 29 for the government of this court provides that "the appellant or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on, in accordance with and confined to the distinct specifications of error contained in his assignments of error, and such fundamental errors of law as are apparent upon the record, each ground of error being separately presented, and being numbered as the assignments of error are numbered; and each and every one not so separately presented shall be regarded as abandoned." The record contains seven assignments of error. None of them are copied, or presented in any way, or even referred to in appellants' brief. The brief is made upon three propositions, without regard to the specifications of error contained in the assignments. The propositions are not numbered as the assignments of error are; and it is impossible to determine under which assignment either or any of these propositions are made. The assignments do not contain "distinct specifications of error," as required by the rule. Appellee invokes an application of the rule, and insists that, as the assignments of error are ignored by appellants, and the judgment being such as the court below was competent to render, it should be affirmed. If the rules adopted for the government of this court are entitled to any consideration whatever, the judgment of the court below should be affirmed without regard to merits. Notwithstanding appellants have abandoned their assignments of error, and there is nothing before this court demanding our consideration, we have, however, examined the pleadings and evidence contained in the record, and find that the only question in the case is one of fact, upon which there is much conflict in the evidence, but we discover no great preponderance either way. In such case this court will not disturb the verdict. We are of opinion that the judgment of the court below should be affirmed.

WILLIE, C. J. Report commission of appeals examined, their opinion adopted, and judgment affirmed.

GASSAWAY v. WHITE.

(Supreme Court of Texas. April 17, 1888.)

1. HOMESTEAD—HOW ACQUIRED—FINDING OF JURY.

Defendant claimed that a store-house and lot which had been attached was his place of business as a commission merchant, and therefore a part of his homestead, and not subject to attachment. Plaintiff insisted that opening the house ostensibly was a pretense to avoid payment of debts; that he had done but little, if any, business as a commission merchant. *Held*, that transacting business, as a question of law, was not necessary to exempt the property from attachment, if defendant opened it in good faith for that purpose; but the case having been submitted to the jury, on proper instructions, who found for defendant, and there being evidence enough to support their verdict, it is conclusive as to the question of plaintiff's right to attach.

2. SAME—ACQUISITION—FINDING OF JURY—SUFFICIENCY OF EVIDENCE TO SUSTAIN.

A defendant claimed a store-house and lot exempt from attachment as his place of business as a commission merchant. *Held*, that proof that he had a license to do business all over the state, but remained at home, and usually kept the house open, was not sufficient to show that the house was not necessary to such business, so as to warrant setting aside a verdict for defendant, on the ground that it was contrary to the evidence.

3. SAME—HOW LOST—DOING BUSINESS WITHOUT LICENSE.

Proof that defendant had not paid the county and city tax, and obtained a license as required by law, as commission merchant, would not subject his homestead to forced sale for carrying on an illegal business. The business was legitimate, and the failure to pay the tax only was penal.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—SUFFICIENCY OF EVIDENCE.

A motion to set aside a verdict and grant a new trial on the ground of newly-discovered evidence was properly overruled when only supported by two affidavits, one as to matters purely hearsay, and the other too uncertain and indeterminate to be relied on.¹

Appeal from district court, Falls county.

George H. Gassaway brought suit on a note, and sued out an attachment, and had it levied on a house and lot belonging to defendant, George W. White, and claimed by him as a business homestead. Judgment was entered for plaintiff on the note, but there was a verdict and judgment for defendant on the attachment, and plaintiff appeals.

Goodrich & Clarkson, for appellant. *Martin & Dickinson*, for appellee.

GAINES, J. Appellant brought suit in the court below against appellee on a promissory note, and caused an attachment to issue and to be levied upon a brick store-house and lot in Marlin, which were then the property of appellee. The latter claimed the property as his place of business, and hence as a part of his homestead. In September, 1884, appellee and one Pringle, as partners, were doing business in the house in controversy, in one room of which they sold dry goods, etc., and in the other kept a saloon. On the 20th of that month they made an assignment. The assignee took possession of the merchandise and house, and retained possession of the latter until the assigned property was sold. As soon as one room of the house was clean, appellee put up a sign as commission merchant, and, as he testifies, began business as such in the house. He got a license from the comptroller, according to his testimony upon the trial, which authorized him to do business in any part of the state; but did not take out either a county or city license. His commission business was confined to some 80 bushels of oats which he stored in the building, and a very small part of which he sold. The testimony showed that he usually came down and opened up the house during the morning, but that this was not always done. The attachment was levied on the 14th day of December next after the assignment. The jury found that the store-house and lot were not subject to the attachment; and appellant complains, first,

¹ As to when a new trial will be granted on the ground of newly-discovered evidence, see *Railway Co. v. Wood*, (Tex.) 7 S. W. Rep. 372.

that the court erred in overruling the motion for a new trial because the verdict of the jury was contrary to the evidence in this particular. In *Scheuber v. Ballou*, 64 Tex. 166, the principle is announced that the mere failure of the owner of a business homestead, and the consequent cessation of the business in which he fails, does not immediately subject the property to forced sale; and it is said in the opinion that "a reasonable time ought to be allowed him to adapt himself to his changed condition, and the property will not be subject to execution unless it is clear that there has been an abandonment." It appears in this case that, as soon as the assignee ceased to use a part of the house, the appellee occupied it ostensibly for the purpose of doing business; but he did virtually nothing. Now, if it were true that it was necessary that the claimant of a business homestead should actually succeed in getting custom in order to exempt the property, then it might well be urged that there was no exemption in this case. But we apprehend that such is not the law. A carpenter may acquire and open a shop, and, failing to get custom, may temporarily seek employment in another line. A physician or a lawyer may purchase and establish an office, and wait long for a patient or client to cross its threshold. Can it be claimed that, in any of these cases, the property (the owner being the head of family) would become subject to forced sale? We think not. So, in this case, the appellee, being insolvent, could not buy and sell on his own account, and could only buy and sell for others. He might open his house in good faith for the purpose of doing a commission business; and yet, for the want of customers, do no business. In such case we think the property would clearly be exempt. He testified substantially to these facts, and there is nothing in the testimony inconsistent with them. If he ever refused to do any business in his proposed line, it is not shown in the statement of facts. The evidence introduced by appellant shows that appellee usually opened his house every day, from which it is to be inferred he had some expectation of getting custom. If the jury believed appellee, (and we cannot say from the record before us he was not entitled to credit,) the verdict is correct. The policy of the exemption of a business homestead may be questioned, but its object is apparent. It is allowed, not for the successful, but for the unfortunate. It would be of no avail to a merchant if it ceased upon his failure as a dealer in his own wares. As long as he is attempting in good faith to use it for the purpose of business, it should be protected. When such use is definitely abandoned, it is no longer exempt. It is true that if the opening of the house ostensibly for business was a mere pretense, resorted to for the purpose of shielding the property from the payment of debts, after the appellee had made an assignment, and after he had abandoned the intention of using it as a place of actual business, it would have lost its homestead character, and would have been subject to the attachment. But the question was submitted to the jury by the court, and their verdict must be held conclusive upon the question. But it is claimed that the verdict is contrary to the evidence because the house was not adapted and necessary to the business which appellee professed to carry on. If it had been shown that he was engaged at this time as a commercial traveler, and actually traveling, and that the house was not necessary to such business, it would not be protected from forced sale. This matter is not made very clear from the testimony. It seemed he had a license to sell all over the state; but it is to be inferred from the evidence that he remained in Marlin, and usually kept the house open. It is probable, if he had succeeded in getting goods or produce upon consignment, (if such was really his object,) that the entire store-house would have been needed for the purposes of his business.

It is also insisted that, because appellee had no license to carry on the business of commission merchant, his business was illegal, and that, therefore, the house was not exempt; and we are referred to the case of *Tillman v. Brown*, 64 Tex. 181, in support of this proposition. In that case it was held

that a house which was used ostensibly for a legitimate occupation, but really for the purpose of gaming, could not be protected from forced sale as a business homestead. The business to be carried on must be a lawful business. But it by no means follows that, because a man may violate the law by carrying on a legitimate occupation without paying the tax, he thereby subjects the house where it is carried on to forced sale. The business remains a lawful one; it is the failure to pay the tax that is penal. We cannot assent to a doctrine which would subject every business homestead in the state to forced sale as soon as the owner neglected to pay his occupation tax.

It is further insisted that the charge given by the court is erroneous, and that the instructions asked by the appellant, and refused by the court, should have been given. We think, however, that the charge of the court clearly presented the vital issue in the case; that is to say, whether appellee was attempting in good faith to do business in the house in controversy, or whether his conduct was a mere pretense to protect the property from the claims of creditors. Neither the assignment upon the charge, nor the proposition under it, points out in what respect the instructions asked differs from those given by the court; and upon careful examination we think them substantially the same.

There was a supplemental motion for a new trial on the ground of newly-discovered evidence, and it is complained that there was error in overruling this motion. But we find that the newly-discovered evidence (the object of which was to show that appellee did not have the oats for sale on commission, as he testified) is not necessarily inconsistent with his testimony. It is to be inferred from the affidavit itself that the affiant Aldridge did not carry the oats to appellee in person, but sent them by his son. He deposes that he understood from his son that he told appellee to sell the oats, but that appellee was to make no charge. Appellee did not expressly testify that he was to make any charge, though such may be the implication from his evidence. It does not appear why the affidavit of the son was not filed, or whether his testimony could have been obtained upon another trial or not. The testimony of Aldridge as to what his son told him is hearsay, and could not be admitted in evidence. A new trial certainly will not be granted on account of the discovery of inadmissible evidence. As to the affidavit of Barton it is too indeterminate to justify the granting of a new trial. He deposes that the Armstrong mentioned by appellee as the party to whom he sold part of the oats had moved away from the county in 1883, and that, as far as witness ever heard, was not seen in or about Marlin afterwards. Could not Armstrong have come back temporarily without witness having heard of it? How does the witness know that the Armstrong about whom he deposes is the same person testified about by appellee? The record shows that appellee names him simply as "Armstrong," and states no other facts by which the person he meant can be identified. A new trial should not be granted for such testimony as that deposed to by Barton.

The controlling question in this case was peculiarly within the province of the jury, and, they having determined it upon sufficient evidence, the judgment should not be disturbed. There being no error in the proceedings of the court below, the judgment is affirmed.

HOUSTON & T. C. RY. CO. v. BOOZER.

(*Supreme Court of Texas. April 20, 1888.*)

1. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE. In an action for damages against a railroad company for injuries sustained by plaintiff, an infant, while crossing defendant's track at a path over it, used by the public generally, where the evidence, though conflicting, showed that there was no lookout on the train, and that no warning was given of its approach, a verdict

against defendant will not be set aside, as it was for the jury to say, under the evidence, whether plaintiff contributed to the injury, and whether defendant did not use that care which, under the circumstances, should have been used.¹

2. DAMAGES—MEASURE OF, FOR PERSONAL INJURIES—ACTION BY INFANT.

Though for injuries inflicted upon a minor by the negligence of a railroad company, resulting in diminished capacity to earn a livelihood, he is not entitled to recover during minority, as the proceeds would belong to his parent, a charge not so qualified is not reversible error where the verdict was not excessive, nor a proper charge asked by defendant.

Appeal from district court, Grayson county.

Action by John H. Boozer, a minor, by his next friend, against the Houston & Texas Central Railway Company, for negligently injuring plaintiff. Defendant appeals.

R. De Armond, for appellant. *W. W. Wilkins* and *Woods & Cunningham*, for appellee.

STATTON, C. J. This action was brought by appellee, through his next friend, to recover damages for an injury alleged to have been caused by the negligence of the employees of the appellant. At the time of the injury, the appellee was a child in his tenth year, and he was injured while attempting to cross the railway track. The first assignment of error is as follows: "The court erred in the fifth paragraph of its charge to the jury, wherein it is stated by the court to the jury that, in estimating the amount of damages that plaintiff might recover, the jury might consider plaintiff's diminished capacity, if any, to labor and earn a livelihood; for the following reason: The plaintiff is a minor. The evidence shows that he was living with his mother at the time of the injury, and still is. She is therefore entitled to his earnings during minority. That his father is dead, and that his mother has now a suit pending against defendant for damages occasioned plaintiff from the same accident." The part of the charge complained of, considered with relation to an adult seeking to recover for an injury to himself, would be strictly correct, but in the case in which it was given the court should have limited the liability for damages resulting from diminished capacity to labor, caused by the injury, to the period after the appellee's majority; for until that period was reached the appellee would not be entitled to the proceeds of his own labor, and would not be entitled to damages on account of his diminished capacity. We are of the opinion, however, that we would not be authorized to reverse the judgment on account of this charge, even if it was not the duty of the appellant to have asked a proper charge in this respect, for there is no complaint made that the verdict of the jury was excessive. The only effect the charge could have had would have been to cause an excessive verdict, and it in no way had a bearing on the question whether the appellant was liable at all under the facts.

The controversy in the lower court, and here, is as to whether, under the facts, the appellant is liable at all. The appellee was injured while attempting to cross the track at a path leading from the thickly-populated part of the city of Denison to houses on the opposite side of the railway, which seems to have been frequently used by many people for a considerable period without objection. In such a case, as said by the supreme court of Pennsylvania: "If an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights, in view of the circumstances, so as to not mislead others to their injury without a proper warning of his intention to recall the permission." Whether, in view of the facts attending the use of the path, the

¹As to the respective duties of the traveler and railroad companies at crossings, see *Schilling v. Railroad Co.*, (Wis.) 87 N. W. Rep. 414, and note; *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 874, and note.

railway company used that care which it ought to have used to guard persons from injury, was a question for the jury, and there was evidence tending to show that no lookout ahead of the train was exercised, though upon this point there was a conflict of evidence; but that there was any warning given of the approach of the train, other than such as would result from its movement, is not claimed. Although it might not be the statutory duty of a railway company, at such a place, to give the signals of an approaching train as is required at a public crossing, yet the failure to do so might be negligence. The engineer stated that he was looking ahead, and that he did not see the boy at all, but from the other evidence in the case the jury may have come to the conclusion that his statement was not true. The degree of care that should be used must be proportioned to the nature of the act performed, the place where performed, and the extent of danger and injury likely to result from a failure to use due prudence and care in avoidance of injury to others. We cannot say, under the evidence in this case, that the employes of the appellant used that care which the law requires.

This cause was before this court at a former term, when a judgment in favor of the appellee was set aside on the ground that it appeared from the evidence that the injury resulted from the contributory negligence of the appellee. Another jury has passed on the case, under evidence tending to relieve the appellee from the charge of contributory negligence, which was not before the jury on the former trial. As the case now stands, were the appellee an adult, it seems to us the verdict should be set aside; but we cannot say that the same degree of care should be exacted of a boy of the appellee's age as must be of an adult. Whether he used that care in attempting to cross the track, and in ascertaining the danger that attended his act, incumbent on one of his age, was a question submitted to the jury by a charge which, on this point, and all others bearing on the question of the liability of the appellant at all, was as favorable to the appellant, and as exacting on the appellee, as the facts would have warranted. Two juries have passed upon the facts; twice have judges of the district court refused to grant new trials; the appellee was of tender years; there was evidence from which the jury might find that the employes of the appellant did not use that care which, under the circumstances, should have been used; and the jury were in position to determine whether the acts of the appellee were, in one of his age, the exercise of such care as such a person should exercise. The rules by which this court is necessarily governed in setting aside verdicts on the ground that they are contrary to the evidence have been too often announced now to require repetition. We cannot see our way clear to the granting of such relief in this case, and the judgment must be affirmed. It is so ordered.

CLARK *et al.* v. GILLESPIE *et al.*

(*Supreme Court of Texas.* April 20, 1888.)

ASSIGNMENT—OF CHOSE IN ACTION—VALIDITY AND EFFECT—NOTICE TO DEBTOR.

Where money is due on a building contract, and the contractor verbally assigns part of his claim to a material-man for valuable consideration, and notice of the assignment is given to the owner of the building, the assignee acquires a right to and interest in the fund remaining in the owner's hands due the contractor, which is valid against a lien subsequently established thereon by statutory proceedings.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Suit by Clark & Clark against A. Brownlee, Smith & Jarvis, W. F. Lake, G. W. Gillespie, and C. H. Rintleman, claiming a right to funds in the hands of Smith & Jarvis on which Gillespie claimed a lien. Brownlee had erected a building for Smith & Jarvis, and assigned money owing him from them to plaintiffs before Gillespie's lien was established. Judgment for defendants. Plaintiffs appeal.

Ball & McCart, for appellants. *Hunter & Stewart*, for appellees.

WALKER, J. This is a contest between material-men over a balance in the hands of Smith & Jarvis, for whom one Brownlee built a house. Gillespie brought suit, January 29, 1885, to subject the balance to his debt alleged to have been established December 17, 1884, against the funds remaining in the hands of the owners of the house. March 9, Clark & Clark, who held an account for materials, etc., brought suit against Smith & Jarvis, and against Brownlee principal, and Lake, Rintleman, and Gillespie sureties, on a bond to Smith & Jarvis, with conditions protecting them in the fulfillment of the building contract, and for repayment of all money they might pay on account of labor done or materials furnished, and which the contractor might fail to pay, etc. Clark & Clark asked a decree postponing Gillespie to their claim. The two suits were consolidated. The findings of facts by the court are as follows, (it appeared in the pleadings that the house had been completed according to contract:) *First*, that the contract and bond mentioned in petition of Clark & Clark, was executed as alleged by the parties as alleged. *Second*, that, on or about the 1st of December, the defendant A. Brownlee requested the defendants Smith & Jarvis to pay to Clark & Clark the sum of \$1,010, being amount then owing by said Brownlee to said Clark & Clark for material furnished said Brownlee, and used in construction of the buildings of defendants Smith & Jarvis, and that at that time said Smith & Jarvis had in their hands the sum of \$5,000 of the sum to be paid by them under their contract with said Brownlee; that, at the time, there was owing by said Brownlee, on account of said buildings, more than the sum in the hands of Smith & Jarvis; that said Brownlee verbally transferred to said Clark & Clark that amount of the sum owing by Smith & Jarvis, and instructed said Clark & Clark to draw upon said Smith & Jarvis for the sum; that on the 16th of December, 1884, said Clark & Clark drew upon said Smith & Jarvis for said sum, and their draft was presented to Smith & Jarvis on the 17th of December, 1884, before the plaintiff Gillespie had served Smith & Jarvis with notice of his account verified under the statute, and that Smith & Jarvis refused to accept the draft of Clark & Clark; that there was no written assignment by Brownlee of any claims to said fund to said Clark & Clark. *Third*, that on the 17th of December, 1884, the plaintiff G. W. Gillespie, a dealer in lumber, held an account against defendant Brownlee for the sum of \$1,358.67 for materials furnished in the construction of said building of Smith & Jarvis, and on said 17th day of December, 1884, (and after the presentation to Smith & Jarvis of the draft of Clark & Clark,) presented to Smith & Jarvis an attested account, as provided in the statute, and thereby fixed the liability of said Smith & Jarvis for payment of the funds then in their hands, and that there was then unpaid by Smith & Jarvis on said contract the sum of \$1,118.90, and that subsequently the plaintiffs Clark & Clark presented to Smith & Jarvis their account for material furnished said Brownlee, attested as required by the statute to fix the liability of said Smith & Jarvis upon the funds in their hands, and on the 7th day of January, 1885, obtained a judgment in the county court against defendant Brownlee for the sum of \$1,000. *Fourth*, that, at the time Gillespie served said Smith & Jarvis with an attested account, he had notice of the fact that said Brownlee was indebted to said Clark & Clark for material furnished for said buildings.

Under the mechanic's lien law as it existed at the time of these proceedings, the subcontractor or material-man could only stop the payment of whatever money due or to become due upon the contract remained under control of the owner of the house. The statutory notice and filing of the account only stopped payment of such balance. The proceedings did not affect the property further than necessary to secure payment of the funds held up by the notice. The facts found by the court—that the contractor had verbally transferred to

said Clark & Clark that amount (their claim) of the sum owing by Smith & Jarvis, of which Brownlee, the contractor, had notice, it being a just debt—would have the effect of withdrawing that sum from the further control of Smith & Jarvis. In *Harris Co. v. Campbell*, 63 Tex. 27, in a well-considered case, and upon a thorough review of the authorities, it is held "that an assignment of a part of a chose in action for a valuable consideration is good in equity, and that it may be made by a direct transfer, or by an order drawn upon a particular fund;" also that such assignee of part of a debt "acquires a right of action in equity against the debtor, and not only a lien upon the fund, but a property in the fund itself." It was also held that such assignment and the rights of the assignee were not affected by subsequent proceedings under the mechanic's lien law. These principles are decisive of this case. There is no inhibition against such transfer by parol contract. *Rollison v. Hope*, 18 Tex. 452. The parol transfer by Brownlee to Clark & Clark, with notice to Smith & Jarvis, was valid, as well against the owners of the house as against all subsequent liens fixed upon the property. The decree below should have been that Clark & Clark be satisfied out of the fund; the balance, if any, to be paid to Gillespie. We have been cited to many cases holding that at law no action lies against a drawee without acceptance, and that an ordinary check does not operate as a transfer of the sum named in it, or appropriate it before acceptance. In this case the fact of the transfer of the named part of the fund is ascertained by the finding of the court. The views taken of the rights of Clark & Clark to priority in the fund renders it useless to pass upon the legal effect of the bond given by Brownlee and his sureties. There is no statement of facts. We act upon the findings by the court.

The judgment below will be reversed, and rendered in accordance with this opinion.

McCUTCHON v. DAVIS *et al.*

(Supreme Court of Texas. April 24, 1888.)

PARTNERSHIP—SALE OF INDIVIDUAL PARTNER'S INTEREST—LIABILITY FOR FIRM DEBTS.

On sheriff's sale of the undivided interest of a partner in firm property for his individual debt, it is the duty of the purchaser to see that there are no unsatisfied partnership debts, as he acquires only such interest in the property as would remain in the execution defendant after their satisfaction.¹

Commissioners' decision. Appeal from district court, Tarrant county.

This suit was originally brought in the district court of Wichita county, by W. A. McCutcheon against Davis, and the other defendants as sureties, on his official bond as sheriff, for damages sustained by reason of the unlawful seizure of plaintiff's undivided one-half interest in a stock of merchandise in said county, to which process plaintiff was not a party. By consent, the cause was transferred to the district court of Tarrant county, and from a judgment in favor of the defendants, plaintiff appeals.

Wray & Stanley, for appellants. *Chas. Fred Tucker*, for appellees.

ACKER, J. Appellant purchased an undivided half interest in a stock of merchandise belonging to M. M. Morris & Co., at sheriff's sale under execution against Morris individually, and went into possession with Lipscomb, the partner of Morris. Lipscomb made no objection to the seizure and sale by the sheriff of Morris' half interest. Immediately thereafter the entire stock of merchandise was levied upon and taken possession of by the sheriff under writs of attachment in favor of partnership creditors against the firm of Morris & Co. The entire stock of merchandise was sold by the sheriff under order of court, and the proceeds lacked something of satisfying the debts

¹ See note at end of case.

for which attachment had been sued out against the partnership. This suit was brought by appellant against appellee Davis, and the sureties on his official bond as sheriff, to recover damages for the wrongful seizure and conversion of his half interest in the merchandise. Appellant contends that he acquired title to Morris' half interest by his purchase at the sale under execution against Morris individually, and that the Morris interest in the goods was not afterwards liable to sale for payment of debts due by Morris & Co. The trial court held that, by his purchase of Morris' interest, he became substituted only to the rights and interest of Morris in the firm property, and that the goods were subject to seizure under the writ of attachment, and accordingly gave judgment for defendants. In this we think the court did not err. In purchasing partnership property at sheriff's sale under execution against an individual member of the partnership, it is the duty of the purchaser to see that there are no unsatisfied partnership debts; for by his purchase he acquires only the interest in the property which would remain to the defendant in execution after payment of all partnership debts, and his indebtedness to the other partners on account of the partnership business. Pars. Partn. 365; Story, Partn. §§ 261, 262. This is the controlling question in the case, and the only one presented which we think demands consideration.

Finding no error in the record requiring reversal, we are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. The report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

NOTE.

PARTNERSHIP PROPERTY, including realty, belongs to the partnership until after the settlement of all partnership accounts. The individual copartners have no several rights in any part thereof; they own the residue remaining after such settlement, *Clay v. Freeman*, 6 Sup. Ct. Rep. 964; *Paige v. Paige*, (Iowa,) 32 N. W. Rep. 360; *Sherley v. Thomasson*, (Ky.) 1 S. W. Rep. 531, and note; and, for the purposes of such settlement, real property is treated as personal estate, *Clay v. Freeman*, 6 Sup. Ct. Rep. 964; *Allen v. Withrow*, 3 Sup. Ct. Rep. 517; *Manufacturing Co. v. Hoyt*, 29 Fed. Rep. 421; *Paige v. Paige*, (Iowa,) 32 N. W. Rep. 360; *Mallory v. Russell*, Id. 102; *King v. Remington*, (Minn.) 29 N. W. Rep. 352, and note; and partnership creditors have a prior lien thereon, *Paige v. Paige*, *supra*; *Johnson's Appeal*, (Pa.) 8 Atl. Rep. 36, and note. Each partner has a lien thereon for all advances. *Hobbs v. McLean*, 6 Sup. Ct. Rep. 870; *Clay v. Freeman*, Id. 964; *Taylor v. Farmer*, (Ill.) 4 N. E. Rep. 370.

On the death of one partner, the survivors are entitled to all assets of the firm, and to settle up the business. *Appeal of Ships*, (Pa.) 6 Atl. Rep. 105; *McKay v. Joy*, (Cal.) 9 Pac. Rep. 940, and 11 Pac. Rep. 832.

As to the respective rights of the surviving partners, and the executors or administrators of deceased partners, see *Chittenden v. Witbeck*, (Mich.) 15 N. W. Rep. 536; *Beale v. Beale*, (Ill.) 2 N. E. Rep. 65.

SICKELS et al. v. EPPS.

(Supreme Court of Texas. April 24, 1888.)

1. PUBLIC LAND—LOCATION OF CERTIFICATE—JUDGMENT OF AFFIRMANCE—FAILURE OF JUDGE TO SIGN.

A survey was made, recorded, and returned to the general land-office, together with the certificate authorizing it, and rejected by the board created by act of 1853, (Pasch. Dig. art. 872 *et seq.*) On appeal to the district court it was declared valid, but the judge omitted to indorse his approval on the certificate, as required by the same act, so that no patent could issue thereon. *Held*, that Gen. Laws Tex. 1871, p. 61, (Pasch. Dig. 7069; Rev. St. Tex. art. 3921,) providing that patents should issue on surveys made under valid certificates on file in the general land-office, removed that obstacle.

2. SAME—REJECTION OF LOCATION—APPEAL—NOTICE TO SUBSEQUENT GRANTEE.

Where a location under a land-grant certificate was rejected by commissioners acting under act of 1853, (Pasch. Dig. art. 872,) and during the pendency of an appeal from such rejection, under the same act, defendant's grantor located on the same land, taking the chances of his title being superior to plaintiff's, defendant is charge-

able with constructive notice that plaintiff was equitable owner as against the state, and cannot complain that by Rev. St. Tex. art. 3921, certain defects preventing the issuance to plaintiff of a patent were removed.

3. SAME—SECOND LOCATION ON SAME LAND—NOTICE OF FORMER LOCATION—INNOCENT PURCHASER.

Where a location had been made under a valid certificate, and defendant's grantor located on the same land, believing the first location to be invalid, but having constructive notice to the contrary, in the absence of proof that defendant paid a valuable consideration, his claim as innocent purchaser cannot be considered.

4. SAME—LOCATION OF CERTIFICATE—ABANDONMENT.

Where plaintiff's grantors had obtained a land-grant certificate in 1857, made location thereunder, and endeavored to procure a patent until suit in 1873, against defendant, whose grantor had located on the same land in 1863, defendant cannot maintain title on the ground of abandonment of plaintiff's claim.

5. LIMITATION OF ACTIONS—EXCEPTIONS—WAR PERIOD.

Where plaintiff's grantors had located under a certificate in 1857, and defendant's grantor had obtained patent to the same land in 1863, an action brought by plaintiff in 1873 is not barred by the 10-years statute of limitations, as all statutes of limitation were suspended from the commencement of the civil war until March 30, 1870.

6. VENDOR AND VENDEE—IDENTIFICATION OF LAND—FINDING OF COURT.

Where field-notes in a bond for title did not definitely cover the land conveyed, but it appeared that grantor had no other land in the same county on a certain creek, and the surveyor on trial identified the land as described by calls, and the court based its finding, as to the identity of the land, on other evidence, an objection to such evidence and finding, without pointing out the reasons, will not be considered.

Commissioners' decision. Appeal from district court, Collin county.

Action for the possession of a tract of land, brought by Martin Epps against M. J. P. Sickels and others. From a judgment against them, defendants appeal.

Morgan & Gibbs, for appellants. *Throckmorton & Brown*, for appellee.

COLLARD, J. The principal questions involved in this suit are whether the location of the Coleman White certificate is valid, whether patent can issue thereon, and whether it has priority over the location made for M. D. Bullion, assignee of J. R. Worrall. On the 18th day of August, 1856, the county court of Denton county issued to Coleman White a certificate for 320 acres of land as a colonist of Peter's colony. White transferred the certificate to Clayton Rogers, and Rogers transferred one-half of the same to R. C. Epps. Epps, being the owner, on the 10th day of February, 1857, located his half of the certificate on the 160 acres in controversy; Rogers having located his half of the certificate, in Denton county, on the 26th of November, 1856. The survey for R. C. Epps was duly recorded in the Collin land-district on the 17th day of March, 1857. The certificate, with the Epps field-notes, were returned to and filed in the general land-office, September 2, 1857. Afterwards, in 1858, the certificate was rejected by the traveling land board of Peter's colony, created by act of the legislature the 4th day of February, 1858, (Pasch. Dig. art. 872 *et seq.*) and suit was instituted in the district court of Collin county, on the 30th day of August, 1858, by Coleman White, to ascertain and establish the validity of the certificate, as provided by the act in case of rejection of a certificate by the board. On the 21st day of March, 1860, the district court rendered judgment approving the certificate, and declaring it valid. A certified copy of the decree, made by the clerk, was filed in the general land-office, April 2, 1860. On the 17th day of August, 1860, R. C. Epps withdrew the certificate from the general land-office to have it approved by indorsement of the judge who tried the case, as required by the act of 1858. From some cause the certificate was not so approved by the judge. It was again, on the 9th day of September, 1867, sent from the general land-office to Coleman White, to be approved by the judge. Between the dates 17th of August, 1860, and the 9th of September, 1867, the certificate had evidently been returned to the land-office,—at what time does not appear. The certificate was then

approved by the judge at the time presiding, but not by the same judge who tried the validity of the certificate. After such approval the certificate was lost, and a duplicate issued to Coleman White, after proof of loss, on the 27th day of October, 1869, and filed same day in the land-office. The duplicate and field-notes have remained on file in the land-office ever since. On February 2, 1863, Bullion, assignee of the Worrall certificate No. 18,145, located on the same land covered by the R. C. Epps location, and procured patent to himself as assignee the 6th day of March, 1863. Appellant Mrs. Sickels owns the Bullion title. Martin Epps, the appellee, owns the title under the White certificate. Which of these locations shall prevail? It is insisted by the appellant that the location by virtue of the White certificate cannot be recognized, because, notwithstanding the decree of the district court of Collin county establishing it as a genuine certificate, it was not approved by the judge, and because there was no certificate of the judgment by the clerk as required by law. The act of 1858 (Pasch. Dig. art. 884) provides that, "upon the rendition of judgment in favor of plaintiff in any such cause, and no appeal being taken therein on the part of the state, the judge trying the same shall approve the certificate, and the clerk of the court shall attach thereto a certificate of such judgment under his official seal, and, on payment by plaintiff of all costs of such suit, the clerk shall deliver to him such approved and certified certificate, and shall thereupon immediately report the same to the commissioner of the general land-office, particularly describing the certificate by number, date, to whom issued, and quantity of land." It is also provided by the seventh section of the act, "that the commissioner of the general land-office is hereby prohibited from patenting upon any land certificate issued by the county courts of Peter's colony since the 1st day of February, 1855, unless the same shall have been approved and reported by the board of commissioners herein created, or shall have been declared valid by the district court, approved by the judge, and reported by the clerk as herein provided for." When this case was before the court upon a former appeal, it was correctly decided that the judgment of the district court was conclusive as to the validity of the certificate; that it was properly issued, and was valid from the beginning. Such being the case, the original location must have been by virtue of a genuine and valid certificate, and conferred upon the locator the equitable title to the land. The only difficulty in the way of obtaining the legal title was the inhibition to the commissioner to issue patents without the approval of the judge trying the case indorsed on the certificate; (but the clerk having forwarded to the land-office a certified copy of the judgment it was a substantial compliance with his duty.) The difficulty in the way of obtaining patent upon the Epps location was removed by statute, April 25, 1871. See Gen. Laws 1871, p. 61; Pasch. Dig. 7089; Rev. St. art. 3921. That act provides "that all surveys properly made by virtue of a genuine or valid land certificate, which surveys, together with the certificate by virtue of which they were made, have been returned and are now on file in the general land-office, and not in conflict with any other valid land claim, shall be deemed valid; and the commissioner of the general land-office is hereby authorized and required to issue patents for the same." Patent could have issued on the Epps location at any time after the act of 1871.

During the time, the Epps survey under the White certificate stood as an equitable right to the land; and while the law of 1858 was still in force, prohibiting the commissioner from issuing patent, Bullion, in 1863, located on the land by virtue of the Worrall certificate, and procured a patent thereon. The land had been previously appropriated by a genuine certificate, and of this appropriation Bullion and all the world were bound to take notice. The file in the land-office showed that the certificate had been rejected, but the law authorized suit to establish its genuineness. We think, under these circumstances, Bullion was bound to inquire and ascertain whether suit had been brought, and what the result of the suit was. The existence of the law per-

mitting the suit to be brought to revise the action of the board, the fact that the action of the board was not final, put Bullion upon inquiry. Such inquiry as any prudent man would have made under the circumstances would have led to the truth that the certificate was genuine, notwithstanding its rejection, and that Epps had the equitable title to the land against the state. If the lower court was correct in his conclusion that a certified copy of the judgment was filed in the land-office April 2, 1860, it, being an archive of the office, would have been notice to other locators. But, be that as it may, the location by Epps was notice to all the world that the land was appropriated, (*Wylie v. Wynne*, 26 Tex. 44; *Hollingsworth v. Holshousen*, 17 Tex. 44,) and Bullion was bound to know whether the certificate had been established by suit under the law authorizing it. Bullion took chances on his location being superior to that of Epps, relying upon his judgment that, because there was no approval of the certificate on file in the land-office, no right had been acquired by its location. Epps at that time had the equitable title against the state to the land located, and Bullion, having constructive notice of the fact, cannot complain that the state, after his location, took away the prohibition of patent on the Epps location. The equities of Epps' location were good against Bullion. The duplicate certificate took the place of the original by operation of law, and had the same effect as the original. See opinion in this case on former appeal.

The court below found that "the field-notes in the bond for title from R. C. Epps to Harvill, and from Harvill to Martin Epps, do not definitely cover the land, but it was proven that R. C. Epps had no other land on the west side of White Rock creek, in Collin county, except the land in controversy, and said bond recites that the land is a tract of 160 acres on the west side of White Rock creek, in Collin county." Having examined the evidence of the surveyor, we are of opinion it sustains the finding of the court. From the record before us, there being no field-notes or plat of the surrounding surveys, we are unable to say the conclusion of the surveyor is incorrect. He identifies the land in suit as the land described in the bond, by calls; and, the court having found accordingly, we cannot set the finding aside. From the finding of the court it appears he did not rely upon the evidence objected to. It had no application save to identify the land as the land sold by Epps' bond. The case being tried by the judge, and his findings showing that his conclusion as to identity of the land was based upon other facts, render the error, if any, harmless. Neither the bill of exceptions nor the assignment of error states the grounds of the objections to the questions or answers, nor was plaintiff required to state the purposes for which the evidence was offered. It may be the questions were objected to because they were leading; it may be because it was an attempt to prove a sale of land by parol, or to identify the land in the Epps bond. Not being advised by the bill of exceptions as to what the grounds of objection were, or the purposes for which the evidence was offered, we must ignore the objections. *Howard v. Kopperl*, 5 S. W. Rep. 627, (December 5, 1887.)

It was not proved that J. W. Haynes paid the \$400 recited as the consideration in his deed from Bullion to the land; nor was there any proof that Mrs. Haynes (afterwards Mrs. Sickels) paid any consideration, as recited in the deed to her by J. W. Haynes. The absence of such proof dispenses with any discussion as to the question of innocent purchasers. The proof of payment of a valuable consideration by other evidence than the recital in a deed is indispensable to show an innocent purchaser.

The question as to abandonment by the plaintiff of the location under which he claimed was one of fact, and was decided by the trial judge adversely to appellant upon sufficient evidence to support the finding. R. C. Epps located the certificate on the 10th day of February, 1857; had the field-notes recorded the 17th day of March, 1857, in the office of district surveyor,

and filed certificate and field-notes in the land-office, September 2, 1857. The certificate was rejected by the land board in 1858. August 30, 1858, suit was filed in district court to revise the action of the board. The judgment of the court thereon was rendered on the 21st day of March, 1860. On the 17th of August, 1860, Epps withdrew the certificate from the land-office to have it approved by the judge. August 8, 1860, he applied for patent by letter to the commissioner, stating the certificate had been approved by the judge. April 3, 1863, he (Epps) again applied to the commissioner, again asked for patent; stating he had forwarded decree concerning the same, inclosing to the commissioner two dollars for patent fee. March 15, 1867, he again wrote to the commissioner to send him the certificate to have it approved by the judge. August 25, 1867, Coleman White applied for certificate to have it approved by the judge. It was approved, and then lost by Rogers, who proved loss, and duplicate was issued by the commissioner, October 29, 1869, who filed same with the original file for Epps same day. Epps sold to Harvill, August 23, 1860, the land located, and Harvill sold to Martin Epps, plaintiff, October 13, 1863. Coleman White transferred to Martin Epps one-half of the certificate, July 26, 1870, and this suit was filed by Martin Epps, May 13, 1873. This is the evidence upon which the court concluded there was no abandonment of the location by the plaintiff and his vendors. His finding is conclusive of the fact. Bullion had no right to presume the White location was abandoned by the owners at the time he located, on the 2d of February, 1863. Before he would be authorized to presume anything about it, he would have to examine the files, and to know the facts of diligence or neglect on the part of the owners in prosecuting the claim to patent. The facts show the parties were intent upon obtaining a patent, and had not abandoned the claim at the time of and before his file.

Under the circumstances of this case, stale demand, if it can be applied to this character of title at all, about which we withhold any opinion, would not bar the action of plaintiff. This suit was brought in a very short time after the lapse of 10 years from the time patent issued to Bullion. The patent issued during the war, March 6, 1863. Statutes of limitation were suspended from that time to the 30th of March, 1870, as an act of justice to parties holding legal claims, from the fact that the courts were practically closed from the commencement of the war to that time. Courts, in applying the doctrine of stale demand, cannot ignore the existence of that state of affairs in the history of the country that called for the suspension of limitation laws. It would be illiberal and unjust. Stale demand in equitable proceedings is analogous to limitation in law. It is nothing but lapse of time in both cases,—one to bar an equitable right, and the other a legal right. We think it might safely be held that stale demand should not run during the time limitation was suspended, but it is not necessary to lay down such a rule in this case. Without further discussion of the matter, we are satisfied we should hold that, during the time of actual war after Bullion's patent issued, stale demand should not apply, and that the defense of stale demand cannot be sustained in this case if it were applicable to the case.

Finding no error in the judgment of the court below, we are of opinion it ought to be affirmed.

MALTBIE, J., did not sit in this case.

STATTON, C. J. The report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

GULF, C. & S. F. RY. CO. v. GREENLEE *et al.*

(Supreme Court of Texas. April 30, 1883.)

1. JURY—IMPANELING—PEREMPTORY CHALLENGES—RIGHT TO SUMMON TALESMEN.

Under Rev. St. Tex. arts. 3001-3004, when 12 jurors are present, and their names have been drawn and entered on the slips, the parties may be required to exercise their peremptory challenges, and cannot require the entire panel to be placed in the box, and their names drawn by the clerk, nor that talesmen be summoned until the number is reduced by challenge.

2. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—DUTY TO LOOK FOR APPROACHING TRAINS.

Where one is driving on a road parallel to a railway track, he is not guilty of negligence in not looking out for approaching trains before he discovers a crossing, but it is sufficient if, after discovering the crossing, he uses ordinary diligence to avoid danger.¹

3. SAME.

In an action for personal injuries sustained at a railway crossing, the court need not instruct that it was plaintiff's duty to look and listen for approaching trains, but it is sufficient to charge that he must exercise ordinary care to avoid danger.¹

4. TRIAL—INSTRUCTION—EXCLUDING ALTERNATIVE FROM JURY.

An instruction giving the rule of damages if the jury should find for plaintiff, does not so emphasize such a finding as to exclude from the minds of the jury the alternative of finding for defendant.

5. SAME—INSTRUCTIONS—ACCIDENTS AT RAILROAD CROSSINGS.

Where, in an action for personal injuries sustained at a railway crossing, the court instructed that, if neither party was guilty of negligence, the injury was the result of accident, and no recovery could be had, the charge is not prejudicial to defendant.

6. SAME—INSTRUCTIONS—HYPOTHETICAL CASE—ACCIDENTS AT RAILROAD CROSSINGS.

Where, in an action against a railway company for personal injuries sustained at a crossing, the court submitted the hypothetical case of a collision between the engine and plaintiffs' wagon, and plaintiffs testified that they thought the engine struck the oxen drawing the wagon, the charge is not misleading to the prejudice of defendant.

7. APPEAL—REVIEW—HARMLESS ERROR—IMPROPER LANGUAGE OF COUNSEL.

Improper language of counsel when addressing the jury, not objected to at the time, and not prejudicial to the opposite party, is no cause for reversal.

8. SAME—WEIGHT AND SUFFICIENCY OF EVIDENCE.

When the evidence is conflicting, a verdict will not be set aside.

Appeal from district court, Bosque county.

W. M. Flournoy, for appellant. *Alexander & Winter* and *S. H. Lumpkin*, for appellees.

GAINES, J. This is an action brought in the court below by James S. Greenlee and his wife, Lou M. Greenlee, to recover damages for a personal injury to the wife, alleged to have occurred by reason of the negligence of the defendant company. The appellees were traveling along a public road in an ox wagon, and arriving at the road of defendant where it is crossed by a highway, and the heads of the oxen reaching the track of the railroad just as an engine drawing a train of cars swept past, the oxen were frightened by the locomotive, and, sheering to the right, overturned the wagon, and inflicted the injury of which appellees complained.

The first question presented in the brief of appellant is as to the action of the court in impaneling the jury. It appears from the bill of exceptions that, when the parties announced ready for trial, a number of the jurors selected for the week had been impeached in another case, and were then considering their verdict, and that thereupon the court directed the names of the remaining jurors to be drawn and placed upon the slips. Twelve names having been drawn and entered upon the slips, the parties were required to exercise their peremptory challenges. The counsel for defendant objected to exercising its right of challenge until the entire panel for the week had been

¹See note at end of case.

placed in the box, and their names drawn by the clerk. The objection was overruled. The counsel then moved the court to allow them to suspend their challenges until a sufficient number of talesmen could be summoned to complete the list. This was refused, and the parties were required to strike from the lists furnished by the clerk before other jurors were summoned. In the action of the court there was no error. The statutes evidently contemplated that, when as many as 12 jurors are present for the trial of causes, their names must be drawn, and placed upon the slips, before others are summoned. Rev. St. art. 3091. The article cited provides, in substance, that, in cases in the district court in which not so many as 12 names remain in the box, the court shall direct the sheriff to summon a sufficient number of qualified persons as it may deem necessary to complete the panel; thereby clearly implying that, if 12 remain, talesmen shall not be summoned until the number is reduced by challenge. When as many as 12 are drawn, they are then subject to be challenged for cause. Id. art. 3092. If, by such challenges, the number be reduced to less than 12, then other jurors must be summoned. Id. art. 3093. But if, after the exercise of the challenges for cause, as many as 12 remain, then "the parties shall proceed to make their peremptory challenges, if they desire to make any." Id. art. 3094. Such is the meaning of the statute, literally interpreted; and its obvious intent is to prevent an unnecessary consumption of time. As long as it is possible to complete the jury without resort to talesmen, this shall be done. Whenever the number is less than 12, either when first drawn, or after the challenges for cause or the peremptory challenges, then, and not before, the court is empowered to order others to be summoned by the sheriff. No reason is seen why the directions of the statute should not be literally pursued. Under them there is a reasonable assurance that every juror obnoxious to either party may be excluded from the panel, and thereby a fair and impartial jury secured. The articles we have cited from the Revised Statutes were partly, if not primarily, intended to meet the very contingency which presented itself in this case, and is wisely provided in order to save delay in the trial of causes, when such delay is not necessary to the due administration of justice. It is to be further remarked that the leading object of our present jury law was to avoid the evils resulting from the summoning of juries by sheriffs, and, in furtherance of that end, it is framed with the intent to secure the panel, when practicable, from the jurors selected by the commissioners.

There are several assignments of error which complain of the charge of the court. The court submitted an instruction to the jury upon the hypothetical case of a collision between the engine of defendant and plaintiffs' wagon; and it is objected to the instruction that there was no evidence of a collision, and that it is therefore erroneous. It seems to us, however, that this is quite an immaterial matter, and that, if the assumption that there was no evidence of actual contact were well founded, the charge could not have misled the jury to the prejudice of appellant. But, in point of fact, there was evidence of a collision between the engine and the oxen which drew the wagon. The plaintiff J. S. Greenlee testified that he thought the engine struck the horns of the oxen, and, in another place, that his impression was it touched their legs. His wife's testimony was somewhat to the same effect. Neither of them was positive whether there was any actual contact or not. It is also complained that the court erred in charging the jury that, if neither party was guilty of negligence, the injury was the result of an accident, and no recovery could be had. But it is clear that the defendant could not have been prejudiced by this instruction. In reference to the other assignments which relate to the instructions of the court, we may say generally that, in our opinion, the court's charge correctly presented the law applicable to the case, and to the issues made by the pleadings and evidence. Upon each phase of the case the jury were clearly instructed that the plaintiffs could not recover if they failed to

exercise ordinary care and prudence in attempting to cross the railroad track. It is claimed, however, that the charge was erroneous, because the jury were not told that the plaintiffs could not recover if they were negligent in not watching for the train before they discovered the crossing. But we know of no law which makes it the duty of travelers upon a highway which runs parallel to a railroad track, before crossing it, to look for trains before they approach the point of danger. The court charged, in effect, that if the plaintiffs, after they "ascertained where the crossing was, or after, by the use of ordinary diligence, could have discovered the crossing, failed to exercise such care to avoid the danger as a prudent man would have exercised under like circumstances," they could not recover. The husband admitted in his testimony that he saw the crossing before he started his wagon down the declivity, and at a point some 50 or 60 feet from the railroad track; and testified that, before attempting to cross over, he looked for approaching trains, but saw none. Before this there was no danger to be encountered, and we are at loss to conceive what diligence he was called upon to exercise prior to this time. Can it be seriously contended that he should have been on the outlook merely because he was moving parallel to the railroad track? If the court had so charged, the charge would have been misleading, and fatal to the judgment if the verdict had been against the plaintiffs.

It is also insisted that the court, instead of charging generally that plaintiffs could not recover if they failed to exercise ordinary care in approaching the crossing, or at least in addition to such charge, should have instructed the jury that it was the duty of plaintiffs, as they approached the track, to look and listen for coming trains. But we think the charge as to contributory negligence of plaintiffs as given, in general terms, sufficient. According to the rule of decision in this court, except in case of a failure to perform a statutory duty, negligence is very rarely a question of law. It is most usually a question of fact, the determination of which depends upon the circumstances of each particular case. *Railway Co. v. Murphy*, 46 Tex. 356. In the case cited it was held that an instruction to the jury which told them that certain acts on part of the servants of the railroad company were negligence was error, and is authority for holding that a more specific charge upon the alleged contributory negligence was not required in this case.

The tenth assignment is that "the court erred in its last clause of its charge, which excluded from the minds of the jury the alternative of finding for defendant by emphasizing their finding for the plaintiffs." The answer to this is that the court did not, in the paragraph complained of, instruct the jury to find for plaintiffs. The instruction merely gives the rule of damages "if, under the instructions given and the evidence," the jury "should find for the plaintiffs." The twelfth assignment of error does not specify the particular special charges, the refusal of which is complained, and is too general to be considered.

An exception was taken to the language of one of the counsel for plaintiffs used in closing argument to the jury. The language was not objected to when uttered, and the judge states in the bill of exceptions that his attention was engrossed, at the time, in the preparation of his charge, and that he only heard one of the remarks of which complaint is made, and that this he promptly checked. Without passing upon the question whether the language is of such a character as would require a reversal under any circumstances, we will say that the remarks were not so plainly prejudicial to defendant as to demand that the verdict be set aside, in the absence of an objection by its counsel at the time the words were spoken.

In reference to the assignments which, in effect, submit that the verdict of the jury is contrary to the law and the evidence, it is sufficient to say that the testimony was conflicting, and that, therefore, the verdict should not be disturbed. If the jury believed the testimony of the plaintiffs, they could not

have come to any other proper conclusion. The last assignment, that "the court erred in overruling defendant's motion for a new trial, and in refusing a new trial," is insufficient, because too general. It is presumed that it merely intended to show that the questions raised by the prior assignments were presented to the court below on the motion for a new trial.

There is no error in the proceedings of the court below, and the judgment is affirmed.

NOTE.

RAILROAD CROSSINGS—DUTY OF TRAVELER TO LOOK AND LISTEN. It is the duty of a person about to cross a railroad track to make a vigilant use of his senses, as far as there is an opportunity, in order to ascertain if there is a present danger in crossing. *Railway Co. v. Adams*, (Kan.) 6 Pac. Rep. 529; *Starry v. Railroad Co.*, (Iowa,) 1 N. W. Rep. 606; *Abbott v. Railway Co.*, (Minn.) 16 N. W. Rep. 266; *Clark v. Railway Co.*, (Kan.) 11 Pac. Rep. 184; *Railroad Co. v. Davis*, (Kan.) 16 Pac. Rep. 78; *Donohue v. Railway Co.*, (Mo.) 2 S. W. Rep. 424; *Mynning v. Railroad Co.*, (Mich.) 81 N. W. Rep. 147; *Harris v. Railroad Co.*, (Minn.) 33 N. W. Rep. 12; *Pennsylvania Co. v. Marshall*, (Ill.) 10 N. E. Rep. 290; *Glascock v. Railroad Co.*, (Cal.) 14 Pac. Rep. 518; *Young v. Railway Co.*, (N. Y.) 14 N. E. Rep. 424. A failure to listen or look, when by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signal contributed to the injury. *Railway Co. v. Adams*, (Kan.) *supra*; *Schofield v. Railway Co.*, 8 Fed. Rep. 488; *Holland v. Railroad Co.*, 18 Fed. Rep. 243; *Mynning v. Railroad Co.*, *supra*. The diligence required of the traveler in ascertaining the approach of a train to a highway crossing must be greater accordingly as the peculiar locality and the circumstances of the case seem to require greater caution. *Morris v. Railroad Co.*, 26 Fed. Rep. 22. The fact that the approach of a railroad to a highway is obstructed from view imposes upon travelers by the highway special care to avoid collisions. *Haas v. Railroad Co.*, (Mich.) 11 N. W. Rep. 216; *Schaefer v. Railroad Co.*, (Iowa,) 17 N. W. Rep. 893; *Burns v. Rolling-Mill Co.*, (Wis.) 19 N. W. Rep. 880; *Pence v. Railroad Co.*, (Iowa,) Id. 785. Where a crossing is particularly dangerous, and requires extraordinary effort to ascertain whether it is safe to attempt to cross, one familiar with the locality and the danger surrounding it must use care proportioned to the probable danger. *Railroad Co. v. Butler*, (Ind.) 2 N. E. Rep. 183; *Merkle v. Railroad Co.*, (N. J.) 9 Atl. Rep. 690; *Seefeld v. Railway Co.*, (Wis.) 35 N. W. Rep. 278. Where the driver of a team brought his horses to a walk, but did not stop and leave his wagon, and go forward where he could see a train obstructed by cars standing on a side track, held not to be contributory negligence. *Kelly v. Railway Co.*, (Minn.) 11 N. W. Rep. 67; *Guggenheim v. Railway Co.*, (Mich.) 33 N. W. Rep. 161. Where the approach to a crossing was obstructed, and the plaintiff's attention was required in one direction, held, under the circumstances, he was not negligent for failing to look in the opposite direction from which a train was rapidly approaching, without signal, bell, or whistle. *Loucks v. Railway Co.*, (Minn.) 18 N. W. Rep. 651. Where one knows the dangerous condition of a crossing, that the approach of a train would be obstructed to both sight and sound, and also knew, or had reason to know, that a train is due, it is his duty to both look and listen, and, if need be, to stop for that purpose. *Tucker v. Duncan*, 9 Fed. Rep. 867. But there may be circumstances which will excuse the traveler from taking the usually necessary precaution of looking and listening. *Railroad Co. v. Hedges*, (Ind.) 7 N. E. Rep. 801; *Abbott v. Railway Co.*, *supra*.

See, also, respecting contributory negligence in crossing a railroad track, *Kelly v. Railroad Co.*, (Pa.) 8 Atl. Rep. 856; *Purinton v. Railroad Co.*, (Me.) 7 Atl. Rep. 707, and note; *Chase v. Railroad Co.*, (Me.) 5 Atl. Rep. 771, and note; *Sherry v. Railroad Co.*, (N. Y.) 10 N. E. Rep. 128; *Cooper v. Railway Co.*, (Mich.) 33 N. W. Rep. 808; *Slater v. Railway Co.*, (Iowa,) 33 N. W. Rep. 264; *Railway Co. v. Henry*, (Kan.) 14 Pac. Rep. 1; *Glascock v. Railroad Co.*, (Cal.) Id. 518; *Woodard v. Railroad Co.*, (N. Y.) 18 N. E. Rep. 424; *Noeler v. Railway Co.*, (Iowa,) 34 N. W. Rep. 850; *Yancy v. Railway Co.*, (Mo.) 6 S. W. Rep. 272.

QUINN v. SEWELL.

(Supreme Court of Arkansas. April 7, 1888.)

1. PAYMENT—WHAT CONSTITUTES—FAILURE TO PLEAD SET-OFF.

In an action for the balance due on the purchase money of certain notes purchased of plaintiff's agent by defendant, who, ignorant of the fact of the agency, had paid for them in part, and had claimed a debt due him from such agent as payment of the residue, not, however, pleading such claim as a set-off, the court instructed the jury that if they find that defendant purchased the notes of plaintiff's agent, and paid for them, not knowing the fact of the agency, defendant is not liable. *Held*, that such instruction is erroneous as leading the jury to believe that the debt due defendant could operate as part payment of defendant's debt to plaintiff.

2. SAME.

It is no defense to an action of debt that defendant had applied a debt due him from plaintiff to extinguish the debt sued on, and had so informed plaintiff; such counter-debt not being pleaded as a set-off.

Appeal from circuit court, Logan county; JOHN S. LITTLE, Judge.

Action by Martitia Quinn against James Sewell to recover a balance due on the purchase of certain notes. Defendant bought the notes of S. M. Quinn, plaintiff's husband, who, unknown to defendant, was acting as plaintiff's agent in the transaction. Sewell paid for the notes in part, and informed S. M. Quinn that he should treat a debt due him from Quinn as payment of the residue. Quinn objected, stating that he had discharged such debt. Judgment for defendant, and plaintiff appeals.

C. A. Lewers, for appellant. T. C. Humphrey, for appellee.

COCKRILL, C. J. Judgment in this cause must be reversed. The court charged the jury that if they found from the evidence that "the defendant, Sewell, purchased the notes from S. M. Quinn, the plaintiff's husband, and paid the purchase money therefor, not knowing that he was acting as agent for the plaintiff, the defendant was not liable." This was a correct enunciation of the law, but it is not applicable to the facts of this case. There was evidence tending to show that S. M. Quinn was indebted to Sewell when he bought the notes, and that the latter undertook to adjust the matter by stating an account, in which he charged himself with the purchase price of the notes, and took credit for the amount which he claimed S. M. Quinn owed him. There was no agreement on the part of either of the Quinns that this should be done. No allusion was made to the Quinn indebtedness in the correspondence between the parties until Sewell had received the notes in pursuance of the terms of the sale. Then he wrote S. M. Quinn about it for the first time, saying he had "taken the privilege of paying" himself what was due him by deducting the amount from the purchase money he had agreed to pay for the notes. At the same time he rendered a statement of the account, as before stated, showing also some other items which it is not material to mention in this connection, and inclosed a post-office money order payable to the plaintiff for the balance struck. The money order was retained by the Quinns; but the husband replied to Sewell, without unusual delay, refusing to accede to his mode of payment, asserting that he had discharged the debt mentioned in Sewell's statement, and demanded the residue of the purchase price. This suit by Mrs. Quinn followed. Now, there is nothing in this that tends to prove more than a partial payment; but that was credited, and the object of this suit was to recover the balance. Unless with Quinn's consent, Sewell could not extinguish any part of the demand against himself by applying Quinn's indebtedness to him as a credit on it. *Hill v. Austin*, 19 Ark. 290. Our law, unmoved, does not operate to extinguish cross-demands even when the indebtedness is undisputed. There was nothing, therefore, upon which to base the instruction about Sewell's payment of the demand. The jury doubtless understood from the charge that they were warranted in concluding that Sewell's mode of stating the account was, in effect, payment. But that conclusion could not be justified. If Sewell desired to base a defense upon the fact that S. M. Quinn was indebted to him at the time he made the purchase, he should have pleaded the indebtedness as a set-off. It is familiar law that when a principal intrusts the possession of his goods with an agent, and one deals with the agent as the principal, without knowledge of the agency, he may set off any claim he has against the agent, before he is undeceived, in answer to the demand of the principal. Whart. Ag. §§ 405, 466; Ewell's Evans, Ag. *397 *et seq.*; 2 Kent, Comm. 682; *George v. Claggett*, 2 Smith, Lead. Cas. pt. 1, *118, and notes; *Reed v. McLroy*, 44 Ark. 348. The doctrine rests upon the ground that the principal who has permitted an agent to

deal with his goods as his own must not only take the contract as the agent made it, but is virtually estopped from alleging that the agent is not the plaintiff in his [the principal's] suit, when he adopts the contract. *Smith, Lead. Cas. supra*, 123. The set-off must be pleaded just as if the suit were in the name of the apparent owner at the time of the sale; that is, the agent. The question of the agent's indebtedness is then a fact for the jury to determine. But, when the indebtedness is proved, the purchaser cannot have the benefit of it against the principal, if he knew, or by the use of due diligence might have known, of the agency. Now, if we should treat the allegations of the answer as amended to conform to the proof, and so regard it as pleading a set-off, the fatal error in the charge, of withdrawing from the jury the consideration of the fact whether Quinn was indebted to Sewell, would remain.

The error was not cured by any part of the charge. Remand the cause for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. WEAKLY *et al.*

(Supreme Court of Arkansas. April 14, 1888.)

1. CARRIERS—OF GOODS—CONNECTING LINES—RIGHTS AND LIABILITIES.

A railroad which takes freight from another railroad for transportation over its line, in accordance with an agreement between the latter road and the consignor, becomes liable to the consignor for failure to perform the contract so far as its line is concerned, and is entitled to the benefit of any limitation of liability contained therein.¹

2. SAME—LIVE-STOCK SHIPMENTS—NEGLIGENCE—BURDEN OF PROOF.

When live-stock is shipped upon a railroad under a contract limiting the carrier's responsibility, and by agreement the consignor travels on the same train, and feeds and takes charge of the animals while in transit, the burden of proof is on him, in suit against the company for loss of any of such animals, to show that the default or negligence of the company was the cause of such loss.

3. SAME—LIMITING LIABILITY—MISTAKE BY CONSIGNOR.

When a railroad freight contract, limiting the company's responsibility to that of a private carrier for hire, is signed by the parties in duplicate, and one copy thereof kept by the consignor, the fact that he signed it under a mistake as to its contents, not having read or heard it read, does not, in the absence of fraud or imposition by the company in procuring his signature thereto, relieve him from the effects of the contract after it has been acted upon by both parties.

4. SAME—LIMITING LIABILITY—WHEN LIMITATION IS REASONABLE.

A clause in a bill of lading of live-stock which limits the carrier's liability to the sum of \$50 for each animal lost, when based upon reduced charges for their transportation, is reasonable, and will be made the measure of damages, although the animal killed was worth from \$300 to \$800.

5. EVIDENCE—DECLARATIONS—*RES GESTÆ*.

In an action against a railroad company for the death of a jack while being shipped over its road, the evidence showed that a tramp, with a stick in his hand, was found in the car with the jacks; that, soon after being removed from the car by the conductor, he said, in the latter's presence: "If it had not been for lopping them mules over the head, I would have froze." Afterwards the jack was found lying dead in the car, with blood running out of its mouth and nose. *Held*, that the declaration of the tramp, not being part of the *res gestæ*, was inadmissible in evidence.

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.

Action by Weakly & Gooch against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and appeal by defendant.

Dodge & Johnson, for appellant. *Scott & Jones*, for appellees.

¹ Respecting the liability of carriers for the negligence of connecting lines, see *Railway Co. v. Pritchard*, (Ga.) 1 S. E. Rep. 261, and note; *Wallingford v. Railroad Co.*, (S. C.) 2 S. E. Rep. 19; *Railroad Co. v. Rogers*, (Tex.) 3 S. W. Rep. 660; *Association v. Wood*, (Miss.) 2 South. Rep. 78; *Knott v. Railroad Co.*, (N. C.) 3 S. E. Rep. 735; *Railroad Co. v. Avant*, (Ga.) 5 S. E. Rep. 78. Respecting the right of carriers to limit their common-law liability by contract, see *Railroad Co. v. Thomas*, (Ala.) 3 South. Rep. 802, and note.

BATTLE, J. This is an action by Weakly & Gooch against the St. Louis, Iron Mountain & Southern Railway Company, to recover the value of a jack that died while in the course of transportation over defendant's railway. The facts, as shown by the testimony, were substantially as follows: On the 22d of December, 1884, plaintiffs shipped, at Nashville, Tenn., by the Nashville, Chattanooga & St. Louis Railway, a car-load of jacks consigned to themselves at Fort Worth, Tex. They were to be shipped by way of Memphis, over the Memphis & Little Rock Railroad to Little Rock, and thence over defendant's road to Texarkana. A written contract was entered into, whereby the Nashville, Chattanooga & St. Louis Railway Company agreed to transport the jacks to its freight station at McKenzie, ready to be delivered to the consignee, or his order, or to such company or carrier whose line might be considered a part of the route to the destination of the stock; and, in consideration of reduced rates of freight, it was agreed that, if any damage occurred by which the carrier was liable, the amount claimed should not exceed \$800 for each jack injured. The stock, in charge of Gooch, one of the plaintiffs, arrived at Memphis on the morning of the 24th of December, 1884. At Memphis the river was then impassable on account of ice, and Gooch was delayed a day. The agent of the Memphis & Little Rock Railroad told him his stock could go forward on the Kansas City Railway at 9 o'clock the next morning; and on the next day, the 25th of December, he took his stock to the Kansas City Railway depot. The stock was driven on the cars a few moments before the train started. About this time a live-stock contract with the Kansas City, Fort Scott & Gulf and the Kansas City, Springfield & Memphis Railroad Company was presented to him for his signature, which he signed without reading, supposing it was a pass for himself. So much of it as is necessary to mention in this opinion is in the words and figures following:

"MEMPHIS STATION, December 25, 1884.

"Agreement made between the Kansas City, Fort Scott & Gulf and Kansas City, Springfield & Memphis Railroad Companies, of the first part, and Weakly & Gooch, of the second part, witnesseth, that whereas, the Kansas City, Fort Scott & Gulf and Kansas City, Springfield & Memphis Railroad Companies, as common carriers, transport live-stock as per tariff, now, in consideration that said parties of the first part will transport, for the party of the second part, one (1) car-load of jacks from Memphis to Fort Worth, Tex., and there deliver to the Kansas City Stock-Yard Company, at the rate of seventy-six (76) dollars per car-load, the same being a special rate, lower than the regular rate mentioned in said tariff between said points, said party of the second part hereby relieves said parties of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be that of only a private carrier for hire. And the said party of the second part * * * hereby assumes all risk of injury which the animals, or either of them, shall receive in consequence of any of them being wild, unruly, or weak, or by maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, * * * or of loss or damage from any other cause or thing not resulting from the negligence of the agents of the said parties of the first part. And the said party of the second part further agrees that he will load and unload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk, while in the stock-yards of the parties of the first part awaiting shipment, and while on the cars, or at feeding or transfer points, or where it may be unloaded for any purpose. And it is further agreed that the parties of the second part will see that said stock is securely placed in the cars furnished, and that the cars are safely and properly fastened, so as to prevent the escape of said stock therefrom. * * * And it is further agreed that in no case shall the said railway companies be liable for a greater amount than fifty dollars per head of live-stock hereby shipped, and that all of the above

rules and regulations for the transportation of live-stock shall be deemed an essential part of this contract. * * * The evidence that said party of the second part, after a full understanding thereof, assents to all the conditions of the forgoing contract, is his signature thereto.

"Witness: L. L. CRISP. E. A. THRUSTON, Agent of the Companies.

"(Pass one.) WEAKLY & GOOCH, Shippers.

"Executed in duplicate."

No charges were demanded or paid by plaintiffs for transporting Gooch and the stock over the railroads, except \$116 at Nashville. The stock was shipped over the Kansas City, Springfield & Memphis Railroad to Hoxie, a station on defendant's road 121 miles north of Little Rock. The station agent at Hoxie testified that the car-load of jacks was received by defendant at Hoxie over the Kansas City, Springfield & Memphis Railway under the contract of shipment made at Memphis, and was transported to Texarkana under the same contract. Gooch accompanied the stock, riding on the same train with them. The stock arrived at Little Rock in good condition. Shortly after leaving Little Rock, the conductor called on Gooch for his contract, and he handed him the Nashville contract, but the conductor refused to accept it, saying it did not pass him free. He then handed the conductor the contract signed at Memphis, which the conductor took, read, and returned, and permitted him to ride upon it. A short distance north of Prescott, Gooch got out to examine his stock, and found a tramp in the car with them; and, after the train had started, he told the conductor about seeing the tramp. When the train stopped at the next station, the tramp was taken out of the car; and was permitted to go into the caboose to warm, it being cold and sleeting. He had a stick. Over the objection of defendant, a witness was allowed to testify that when the tramp went into the caboose, and sat down by the stove to warm, he said, in the presence of the conductor: "It is d——n cold; and if it had not been for lopping them mules over the head, I would have froze to death." Gooch got out several times between Little Rock and Texarkana to look at his stock, and found them standing, and apparently all right. He did so after seeing the tramp among them, and a short time before they reached Texarkana, and discovered nothing wrong until they arrived at Texarkana, when he found one of the jacks lying dead in the middle of the car, with blood running out of his nose and mouth. He saw no marks of blows or bruises on the animal. Its skin was unbroken. He rode on the same train with the stock, according to his contract, from Hoxie to Texarkana, and testified he did not know the cause of the death. He testified that the dead jack was a fine animal, blooded, and of good pedigree, and was worth at Nashville \$600, and at Fort Worth \$800. When the other jacks reached Fort Worth, plaintiffs presented the contract signed at Memphis, and on it demanded and received their stock. Plaintiffs recovered judgment for \$300, and defendant appealed. The declaration of the tramp was inadmissible. It was no part of the *res gesta*, and appellant should not be affected by it.

Appellant asked and the court refused to instruct the jury as follows: "The court instructs the jury that if they find from the evidence that the plaintiff signed the bill of lading or contract of shipment in evidence, by which said car-load of jacks was carried from Memphis, Tenn., to Fort Worth, Tex., via Hoxie, it matters not if plaintiffs did not read or understand the same. The fact that they signed the same is conclusive, unless said signatures were obtained by fraud on the part of the carriers making the contract. It was plaintiffs' duty to know, and they were bound to know, what the contract contained and meant; and the effect of all its terms and conditions." But, at the instance of appellees, did instruct them as follows: "Unless the jury find from the evidence that the 'Memphis contract,' so called in the evidence, was made by the defendant with the plaintiffs for a valuable consideration, they will disregard the same; and, if they find that the same was signed by the

plaintiffs under the supposition alone that it was only for the purpose of having his jacks shipped from Memphis to a point on defendant's line of railway where the original or Nashville contract would have carried the same, they may entirely disregard said Memphis contract, unless they believe the injuries received by said jacks were received between Memphis and Little Rock." Appellant also asked and the court refused to instruct as follows: "If the jury find from the evidence that plaintiffs entered into a written contract at the city of Memphis with the Kansas City, Fort Scott & Gulf and the Kansas City, Springfield & Memphis Railroad Companies, by which it was agreed that said railroads should carry their car-load of jacks from Memphis to Fort Worth, Tex., at reduced rates as a private carrier, and, upon certain agreed values of said stock, upon a limited liability; that the defendant was and is a connecting carrier of said railroads, and that, to carry out the contract, it was necessary to carry said stock on defendant's railway; that said defendant received and carried said stock under said contract,—then, in that event, the court instructs you that as said bill of lading was a through bill of lading, expressing upon its face a rate of freight to be charged by all the connecting lines from Memphis, Tenn., to Fort Worth, Tex., the destination of the stock, then its contract for exemption from liability inures to the benefit of the owners of all the lines of the whole route, including defendant company; and if, therefore, they find that there was such a contract, they must find that the same was for the benefit of this defendant, and must control in this case." Did the court err in giving the instructions asked for by appellees, and in refusing those asked for by appellant? At common law a common carrier, in the absence of a contract limiting his liability, is responsible for any loss or damage, however occasioned, unless it was by an act of God or a public enemy. He is bound to receive and carry all the property offered for transportation, if it be of that character which he carries for the public, subject to the responsibility incident to his employment, and is liable to an action if he refuses. He cannot relieve himself of such responsibilities except by contract with the shipper, based upon a consideration. He cannot limit his liabilities by an act of his own, and can only do so by the assent of the parties concerned. *Taylor v. Railroad Co.*, 89 Ark. 148, 157; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 328; *Gaines v. Insurance Co.*, 28 Ohio St. 418, 14 Amer. Ry. Rep. 158. Appellees contend that they never assented to the limitations of the liabilities of appellant contained in the contract signed at Memphis, because they signed it without reading or hearing it read, and under a mistake as to its contents. But this will not relieve them from the contract, unless it was procured by fraud or imposition. It has generally been held by the courts in this country and in England that such contracts are binding on the shipper, although he did not read or hear them read before signing, provided the carrier resorted to no unfair means, and practiced no fraud or imposition, and the shipper had the opportunity to know the contents. As said by Hutchinson on Carriers: "There is nothing unreasonable in this. Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind, and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his services and risk." Hutch. Carr. § 240; *McMillan v. Railroad Co.*, 16 Mich. 79; *Squires v. Railroad Co.*, 98 Mass. 239; *Long v. Railroad Co.*, 50 N. Y. 76; *McIlroy v. Buckner*, 35 Ark. 555; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Rice v. Manufacturing Co.*, 2 Cush. 80,

87; *Harris v. Story*, 2 E. D. Smith, 368, 367; *Lewis v. Railway Co.*, 5 Hurl. & N. 867; Cooley, Torts, 488-491; *Greenfield's Estate*, 14 Pa. St. 489, 504; *Hunter v. Walters*, L. R. 7 Ch. 75, 82, 84; *Morrison v. Construction Co.*, 44 Wis. 405, 409; *Fuller v. Insurance Co.*, 36 Wis. 599, 608; *Long v. Railroad Co.*, 3 Amer. Ry. Rep. 350; *Mulligan v. Railway Co.*, 2 Amer. Ry. Rep. 322, 328; *Grace v. Adams*, 1 Amer. Rep. 131, 100 Mass. 505. But in this case the Kansas City, Fort Scott & Gulf and the Kansas City, Springfield & Memphis, and the St. Louis, Iron Mountain & Southern Railway Companies were not parties to the contract made at Nashville. The stock was to have been transported, by way of Memphis, over the Memphis & Little Rock Railroad to Little Rock, and from there to Texarkana. When it arrived at Memphis, it was ascertained it could not be shipped over the Memphis & Little Rock road without delay, and appellees determined to ship it over another and much longer route, and for that purpose entered into the contract signed at Memphis. Under this contract the stock and one of the appellees were carried from Hoxie to Texarkana, and the stock was delivered to its owners at Fort Worth. Appellant acted under and was governed by it in carrying the stock. If the contract signed at Memphis was procured by fraud, and appellees were unwilling to be governed by it, they should have so informed appellant before the delivery of the stock to its agents. They were then in a situation to correct any mistake or misunderstanding in the terms of the shipment, and definitely adjust its terms. But, having failed in this, they cannot make appellant suffer the consequences of their negligence. If a fraud was committed in the procurement of the contract at Memphis, their negligence enabled the perpetrators to succeed in its commission, and they should bear the loss occasioned by it, if any. The Kansas City, Fort Scott & Gulf, and the Kansas City, Springfield & Memphis Railroad Companies contracted with appellees to transport their stock from Memphis, Tenn., to Fort Worth, Tex. The appellant, by receiving the stock, became their agent to complete their contract to the extent of shipping the stock over so much of its road as formed a part of the route over which the shipment was to be made. From this fact the law implied a privity between the parties to this action sufficient to enable appellees to sue appellant for any losses sustained by reason of its failure to perform the contract, and gave to appellant the benefit of all valid limitations contained in the agreement upon the carrier's liability; so that, while the burdens were imposed, the benefits of the limitations in the contract inured to appellant. *Taylor v. Railroad Co.*, 39 Ark. 148, 158; *Halliday v. Railway Co.*, 74 Mo. 159, 6 Amer. & Eng. R. Cas. 433; *Hutch. Carr.* §§ 251, 252, 254, 256.

Appellant contends that the court below erred, because it asked and the court refused to give an instruction in the following words: "If the jury find from the evidence that the plaintiffs entered into a contract with defendant, or its connecting carrier, whereby it was agreed that in no case should the carriers be liable for a greater amount than fifty dollars for each stock or animal shipped therein, then they are instructed that, if they find that the defendant is liable at all in this action, their verdict cannot exceed the sum of fifty dollars." In the Memphis contract the liability of the carrier for losses or damages was limited to \$50 for each jack injured. Should the instruction limiting the liability of appellant to \$50 have been given? In *Railroad Co. v. Lockwood*, 17 Wall. 357, it was held: "A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law." *Hart v. Railroad Co.*, 112 U.S. 331, 5 Sup. Ct. Rep. 151, was an action like this. In that case the property received for shipment was five horses, and the extent of the carrier's liability agreed upon for each horse was \$200. By the negligence of the carrier one of the horses was killed, and the others were injured. The plaintiff proved the horses were race-horses, and offered to show damages, based on their value,

amounting to over \$25,000. The testimony was excluded, and he had verdict for \$1,200. On writ of error brought by him, it was held that the evidence was not admissible; that the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; and that the terms of the limitation covered a loss through negligence. Mr. Justice BLATCHFORD, speaking for the court, said: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight, and secure the carriage if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract. The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and when there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." *Railroad Co. v. Henlein*, 52 Ala. 606, was an action against a carrier on a contract to carry live-stock, in which the extent of the carrier's liability was limited to \$50 to each animal. The court said: "We have had much difficulty in determining the validity of the stipulation in the contract that, if loss or injury should occur for which the company is liable, the amount claimed should not exceed fifty dollars for any one of the animals. If the measure of the liability thus fixed appeared to be greatly disproportionate to the real value of the animal and the amount of freight received, we should not hesitate to declare it unjust and unreasonable. But, as the case is presented, it seems to have been intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier against exaggerated or fanciful valuations. We cannot, therefore, presume it unjust and unreasonable, and it is the measure of appellant's liability." There are other decisions to the same effect as those cited. See *Railroad Co. v. Henlein*, 56 Ala. 368, 19 Amer. Ry. Rep. 200; *Harvey v. Railroad Co.*, 74 Mo. 538; *Magnin v. Dinsmore*, 62 N. Y. 35. But all the decisions upon this question are not in harmony. They are cited and reviewed to some extent in *Hart v. Railroad Co.*, *supra*. After a review of them the court reached the result as above stated. In *Railway Co. v. Lesser*, 46 Ark. 236, this court followed the decisions of the supreme court of the United States in *Railroad Co. v. Lockwood* and *Hart v. Railroad Co.* In that case the carrier transported a car-load of mules over its road under a contract which limited its liability to \$100 to each horse or mule. One of the horses, to the value of \$150, was injured. This court held that the damages the shipper was entitled to recover in that case was the proportion of \$100 the horse was lessened in value by reason of the injury.

As a general rule, the common carrier is bound to receive and carry that which is offered to him for transportation. He ought to be entitled to a reasonable reward for his services. As the risk of conveying property of considerable value is greater than that of small value, the care required is, and the reward should be, greater. It is therefore reasonable and right that the value of the property shipped should be ascertained, in order that the carrier may know the extent of his responsibility, and the care and attention required, and fix the amount of his reward. As said by Lord MANSFIELD in *Gibbon v. Paynton*, 4 Burrows, 2298: "His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionate to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards or other method of security, and therefore he ought, in reason and justice, to have a greater reward." If, therefore, the measure of the liability of the carrier as agreed upon is adjusted by the reward to be received by the carrier under his contract, and the contract of shipment is fairly entered into, and no deceit is practiced upon the shipper, the contract is reasonable as to the measure of liability, and should be upheld. Inasmuch as the measure of appellant's liability, in the stipulations contained in the Memphis contract, is stated to be based on reduced rates of freight paid for the transportation of the stock, it must be presumed, in the absence of evidence to the contrary, that the rate of freight was graduated by the valuation agreed upon as the limit of the carrier's liability, and was reduced under the regular rates, in consequence and consideration of the terms or stipulations of the contract. *Railway Co. v. Lesser*, 46 Ark. 236.

As to the burden of proof, the circuit court instructed the jury, at the instance of appellees, as follows: "The jury are instructed, as matter of law, that, whenever a common carrier seeks to avoid a liability for losses on account of contract limiting its liability, the burden of proof, as a general rule, is upon it, not only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract; and this fact must be established with reasonable certainty, and not rest upon conjecture or possibility. So, in this case, if defendant seeks to avoid its liability for the death of the jack sued for, under a clause of their contract of shipment exempting the company from such liability for injury to said jack caused by the animals shipped in the car with him, or on the ground that the death of said jack was caused by the inherent vices and propensities of such animals, the burden of proof is upon the defendant to show that the death of said jack was caused by other animals in the car, or their inherent viciousness." And, at the instance of the appellant, as follows: "If the jury find from the evidence that plaintiffs' stock was received and transported under a written contract or bill of lading wherein it was stipulated or agreed that the owners or their agents should ride upon the freight trains in which said stock was being transported, and that they should load, transport, feed, and care for said stock while on the cars, or at feeding, transfer, or other points; and if they further find that plaintiff J. S. Gooch, one of the owners of said stock, did accompany the said stock, and was upon the same train upon which the stock was at the time said animal died, and that said contract exempted the carriers from all liability from injury to said stock,—then you are instructed that, by virtue of said exemption in said contract contained, the burden of proof is upon plaintiffs to show that said animal was killed by or through the negligence or fault of this defendant; and if you find that no evidence of negligence has been offered showing, or tending to show, that defendant was at fault, then you must find for the defendant." These instructions are inconsistent with each other; and the one given at the instance of the appellees is misleading, and not applicable to the facts in this case. In *Railway Co. v. Lesser*, *supra*, it is said: "Whenever a common carrier seeks to avoid a liability for losses on account of a contract limiting his liability, the burden of

proof, as a general rule, is upon him, not only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in the contract." But this court has never applied this rule to any case except those in which the loss was caused by fire or like causes, against which the carrier was an insurer at common law. It did not, in *Railway Co. v. Lesser*, undertake to say to what class of cases it is applicable. Does it govern in this case? At common law a carrier is held to the strictest accountability. The reason is, when goods are placed in his care for transportation, the shipper is dependent on him for their safe-keeping and delivery. He seldom goes or sends any one to protect his interest. His necessities often compel him to rely solely on the carrier. If the goods are lost through the grossest negligence of the carrier or his servants, or stolen by them, or others in collusion with them, he is unable to prove it by any one except the carrier's servants. Under these circumstances, the ability of the owner to sustain an action against the carrier for damages is necessarily uncertain, and sometimes impossible. To give due security to the owner, and to insure the utmost good faith and diligence in the carriage and delivery of freight, the common law imposes upon the carrier the responsibility of an insurer against all losses except those occasioned by the act of God or the public enemy; and, in case of damage or loss, requires him to show the cause. To exonerate himself from liability the burden of proof is upon him to show that the loss or damage was caused by the act of God or the public enemy. This rule of evidence is the necessary result of the common-law liability, and the circumstance that the cause of the loss is presumed to be peculiarly within the knowledge of the common carrier. But in this case there was a restriction upon the common-law liability of the carrier. Appellees agreed to load the cars with the stock, and unload, feed, water, and attend to them, at their own expense and risk, while in the stock-yards of the carriers awaiting shipment, and on the cars, or at feeding or transfer points, or when the same might be taken off the cars for any purpose, and to see that the cars were securely fastened; and for that purpose one of them was allowed to ride, and did ride, on the train with the stock from Hoxie to Texarkana, free of additional charge. Under the contract, they took charge of the stock during transportation, and relieved appellant of any responsibility for the discharge of these duties of a common carrier which they undertook to perform, and confined its duties, by the Memphis contract, to the furnishing suitable cars, and hauling them to the place of destination. Having the care of the stock, the liabilities of a common carrier which make it his duty to account for the loss of freight did not devolve on appellant. Being in charge, they were presumed to know the cause of the loss of the jack found dead, if either party to the contract does; and the burden of proof is upon them to show that the default or negligence of appellant was the cause before they can be entitled to recover. *Railroad Co. v. Hedger*, 9 Bush, 645, 651; *Clark v. Railway Co.*, 64 Mo. 441, 448; *Harvey v. Rose*, 26 Ark. 3; *Railway Co. v. Reynolds*, 8 Kan. 623, 641.

For the errors indicated, the judgment of the court below is reversed, and the cause is remanded for a new trial.

McVEIGH, County Clerk, et al. v. LANIER et al.

(Supreme Court of Arkansas. April 7, 1888.)

TAXATION—OVERPAYMENT OF TAXES—SET-OFF.

Persons having a valid claim for overpaid taxes are simply creditors to that amount, which they may recover in whatever manner the law provides, but they are not entitled to a decree rendering such claim a set-off against future taxes.

Appeal from circuit court, Mississippi county; J. E. RIDDIOK, Judge.

Action in chancery by Felix Lanier and others against Hugh R. McVeigh, county clerk, W. B. Haakins, collector, and others, to enjoin the clerk from executing tax deeds against certain property, and to have taxes, penalty, and

costs, charged to said lands, declared void. The decree of the court was for plaintiffs, and defendants appeal.

H. M. McVeigh, for appellants. *O. P. Lyles*, for appellees.

COCKRILL, C. J. The county clerk and the collector of taxes of Mississippi county are the appellants in this cause. The appellees, whose lands had been sold for the non-payment of taxes, filed their complaint against the officers named, and some of the purchasers at the tax sale, to restrain the execution of tax deeds to their lands. A temporary restraining order was issued. No defense was made by any of the defendants. The complaint, which alleged irregularities in the assessment and notice and time of sale, any of which would have avoided it, was taken as confessed. The court made a special finding of facts, presumably upon sufficient evidence, though the record does not contain it, to the effect, not only that the irregularities mentioned existed, but also that, pending the suit, the appellees "paid the several amounts of taxes, penalty, and costs that appear above herein opposite each tract of said land, and that the same were paid under protest, reserving their respective rights to test the legality of said penalty and costs." Whereupon the forfeitures and sales were declared illegal, the order restraining the execution of deeds was made perpetual, and it was decreed that the "appellees recover back the penalties by them paid, and that each of them should be entitled to set off the several amounts of penalties paid against any future taxes that might be imposed or assessed upon their respective lands." It is the latter feature of the decree that the officers, who alone have appealed, complain of. To whom the taxes and penalty were paid by the appellees, and what became of the fund, is not made clear by the record. The two years allowed for redemption had expired when the complaint was filed, and the money was paid thereafter. As no effort was made by any one to sustain the sale, and the purchasers, who were made parties, have not appealed, we presume the appellees followed the statutory method to redeem, by paying the funds into the county treasury as though the statutory period had not expired. Their proper course would have been to tender the amount for which their lands were liable with their complaint; and, if they were not in fault in the non-payment of their taxes, the court could have granted them relief without exacting the payment of the penalty, or by returning it to them if it was under the control of the court. *Hickman v. Kempner*, 35 Ark. 505; *Railway v. Alexander*, 49 Ark. 194, 4 S. W. Rep. 758. But the money was not brought into court, or placed subject to its order. If it be conceded that the appellees are entitled to the return of the penalties paid by them, it does not follow that the decree which awards the return is right. Against whom should it be rendered? Not against the clerk or collector, who were the appellants, because the fund has never been subject to the control of either. But the decree does not seem to contemplate a recovery from any one. The effort to make the excess thus paid a set-off in favor of the land-owner against taxes thereafter to be assessed against the land cannot be sustained upon any theory. It is an attempt to adjudicate the rights of the state, county, and other beneficiaries of the taxes thereafter to be raised, and to declare them satisfied in advance, without having any of the parties before the court. Besides, taxes are not the subject of set-off. "The nature and use of these contributions is such that nothing can retard the payment of them." Dom. Civil Law, § 2299. No one can read the provisions of our statutes, and come to a different conclusion. If the appellees have a legal claim for overpayment against the state, county, or other party, they occupy the position of creditors only, and must avail themselves of whatever remedy the law affords for their relief. They cannot set-off the amount thus due against taxes to be paid on the lands.

That part of the decree granting such relief will be vacated. Otherwise the decree is not disturbed.

RICHIE v. FRAZER.

*(Supreme Court of Arkansas. April 14, 1888.)***EVIDENCE—PAROL TO VARY WRITING—PROMISE TO PAY IN CERTAIN MEDIUM.**

All debts due a county, being by statute (Dig. Ark. 1884, § 1146) payable in its warrants, a county cannot prove by parol, in defense to a petition asking that the sheriff be compelled to receive such warrants in payment of a judgment recovered by it, that it was agreed that the note on which such judgment was based should be paid in money, when neither note nor judgment specify in what medium it is to be paid, since to do so would be to modify the terms of a written instrument by parol.

Appeal from circuit court, Bradley county.

Petition by Mary A. Frazer for an order compelling Richie, sheriff of Bradley county, to receive county warrants in payment of a judgment of said county against her. Petition granted, and appeal by defendant.

W. S. McCain, for appellant. *W. P. Stephens*, for appellee.

BATTLE, J. Bradley county sold its poor-house to Mary A. Frazer for one-third cash, and two promissory notes for the remainder of the purchase money. One of the notes not being paid at maturity, suit was brought on it for the use of the county, and judgment was recovered for the full amount thereof. It was not stated in either the notes or the judgment in what medium payment was to be made. Execution was issued, and Mrs. Frazer paid the costs in lawful money, and tendered to the sheriff the remainder due on the judgment and execution in the warrants of the county of Bradley, and he refused to accept them. She thereupon petitioned the Bradley circuit court to compel him to receive them. On the hearing of the petition the defendant offered to prove by parol testimony that it was understood and agreed by all parties to the notes that they should be paid in lawful money of the United States, and the court refused to receive or hear the testimony, and granted the petition, and defendant appealed. The only question in the case is, is this testimony admissible? Appellant contends that it is, and to sustain his contention cites *Sessions v. Peay*, 21 Ark. 100. The notes sued on in that case were executed to the trustees of the Real Estate Bank. At the time they were executed, there was a parol agreement between the payees and the makers that they should be paid in the gold and silver coin of the United States, but this agreement was not incorporated in the notes. They were in the ordinary form, and payable in dollars. A statute then in force provided that such notes might be paid in the bonds issued by the state to the Real Estate Bank; but this court held, conceding that this statute was valid, that the parol evidence was admissible to show that the notes were payable in specie, and that it was not contradictory, "but consistent with what is expressed in the face of the notes." But *Sessions v. Peay* is clearly contrary to the rule of evidence as held by this court, and against the overwhelming weight of authority. This court has often held that parol evidence is inadmissible to vary, qualify, or contradict, to add to or subtract from, the absolute terms of a valid written contract containing no ambiguity. As to the correctness of this rule of evidence, there is not a solitary doubt. *Haney v. Caldwell*, 35 Ark. 156; *Scott v. Henry*, 13 Ark. 125; *Troubridge v. Sanger*, 4 Ark. 179; *Glanton v. Anthony*, 15 Ark. 543; *Hensley v. Brodie*, 16 Ark. 511; *Borden v. Peay*, 20 Ark. 293; *Turner v. Baker*, 30 Ark. 186; *Pickett v. Ferguson*, 45 Ark. 177. In *Brown v. Wiley*, 20 How. 447, it is said: "When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general principle in the construction of contracts. Some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule." *Mar-*

tin v. Cole, 104 U. S. 30. A statute of this state provides that all county warrants and county scrip shall be receivable for all debts due the county by whose authority the same were issued. This statute has been held by this court to be constitutional, and that county warrants, under it, are receivable for county debts. *State v. Rives*, 12 Ark. 721; *Askew v. Columbia Co.*, 32 Ark. 270. The note in question in this case is for money due to the county of Bradley. It is a valid contract and unambiguous. It does not specify in what medium it shall be paid; but it is in the ordinary form, and is for dollars. Its legal effect and operation is fixed and settled by the laws of this state, and it is payable in the lawful money of the United States or the county warrants of Bradley county, and parol evidence is not admissible to modify or explain it. *Noe v. Hodges*, 3 Humph. 162; *Cowles v. Townsend*, 31 Ala. 133; *Clark v. Hart*, 49 Ala. 86; *Langenberger v. Kroeger*, 48 Cal. 147; *Baugh v. Ramsey*, 4 T. B. Mon. 155; *Pack v. Thomas*, 13 Smedes & M. 11-16; *Cockrill v. Kirkpatrick*, 9 Mo. 695, 698; *Alsop v. Goodwin*, 1 Root, 196; *Thorington v. Smith*, 8 Wall. 1; *Cole v. Hundley*, 8 Smedes & M. 473-478; 2 Pars. Notes & B. (2d Ed.) 501, 506-508, and cases cited. Judgment affirmed.

UNSEL v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 23, 1886.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF MATERIAL WITNESS.

The defendant in a criminal case is not entitled to a continuance on the ground of absence of a material witness, where the affidavit shows that process was issued, but does not show that it was placed in the hands of an officer for service.

Appeal from circuit court, Daviess county.

Owen & Ellis, for appellant. *P. W. Hardin*, for appellee.

BENNETT, J. The appellant, Unsel, was fined \$100 before a justice of the peace of Daviess county for assault and battery. He appealed to the circuit court, and was there fined \$75. He has appealed to this court. He filed his affidavit for a continuance in the circuit court on the ground of the absence of two witnesses, Floyd and Woolfolk. Woolfolk, after the affidavit was filed, appeared as a witness. Thereupon the commonwealth admitted the affidavit, as to Floyd, to be read as his deposition. Thereupon the court forced the appellant to try, notwithstanding his objections. The main ground relied upon for a reversal is that the act of the legislature approved May 15, 1886, allowing the commonwealth to admit the statements of a defendant's affidavit in a criminal case as to what his absent witness would prove to be read as the witness' deposition, is unconstitutional. We cannot consider this question, for the reason that the appellant's affidavit failed to show that he was entitled to a continuance on account of the absence of Floyd. The affidavit says that the appellant "has had process for Floyd at this term of the court," and that he was not served; "and, when the case was postponed last Saturday, he took an attachment for Woolfolk, and an *alias* process for Floyd, both of which have not been served." There is no statement in the affidavit that either process for Floyd was put in the hands of an officer to be served. The process, so far as the affidavit discloses, may never have left the hands of the appellant. The appellant having failed to disclose proper diligence to obtain the attendance of the witness Floyd, he was not entitled to a continuance. Therefore, the commonwealth having admitted the affidavit as to Floyd to be read as his deposition, the appellant, rather than being prejudiced, obtained an advantage. The judgment is affirmed.

CLARK v. STATE.

(Supreme Court of Tennessee. April, 1888.)

1. LARCENY—ATTEMPT TO COMMIT—INDICTMENT.

An indictment for attempt to commit larceny, which shows an attempt upon money and chattels in the cash drawer of prosecutor, and its progress to the point of pulling out the drawer with felonious intent, is sufficient.

2. LARCENY—ATTEMPT TO COMMIT—WHAT CONSTITUTES.

One caught in the act of opening a cash drawer for the purpose of stealing money is guilty of an attempt to commit larceny, although there was no money in the drawer at the time.

Appeal from circuit court, Fayette county; THOMAS J. FLIPPIN, Judge.

Will Clark was indicted for an attempt to commit larceny. There was a conviction, and defendant appeals.

C. A. Hainback, for appellant. *The Attorney General*, for the State.

FOLKES, J. This is an indictment for attempt to commit a larceny. There was a conviction, and sentence of one year in the penitentiary. Motion for new trial and in arrest of judgment being made and overruled, the defendant has appealed in error. The indictment charges that the said "Clark, on the 23d day of November, 1887, in the county aforesaid, unlawfully, and feloniously did enter into the business house of E. D. Peebles, and did then and there pull out the cash drawer, where cash (money) was usually kept, of said Peebles, and feloniously attempted to take, steal, and carry away therefrom the money, personal goods, and chattels of said Peebles, then and there to be had and found in said business house, with the intent feloniously to convert same to his, the said Clark's, own use, and to deprive the true owner thereof. Wherefore, * * * by the means aforesaid, thus feloniously did attempt to commit a felony, to-wit, a larceny, against the peace and dignity," etc.

The first error assigned is to the action of the court in overruling a motion to quash. This motion was predicated upon the assumed failure of the indictment to specify what particular property, together with its value, was attempted to be stolen; and that it failed to allege to what extent defendant had gone in the attempt, and finally that the indictment fails to allege affirmatively that there was money or anything of value in the drawer susceptible of larceny. The indictment was found under section 5379, Mill. & V. Code, which enacts that "if any person assault another with intent to commit, or otherwise attempt to commit, any felony, or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise provided, he shall, on conviction," etc. It may be said to be well settled that, under an indictment for an attempt to commit a larceny, the goods upon which the attempt is made do not have to be described with the same particularity as would be required in an indictment for an accomplished larceny. This must be so in the very nature of things; for otherwise it would often be impossible to form an indictment in this class of cases that would be effectual. To illustrate: A party is charged with breaking into a room or a trunk, with intent to steal, where there are many different articles, all susceptible of larceny, and he is detected and arrested, how can it be alleged or charged, and how proven, what particular articles he intended to take? All that is required is to charge facts which make "an attempt" in point of law, and so identify the offense as to secure the defendant from a second prosecution therefor. *Hayes v. State*, 15 Lea, 64; *State v. Montgomery*, 7 Baxt. 160. This indictment, as will be seen, shows that the attempt was upon money and chattels in the cash drawer of the prosecutor, and that the attempt had progressed to the point or extent of pulling out said drawer, with the felonious intent charged. This is sufficient. See 1 Whart. Crim. Law, §§ 190-195. There was therefore no error in the action of the trial judge in overruling the motion to quash.

The next error assigned is to the charge of the court, in this: "If his pur-

pose was to steal when he opened the drawer, and his opening it was a part of the act designed by him for getting possession of the prosecutor's money, he would be guilty of an attempt to commit larceny, even though at that particular time there was no money in the cash drawer." The proof shows that the defendant was detected by the prosecutor in the act of opening the cash drawer of the latter's store, having thrown himself across the counter for that purpose; he being alone in the front part of the store at the time, the prosecutor being in rear, waiting on a customer, and being hidden from defendant's view by a screen. When thus detected and hallooed at by the prosecutor, the defendant hurriedly left the store. The proof leaves it in doubt whether or not there was any money in this particular drawer at the time the attempt was made. It was early in the morning, and the drawer had been emptied the evening before. The court had stated to the jury that the state claimed that there was money in the drawer at the time of the alleged attempt, and that this was denied by the defendant, and that this was one of the questions of fact that they must determine, and that they must determine from the proof what was the purpose and intention of the prisoner in opening the cash drawer; and if they found that the defendant believed there was money or other valuables in said drawer, and his purpose in opening same was to steal its contents, then he would be guilty of an attempt to commit larceny, whether there was money or other valuables in the drawer at the time or not. There is no error in this record. The act averred and proven is sufficient. The direct question here presented has never been passed upon by this court, but it is by no means one without authority. It has received much discussion in the text-books, and in the adjudged cases from other courts. The English cases are conflicting. In *Reg. v. Collins*, Leigh & C. 471, it was held there could be no attempt to pick the pocket of a person who had no money at the time in her pocket; while in *Reg. v. Goodhall*, 1 Denison, Cr. Cas. 187, it was held an attempt to produce a miscarriage could be committed on a woman supposed to be, but not in fact, pregnant. It appears to us that these cases cannot be reconciled, although Mr. Heard, in his second edition of *Leading Criminal Cases*, (volume 2, pp. 482, 483,) has attempted to do so. We are constrained to agree with Mr. Bishop that "these differing opinions must have sprung from opposite views in the two benches of judges. Bish. Crim. Law, (7th Ed.) § 741, note 1. The American cases seem to be uniform, or at least substantially so; for here the few conflicts are more apparent than real. In *Rogers v. Com.*, 5 Serg. & R. 463, the Pennsylvania court held that an indictment for assault with intent to steal from the pocket is good, though it contains no setting out of anything in the pocket to be stolen. DUNCAN, J., in delivering the opinion of the court, said: "The intention of the person was to pick the pocket of whatever he found in it; and, although there might be nothing in the pocket, the intention to steal is the same." So in Massachusetts, under a statute differing in terms, but the same in substance, as our own above herein quoted, it was held that the indictment need not allege, and the prosecutor need not prove, that there was in the pocket anything which could be the subject of larceny. *Com. v. McDonald*, 5 Cush. 365. See, also, *Com. v. Jacobs*, 9 Allen, 274. To the same effect is *State v. Wilson*, 30 Conn. 500. So in Indiana it has been held that an assault on one with intent to rob him of his money may be committed, though he has no money in possession at the time. *Hamilton v. State*, 36 Ind. 280. If an indictment for an attempt to steal the contents of a trunk or room would not be good where it transpired that there was nothing in the trunk or room, then it would seem to follow that the indictment, in case where there were goods in the trunk or room, would have to allege what particular goods the thief purposed to steal; and, if necessary to allege, it is necessary to prove; and how could this be proven where there was a variety of different goods, and the thief was arrested before he had laid hands upon any article? Again, if a thief is caught with his hand

in your pocket before he can grasp any of its contents, and it is found that the pocket contains both money and a watch, how can it be proven that he intended to steal both; and, if not both, which? And in the case last put, is there any more of an attempt to steal, the thief being ignorant of the presence of the watch or money, than there would be had he, with similar intent and ignorance, placed his hand in an empty pocket? In each case there is the substantive and distinct offense as prescribed by the statute. There is the criminal intent, and an effort made to carry out the intent to the point of completion, interrupted by some unforeseen impediment or lack outside of himself, special to the particular case; and not open to observation, intervening to prevent success, without the abandonment of effort or change of purpose on the part of the accused. As said by Mr. Bishop: "It being accepted truth that the defendant deserves punishment by reason of his criminal intent, no one can seriously doubt that the protection of the public requires the punishment to be administered, equally whether in the unseen depths of the pocket, etc., what was supposed to exist was really present or not." 1 Bish. Crim. Law, § 741. The community suffers from the mere alarm of crime. Again: "Where the thing intended [attempted] is a crime, and what is done is of a sort to create alarm,—in other words, excite apprehension that the evil intention will be carried out,—the incipient act which the law of attempt takes cognizance of is in reason committed." 1 Bish. Crim. Law, § 742. The true legal reason for the conclusions reached is that the defendant, with the criminal intent, has performed an act tending to disturb the public repose. Id. § 744. M. Wharton's views on this at one time perplexing question are in accord with Mr. Bishop. See 1 Whart. Crim. Law, (9th Ed.) §§ 182, 183, 185, 186, 192. Let the judgment be affirmed.

CHESAPEAKE, O. & S. W. R. CO. v. BARLOW *et al.*

(*Supreme Court of Tennessee. April, 1888.*)

TRIAL—FAILURE OF JURY TO AGREE—IMPROPER REMARKS BY THE JUDGE.

A jury, after being out nearly two days, reported that they could not agree, whereupon the court said to the jury that it seemed very difficult for juries to agree at the present term; that they ought to agree and decide cases; that he had no idea of discharging them, but would keep them together during the entire term if they did not sooner agree. The next evening the jury announced a verdict. *Held*, that such remarks on the part of the court were reversible error.

Error to circuit court, Dyer county; THOMAS R. FLIPPIN, Judge.

Holmes Cummins and *Parks & Draper*, for plaintiff in error. *Latta & Richardson*, for defendants in error.

TURNER, C. J. At the close of the second day after the cause had been submitted to the jury, it came in, and stated to the court it was not able to agree on a verdict. "The court thereupon said to the jury that it seemed to be very difficult matter for juries, at the present term of the court, to decide questions of fact submitted to them; that it seemed to the court that nearly every jury had returned, and said they could not agree." "The court therefore said to the jury they ought to agree and decide cases, for they had to be decided by juries; that he had no idea of discharging them, but would keep them together on said case during the entire term if it lasted three weeks, unless they sooner agreed upon it. The next day the jury again received the papers, and in the evening brought in their verdict." This action of the court is assigned for error, and falls within the rule as declared in *Taylor v. Jones*, 2 Head, 565; *Hancock v. Elam*, 3 Baxt. 83; *Railroad v. Winters*, 1 Pickle, 245, 246, 1 S. W. Rep. 790. The reasons why this is error are given in the cases cited, and will not be repeated here. Reverse, and remand for new trial.

WOOD *et al.* v. FRAZIER *et al.*

(Supreme Court of Tennessee. April 25, 1888.)

1. APPEAL—PRACTICE—ASSIGNMENTS OF ERROR.

Under rule 29, regulating the practice of the supreme court of Tennessee, which provides that assignments of error shall point out definitely the errors complained of, and cite the specific testimony relied upon, designating the page of the record, assignments stating that it was error to allow the withdrawal of an answer, to sustain a demurrer, etc., although followed by references to particular testimony in the record, are fatally defective unless they contain the reasons why such decisions are held to be error, and citations of fact upon which the decisions were based.

2. SAME—DISMISSAL—RULES OF SUPREME COURT.

Mill. & V. Code Tenn. § 8377, (Thomp. & S. § 8160,) providing that "no appeal shall be dismissed by the appellate court for failure to assign reasons for the appeal," has reference to courts of original jurisdiction only; and the supreme court, in making rules regulating its own practice, is not subject thereto.

Appeal from chancery court, Henry county; A. G. HAWKINS, Chancellor. *Champion & Farabaugh*, for appellants. *Cole & Sweeney* and *Ward & Thompson*, for appellees.

TURNER, C. J. By rule 29, regulating the practice in this court, (1 Pickle, 757,) it is made the "duty of appellants or plaintiffs in error, their attorneys or solicitors, to file, on or before the first day of the term to which appeals have or may hereafter be taken or are triable, specific assignments of error to the rulings of the court below, as well as to errors of fact, pointing out definitely the error or errors complained of, and citing in the most concise manner the specific testimony relied upon, designating page of record." "The same rules will be applied in the construction of this rule as are applied in the construction of the act of 1883, creating the commission of referees." In *Loveman v. Taylor*, 1 Pickle, 8, 2 S. W. Rep. 29, this court, construing the act of 1883, said: "In order to entitle parties to a review of the facts, they must by exception point out the errors of fact clearly and distinctly, by quotations from and citations of pages of record from which such errors may be readily discovered. It is not sufficient to state propositions or conclusions, and refer in uncertain terms to pages of the record for proof. The language, or its substance, relied on, as showing the error or mistake, must be given either in the exceptions or brief filed with them; otherwise the exceptions will be disregarded, and report confirmed." In *Denton v. Woods*, 2 Pickle, 40, 5 S. W. Rep. 489, this court said: "The presumption is in favor of the correctness of the rulings and decisions of the lower courts; and under the established practice in this court, unless error is affirmatively shown, an affirmation will be had." On appeal to this court the appellant becomes the actor, and takes upon himself to show affirmative error. The assignments here are: "Complainant assigns for error (1) the decree of the chancellor allowing defendant W. E. Cook, administrator of C. Frazier, to withdraw the sworn answer of his intestate, and for allowing W. D. Kendall, trustee, to withdraw his sworn answer, and file demurrers to complainant's bill. See demurrer; answer of C. Frazier; answer of W. D. Kendall; original bill; deed of assignment. Motion of defendants at previous term of court to dismiss complainants' bill for want of equity on its face, which was disallowed by the court; also defendants motion to discharge complainants' attachment, and for leave to file schedule of assets under oath, which was also disallowed by the court. (2) Because the chancellor sustained the demurrer of W. D. Kendall, and as to him, dismissed complainants' bill. See decree; bill; deed of assignment; answer of C. Frazier; answer of W. D. Kendall; demurrer; bill of exceptions. (3) Because the chancellor refused to look to the answers, or either of them, for any purpose. See bill of exceptions." With this literal copy of the assignments, we will see whether there is a compliance with the rules.

1. There is no reason or fact given why it was error to allow the withdrawal of the answer, nor why demurrer should not be filed, nor why the motion to dismiss the bill was not properly disallowed, nor why the motion to discharge attachment was not properly disposed of, nor why it was improper to refuse leave to file schedule of assets. All such steps, motions, and orders, are constantly had in the chancery court, and acted upon as the case requires. The court had jurisdiction, and no affirmative error is shown. We are presented with conclusions of counsel, unsupported by citations of fact, against the judgment of the court, presumed to be based upon the facts of the record. This is a court of appellate jurisdiction, and was constituted for the sole purpose of correcting errors, to do which it is necessary that the party complaining shall point out the error. To make an assignment of errors effective for any purpose, the court must have a statement of the case, and then the rulings of the lower court upon that statement. It is an easy matter for the lawyer who knows his case to state it to the court trying it. It is equally easy for him to state what the court has done which, when applied to the facts, constitutes the error complained of; and quite as easy to give the substance of the matter of which the error is predicated, with definite and specific reference to the name of witness, page of record, etc., as to state the question, with the rulings of the court, either in the admission or rejection of evidence, or charge of the court, pointing to the necessary matter of record to support the objection. The assignments in this case do none of these things; but simply state, in general terms, that the court erred in doing some things, and in not doing others, without the slightest intimation of fact or reason or history of the case from which the conclusions of the solicitor have been drawn, and, of course, affording no aid to the court in expediting business. The assignments are abstract invitations to the court to take the record, and study it in all its bearings to find errors; while the rule, based upon the idea of the objects and purposes of a court of last resort, requires the errors to be pointed out. The appellant, to be entitled to relief, must make out his case. The obligation on him to do so is as imperative as it is upon a plaintiff or complainant in an inferior court to make a case in his declaration or bill. The assignment in this court is nothing more nor less than a declaration or bill reciting the grievances of the appellant, who is the plaintiff or complainant here. The rule requiring assignments is one of pleading; and, while it may require more reading, it requires less manual labor, and less accurate legal skill, than the preparation of pleading in courts of original jurisdiction, as in the latter counsel must be able to so frame his pleadings as to meet every possible phase and aspect of his case, while in this court the case is complete of record, and there is no possible contingency by which its character can be changed; no chance for surprise in the testimony; amendments are out of order; no corrections by witnesses as to what they have sworn; no misleading of counsel by misrepresentations by clients. The whole case is of record, and the pleader has only to be patient and painstaking, and he can raise with unerring certainty the issues he wants to present. Why he may not, with the record before him, plead with greater certainty its breaches of law or fact than he can the breaches of a bond in an action of covenant in a court of law, or the breaches of a trust undertaking in a court of chancery, we do not understand. An appeal to this court is a suit upon the record to correct its errors. Like all suits, there must be shown by the pleadings grounds for its institution; and if there is a failure to show, upon the face of the pleadings, grounds of action, it must fail without further steps.

To make the rule, or, rather, to declare it, is one of the inherent powers and duties of the court. When the constitution conferred upon the court the authority to try and determine causes, it at the same time, as an indispensable incident to such power, or, to put it more correctly, as part of it, gave the authority and power to adopt such means as will facilitate and perfect inves-

tigation and decision. The general authority to do embraces also an authority to determine the means of doing. This power belongs alone to the court, and is without the control or revision of other governmental departments. We might as appropriately undertake to prescribe rules for the guidance of the governor or legislature as either of them for us. Each is alone capable of meeting and providing for occasions as they arise in the changes constantly occurring. The lawyer who appeals, certainly knows why he does so. The rule only requires that he shall state to us, in historical form, why he did so; confining himself to the errors of which he complains. The condition of the dockets demanded a change in practice in this court. The state is increasing in wealth and population; its resources are being, not only rapidly developed, but discoveries of new ones are being constantly made. Every interest is alive with energy and enterprise; and, in consequence, litigation is on growth *pari passu*. At the last term of this court the docket was cleared. On the meeting at the present term, we found about 400 cases, showing a greater amount of appeals than has ever been at any one term in the history of the court. Under the former practice, it would have been impossible to have cleared the docket. It is not an uncommon occurrence for records to contain several hundred pages, and sometimes reaching thousands, but presenting questions within comparatively small compass when pointed out. If the court must read and master these unnecessarily large records, often containing impertinent matter, to discover one or two or a half dozen suggested errors, it loses just that much time from its other and more legitimate business, and the docket will grow beyond its management. To cure such evils the rule was adopted. It enables the court to dispose of more business. It brings us at once to the questions involved; and while it intensifies, it certainly shortens, the labor of court and counsel in the trial of causes. It does not lessen the labor of the court, but multiplies the results of its efforts to properly dispatch business. The retired predecessors of the present bench were as faithful, laborious, and painstaking as a court could be. To them were always accorded industry, honesty, and capacity, with an anxious desire to relieve an overladen docket. They did not succeed because of adherence to the old methods of practice,—methods which did not progress with the state and condition of the commonwealth. With the present method, that court, with the same amount of labor, could and would have reduced the dockets to cases of the present, instead of being constantly confronted with records of six, eight, and ten years' standing. The law is progressive, and upon its prompt enforcement depends every interest in the land. Until communities have the assurance that they may command a ready redress of grievances and protection of rights, they will lack energy and thrift and respect for law. Therefore it behooves the courts to employ every fair and legitimate means of enforcing the law. It is expected—rightfully expected—of the courts that they will do their whole duty in declaring and enforcing such rules as will secure speedy trials and just judgments in all causes coming before them. Such is the purpose of the rule before us. Parties are required to make simple statements of the questions they want decided, with the substance of such record matter as raises them, and suggests their solution. Courts must keep abreast with the public welfare.

The statutory provision that "no appeal shall be dismissed by the appellate court for failure to assign reasons for the appeal," (Thomp. & S. Code, § 3160; Mill. & V. § 3877,) does not interfere with the principles of this opinion. It is intended for the government of courts of original jurisdiction only. But if it did apply to this court and was authorized by the constitution, it would still not be in the way, as no appeals are ever dismissed for the reasons given by the act, but all judgments and decrees are either affirmed, modified, or reversed so as to make the action of this court operative on the rights of parties. Further, admitting, for the time, the constitutionality of the act, we

see from section 4504, Thomp. & S., and section 5254, Mill. & V. Code, it does not apply to this court. The latter section provides: "The supreme court may make rules of practice for the better disposal of business before it." As already suggested, however, we do not rely on statutes for authority for the rule. The court alone is authorized to make its rules; and any legislative mandate proposing to regulate the practice of this court in this particular would be an unauthorized interference with our duties, and should of course be disregarded. When the rule was announced, the profession was made to understand that for a time it would be liberally construed, so as to enable all to prepare for compliance with it; that we would gradually come to its strict enforcement. We have been practicing upon that assurance. Hereafter we will expect the bar to conform to its requirements; thereby making more accurate lawyers of themselves, and safer and better judges of us.

While satisfied with the decree upon the merits, we prefer putting the decision upon the insufficiency of the assignments of error, and questions made in argument upon the rule, that attention may be called to the rule, its purposes, meaning, and scope, and the authority upon which it is based. Knowing, as we do, the character and capacity of the author of the assignments, we are constrained to believe he made the most of the record before him. The assignments are fatally defective in making a case. The decree is affirmed, with costs.

DAVIS v. WILSON.

(*Supreme Court of Tennessee.* April 26, 1888.)

1. LANDLORD AND TENANT—LIABILITY OF PURCHASER OF CROP FROM TENANT FOR RENT—NOTICE TO PURCHASER.

Under Code Tenn. § 4288, providing that a person entitled to rent may recover from the purchaser of the crop the value of the property to the amount of the rent, a purchaser of a crop is liable to the landlord to the amount of unpaid rent, though he had no notice of such claim against the crop.

2. SAME—LIABILITY OF PURCHASER OF CROP FOR RENT—LIMITATION TO ACTION FOR.

Code Tenn. § 4288, providing that a person entitled to the rent may recover from the purchaser of the crop the value of the property to the amount of the rent, gives the landlord a right of action against the purchaser personally, which is not limited by the duration of the landlord's lien against the crop, which, under section 4281, only continues for three months.

Appeal from circuit court, Obion county; W. H. SWIGGART, Judge.
D. D. Bell, for appellant. Harpole & Whitsett, for appellee.

CALDWELL, J. Mrs. M. J. Wilson rented a tract of land to Alex and Felix Pursley for the year 1886, for the sum of \$60, payable on the 1st day of August of that year. In June, Cato Davis purchased from the tenants a crop of wheat grown upon the land, and thereafter, on the 9th day of November, 1886, Mrs. Wilson sued him before a justice of the peace "in a plea of debt" for the amount of the rent. The case was appealed to the circuit court at Union City, and there tried by the circuit judge without the intervention of a jury. Judgment was rendered against Davis for \$63, (that being the amount of the rent debt, with interest,) and he has appealed in error to this court. It is abundantly shown that the landlord had not received her rent, and that the crop purchased by Davis was worth more than enough to pay it. Nevertheless, Davis denies his liability, and assigns error upon two grounds: "(1) Because he bought the crop without notice of any lien; (2) because the plaintiff's action is barred by the statute of three months."

It is true, as a matter of fact, that Davis had no notice of the existence of the landlord's lien at the time he purchased the wheat; but that is no protection to him in law, as he assumes it to be in his first assignment of error. Under the act of 1857-1858, Thomp. & S. Code, § 3542, the want of notice was a good defense to the purchaser; but his liability does not in any sense

depend the question of notice since the act of 1879, Mill. & V. Code, § 4283, which amended the former act by striking out the words "with notice of the lien."

From the dates already given, it is seen that this suit was commenced more than three months after the maturity of the suit. For this reason it is insisted, under the second assignment of error, that the action is not correct. This position would certainly be sound if the suit had been brought with a view of enforcing the landlord's lien on the crops; for, by the express terms of the statute the lien continues for only three months after the rent becomes due, and until the termination of any suit commenced within that period for the collection of rent. Mill. & V. Code, § 4282. The application of this statute is the same, whether the proceedings be against the crops in the hands of the tenant, or in the hands of a purchaser. *Phillips v. Maxwell*, 1 Baxt. 31. But such is not the purpose of this action. No effort is made to enforce the lien, or in any other manner impound or subject the crop itself. It is an action of debt against the purchaser of the crops under the act of 1879 which is in these words: "And the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property so that it does not exceed the amount of the rent and damages." Code, § 4283. This statute gives the landlord a right of action which is not limited by the duration of the lien against the crops,—a right of action against the purchaser personally, and without reference to the existence or non-existence of the lien when suit may be brought against him. This purchase of the crop while subject to the lien is an interference with the rights of the landlord, and for that interference he may be sued by the landlord before the rent is due, (*Richardson v. Blakemore*, 11 Lea, 290,) or after the lien has expired by limitation. The statute giving this right of action makes no provision, in terms, with respect to the time in which the suit shall be brought; but it indicates the nature of the suit, by saying that it shall be "for the value of the property." This contemplates an action of debt as upon an implied contract or promise on the part of the purchaser, and falls within the last clause of section 8472 of the Code, which requires that "actions on contracts, not otherwise expressly provided for," shall be commenced "within six years after the cause of action accrued." The judgment is affirmed, with costs.

LURTON and FOLKES, JJ. We concur in the above as a correct exposition of the statute in question, but regard the result as exposing the merchant or purchasing class of the community to a harsh measure of liability.

GLENN *et al.* v. SOUTHERN EXP. CO.

(*Supreme Court of Tennessee.* May 5, 1888.)

CARRIERS—OF GOODS—LIABILITY FOR LOSS—NOTICE OF CLAIM.

In an action against an express company for a shortage in a package of money delivered to it for transportation, the receipt for such package contained a clause making the presentation of a written claim for any loss within 30 days from date of receipt a condition precedent to recovery therefor. There was evidence tending to excuse plaintiffs for their delay in making such claim, which was made as soon after discovery of the shortage as was reasonably possible. An instruction that there should be a strict compliance by plaintiff with the letter of such receipt, before he could recover, is error.¹

Error to circuit court, Shelby county; L. H. ESTES, Judge.

Action by William Glenn & Sons against the Southern Express Company for a shortage in a money package intrusted to defendant to be delivered to plaintiffs. Judgment for defendant, and plaintiffs bring error.

¹Respecting the right of common carriers to limit their liability by contract, see *Express Co. v. Darnell*, (Tex.) 6 S. W. Rep. 765, and note.

Poston & Poston, for plaintiffs in error. *Gillham & Miller*, for defendant in error.

TURNER, C. J. In the receipt of the company for the money package is the clause: "In no event is this company to be liable for a greater sum than the above mentioned; nor shall it be liable for any such loss unless the claim therefor shall be made in writing at this office within thirty days from this date," etc. The shipment was to have been made from Rutherford, Tenn., to the plaintiffs, in Cincinnati, and could have been made and heard from in a very short time. Therefore the stipulation is a reasonable one; and, with nothing explaining a non-compliance with its requirements, should be enforced. If, however, a sufficient legal excuse be shown for the failure of a strict compliance,—if, for example, the plaintiffs had shown that, without fault or blame on their part, they did not discover that the amount sued for and claimed to have been extracted from the package had been inclosed therein and delivered to the company, and there was no material fact connected with the delivery to them of the remainder of remittance calculated to give them notice or put them on inquiry, and that, within a reasonable time after the discovery of the shortage, the notice provided for was given,—this would, in legal contemplation, be a compliance with the stipulation. The court charged the jury: "Plaintiffs should have at once, and within thirty days from date of shipment, have notified the express company of the shortage; and, if plaintiffs failed to do so, this was such negligence, should you find by the receipt and contract of shipment in this instance it is provided that the express company should not be liable for loss of the money intrusted to it for transportation to the plaintiffs, unless the claim therefor should be made in writing at the office of shipment within thirty days from date of such receipt. * * * The court charges you that was a reasonable condition, and you will find for the defendants." This is error. The plaintiffs had introduced evidence tending to excuse them for their delay in making claim of the company for the shortage; also that claim was made as soon after discovery as was reasonably possible, and that the delay of discovery was not chargeable to their neglect or fault. The charge of the court means that the stipulation is imperative, and limited to its letter. This construction, of course, withdrew from the jury the proof alluded to heretofore, and upon which the plaintiffs had the right to have the jury pass under a proper charge. Reversed and remanded.

ROBINSON v. WARE.

(*Supreme Court of Missouri*. May 7, 1888.)

DOWER—ACTION FOR ASSIGNMENT OF—LIMITATION.

An action for the assignment of dower is an action to recover real estate, within the meaning of Rev. St. Mo. 1879, § 3219, which provides that no action for the recovery of possession of land shall be maintained by any person, unless he, or the person under whom he claims, was seized or possessed of the premises within 10 years before the action, the widow being deemed in law as in possession upon the death of her husband, and the limitation will begin to run at the time the cause of action accrues.

Appeal from circuit court, Audrain county; **ELIJAH ROBINSON**, Judge.

Action for assignment of dower by Maria Robinson against Joseph G. Ware. Judgment for defendant, and plaintiff appeals.

J. McD. Trimble, George Robertson, and *Slaughter & Taylor*, for appellant. *T. B. Buckner and Pratt, McCrary & Ferry*, for respondent.

BLACK, J. This was an action for the assignment of dower, commenced in June, 1884. The plaintiff failed in the court below, on the ground that her action was barred by the statute of limitations. The facts are these: Benjamin Robinson, plaintiff's husband, died in April, 1867, seized in fee of

the described premises. The administrator sold the land in 1869 for the payment of the debts of the deceased, under an order of the probate court, and the defendant became the purchaser. He has had adverse possession for more than 10 years before the commencement of this suit.

It becomes of some importance to determine, at the outset, whether this action is one for the recovery of real estate. The old writ of dower, *unde nihil habet*, and the writ of right of dower, were classed as real actions. Ang. Lim. (6th Ed.) § 367; Wood, Lim. § 273; Steph. Pl. (9th Amer. Ed.) 10. Our statute in respect of the assignment of dower provides, and for many years has provided, that "when any widow shall be entitled to dower in real estate, and she be deforced thereof, or cannot have it without suit, or if her dower be unfairly assigned, or not assigned within two years after the death of her husband, she may sue for and recover the same, with damages." The suit is to be brought against any person claiming an interest in the land, or being in possession, or who shall deforce her of her dower. The interlocutory judgment is that she be seized of her dower, the appointment of commissioners to set off the same, and that she recover the damages to be assessed; and, by the final judgment, she is awarded a writ of possession, and an execution for the damages. Sections 2206, 2211, 2214, 2215, Rev. St. 1879. Now, if the old writs, which it seems did not give the widow possession, were properly classed as real actions, then with much greater reason should our proceeding be denominated a real action; for it not only determines the right to dower, sets off the third part of the lands, but gives possession. The final judgment, besides determining the right and awarding damages, is equivalent to a judgment in an action of ejectment. It is sometimes said that an unassigned dower is a chose in action; but, upon the death of the husband, the inchoate interest becomes consummated, and her right to demand and enter upon the enjoyment of that interest commences. 1 Scrib. Dower. 618. Call it what we may, it is an interest in real estate; and the proceeding to have dower assigned is, in this state, a possessory action. It comes literally within the words, "an action for the recovery of lands, or for the recovery of the possession thereof." Thesections of the Revised Statutes of 1879 concerning the limitations of actions, and having a direct bearing upon the questions of law at issue, are: Section 3219: "No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be commenced, had, or maintained by any person, * * * unless it appear that the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of such action." Section 3228: "Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued." Section 3229: "Within ten years: *First*, * * *; *third*, actions for relief not herein otherwise provided for." Other sections follow, fixing a limitation of five, three, and two years for different classes of personal actions.

At first it would seem to follow, from what has been said, that this action is within section 3219. But it has been generally, though not always, held in the United States that the action for dower is not within those statutes, in respect of the limitation of real actions, which are modeled after the statutes of Henry VIII. and James I., as ours is. 2 Scrib. Dower, c. 20; Ang. Lim. (6th Ed.) 369; Wood, Lim. § 278. Hence it was held in *Littleton v. Patterson*, 32 Mo. 357, that an action for dower was not barred by the act of February 2, 1847, (Acts 1847, p. 94,) which, except as to the period of time required, is the same as section 3219. That case was decided, and doubtless had to be decided, without reference to subsequent legislation. The practice act, adopted in 1849, (Acts 1848-49, p. 73,) abolished all distinctions between actions at law and suits in equity, and declared that thereafter there should be

in this state but one form of action, which is denominated a "civil action." The first section of the second article repealed certain sections of the Revised Statutes of 1845, concerning the limitation of personal actions, and substituted others. The second section declared that "civil actions" embraced within the article could only be commenced within the time prescribed in sections which follow, "except where, in special cases, a different limitation is prescribed by statute;" and the next section contains the catch-all clause, as it is called, namely, "third, actions for relief not herein otherwise provided for." As said in *Hunter v. Hunter*, 50 Mo. 455, this clause seems to have been made to cover equitable cases, as well as others not falling under any other part of the statute. This history of the legislation shows clearly that it was the policy of the legislature in 1849 to fix a period of limitation for all "civil actions." Dower is a civil action, and we believe such an action would have been held to be barred, in the case of *Littleton v. Patterson, supra*, either by the first section of the act of 1847, or this general clause in the act of 1849, had the court been called upon to consider the statutes as a whole; but the cause of action there appears to have accrued before the adoption of the act of 1849. Which of the sections would have been applied, is not material, at this time, in this case. These sections of the acts of 1847 and 1849 were carried into the Revision of 1855, and, combined in one act, passed as such, concerning the limitation of actions. They were again re-enacted in 1857, (Acts 1856-57, p. 76,) probably because the revised bill of 1855 had no enacting clause. Thus the law continued until the Revision of 1865, when these sections appear just as they are at the present time. It was then, for the first time, section 3228 read: Civil actions, "other than for the recovery of real property," can only be commenced within the time prescribed in sections which follow. The words just quoted, exclude actions for the recovery of real estate, and hence the general clause of section 3229 cannot be held to apply to an action for dower. But we are satisfied the legislature made the section assume that form because it intended that the previous section, now section 3219, should include all actions for the recovery of lands, or the possession thereof, the action for dower included. This we can hardly doubt, if we consider the history of the statutes, and pay any regard to the legislative policy to provide a limitation for all actions, so clearly indicated. We are the less embarrassed in reaching the conclusion just stated, because some courts have held dower to be barred by statutes in form like section 3219. Thus in *Jones v. Powell*, 6 Johns. Ch. 196, the chancellor said: "The same general statute declares that no action for the recovery of any lands, etc., shall be maintained, etc., unless on a seizin or possession, etc., either of the plaintiff, etc., or of the ancestor or predecessor of the plaintiff, within 25 years before such action brought." The general and sweeping language of this act, no less than the sound policy of it, would dictate the application of it to the action of dower, as well as to any other real action." In *Arkansas* it is held that, where a purchaser is in possession holding adversely, the statute of limitations will bar the widow's claim for dower. *Livingston v. Cochran*, 33 Ark. 294; *Stidhan v. Matthews*, 29 Ark. 660. By reference to *Danley v. Danley*, 22 Ark. 263, it will be seen their statute is the same as ours. Again, the reason assigned for excluding actions for dower from statutes formulated after the English statutes are that the statute presupposes a previous seizin or possession, from the expiration of which the limitation must commence; that dower can have no limitation from the disseizin of the husband; nor from the widow's own seizin, because she has no right of entry or of action for possession until dower is assigned. *Littleton v. Patterson, supra*. In some cases, as where the husband alienates the land during marriage, the right of dower then being inchoate, the wife has and can have no immediate action for the assignment thereof, and the limitation can only commence after the death of the husband. But we have seen that, by the statute law of this state, the action for dower is of itself a possessory action. It need not be followed, as

under the old writs, by an action of ejectment. The judgment is equivalent to a judgment in ejectment, and it gives her actual possession of that estate of which she is deforced. Again, by the statute law of this state, the widow's right to tarry is not limited to 40 days. She has the right to hold and enjoy the mansion house and plantation thereto belonging, free of rent, until dower is assigned, no matter if it be for the remainder of her life. This estate she may recover by an action of ejectment. *Roberts v. Nelson*, 86 Mo. 22, and cases cited; *Holmes v. Kring*, 6 S. W. Rep. 347. Kent, speaking of such statutes as this, says that, upon the death of the husband, the widow "is by law deemed in possession, as a tenant in common with the heirs, to the extent of her right of dower; and her right of entry does not depend upon the assignment of dower, which is a mere severance of the common estate." 4 Kent, Comm. (13th Ed.) 62. Of course, this right to occupy the mansion, etc., is not the same thing as dower; but the two estates are closely connected, the continued existence of the former depending upon the non-assignment of the latter. Now, if the statute read, in substance, "that no action for the recovery of lands, etc., or for the recovery of the possession thereof, shall be maintained, unless the action is brought within, etc., after the cause of action accrued to the plaintiff, or person under whom he claims," there can be no doubt but the action for dower would be included. This is the effect which we give to the statute in other cases. It is its meaning, as indicated by the disability sections. As a general rule, when we adopt a statute from another jurisdiction, we take it with the construction which has been given to it in that jurisdiction; but, where one or more sections are formulated after these old English statutes, we must construe our own enactments in the light of the whole body of our statute law upon the same general subject. With the before-noted added statutory incidents to the dower estate, and giving due consideration to the legislative policy of the state to quiet vexatious litigation by fixing a period of limitation for all civil actions, we are bound to say, and do hold, that the action for the assignment of dower is within the limitation prescribed by section 3219, Rev. St. 1879; that the statute will not begin to run until the cause of action has accrued. Of course, to put the statute in operation, the possession must be adverse.

It is conceded that the act of March 22, 1887, (Acts 1887,) has no application to this case, and hence we are not concerned with it here. It was probably passed because of the decision in *Johns v. Fenton*, 88 Mo. 66. In that case the defense interposed was staleness of the demand,—not an actual bar by the statute. What was said in respect of the statute of limitations was but following the case of *Littleton v. Patterson*, *supra*; and that, too, without our attention being called to the radical change made in the statute by the act of 1849. The judgment in this case is therefore affirmed.

RAY, J., absent. The other judges concur.

BEARD v. HALE.

(*Supreme Court of Missouri*. May 7, 1888.)

DOWER—ACTION FOR ASSIGNMENT OF—LIMITATION.

An action by a widow for the assignment of her dower is an action to recover real estate within the meaning of Rev. St. Mo. 1879, § 3219, which provides that no action to recover real estate shall be maintained by any one unless he was seized or possessed of the premises within 10 years before the action, the widow being deemed in law as in possession upon the death of her husband, and the limitation will begin to run at the time her cause of action accrues. Following *Robinson v. Ware*, *ante*, 153.

Appeal from circuit court, Audrain county; ELLIAH ROBINSON, Judge.

W. W. Fry, for appellant. G. B. Macfarlane and Karnes & Krauthoff, for respondent.

SHERWOOD, J. Action for assignment of dower. Plea, the statute of limitations. Evidence shows sale of the land by the administrator of the estate of plaintiff's former husband in 1864; immediate possession taken by the purchaser, and that he, and those claiming under him, have been in adverse possession ever since. This action was brought in 1884. The court below ruled that the statute had run, and consequently found in favor of defendant. In the case of *Robinson v. Ware*, ante, 153, (decided at the present delivery,) an action of the same nature as the present one was decided the same way. That case dominates this one, and the judgment is affirmed.

All concur, but RAY, J., absent.

TURNER v. HOYLE.

(Supreme Court of Missouri. May 7, 1883.)

TRUSTS—SECURING DEBT WITH TRUST PROPERTY—NOTICE TO CREDITOR.

A note payable to certain trustees, and secured by a deed of trust, was by them indorsed, as trustees, to their successor in the management of the trust-estate. After maturity, the new trustee pledged both note and deed of trust to secure his private debt, the person receiving the same being ignorant of the trust. Held, that the person receiving said note was charged with notice that it was held in trust, and is liable for the conversion thereof.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

This was an action brought by Charles H. Turner against Charles Hoyle for the conversion of a promissory note belonging to an estate of which plaintiff is trustee. Judgment for plaintiff, and defendant appeals.

Dyer, Lee & Ellis, for appellant. *Muench & Cline* and *Fred Wislizenus*, for respondent.

BRACE, J. In this action the plaintiff recovered judgment in the circuit court of the city of St. Louis for the sum of \$4,325.32 damages for the conversion of a promissory note belonging to an estate of which he is the trustee. The facts in the case are substantially as follows: On February 9, 1874, Caroline O'Fallon *et al.* conveyed to Benjamin Farrar certain real estate in said city, in trust for Fanny Wall, Ellen Smith, and Emily O'Fallon, with power "to sell and convey the same to any purchaser at public or private sale, and to receive the proceeds thereof, which shall be by the said party of the second part [said Farrar, trustee] invested and held subject to the same trusts which are by this deed impressed upon the property hereby conveyed." Benjamin Farrar having died on the 7th of November, 1878, John R. Farrar and D. D. Burns were substituted as trustees in his place, who on the 20th of April, 1881, invested a part of said trust fund in the promissory note for the conversion of which this action was brought, and which is as follows: "ST. LOUIS, April 20, 1881. \$4,000. Two years after date, without grace, we promise to pay to the order of Jno. R. Farrar and D. D. Burns, trustees, four thousand ~~no~~ dollars, for value received, with interest from maturity at the rate of six per cent. per annum, at the St. Louis Nat. Bank. ESTATE OF BENJ. FARRAR, DEC'D. By SAMUEL SIMMONS, Executor. ANNA B. FARRAR, Executrix." This note was secured by deed of trust of same date, executed by the makers of said note on certain real estate in said city, in which the beneficiaries were designated as "D. D. Burnes and John R. Farrar, trustees for Mrs. Fanny Wall, Mrs. Ellen Smith, and Emily O'Fallon, parties of the third part." On the 17th of January, 1884, W. C. Jamison succeeded Farrar and Burns as trustee in the trust, and received from them, among other assets, the said note and deed of trust; the note bearing the following indorsements: "In't paid on this note to October 20, 1883. Without recourse. JOHN R. FARRAR, D. D. BURNES, Trustees." On the 17th of March, 1884, Jamison borrowed of the defendant \$6,000, for which he executed to defendant his promissory

note of that date; and as collateral security, in part, for said loan, indorsed said trust promissory note, and delivered the same, together with the deed of trust given to secure its payment, to the defendant. On the 1st of July, 1884, the plaintiff was appointed trustee in place of said Jamison, and thereafter made demand of said note of the defendant; and, upon his refusal to deliver or account for the same, plaintiff brought this suit. The defendant, examined in his own behalf as a witness, gave substantially the following account of this transaction between him and Jamison: "On March 17th, Mr. Jamison met me, and asked me if I could loan him six thousand dollars. I told Mr. Jamison that I had the money, but needed it, or would need it in a very short time. Jamison said he could give me good security for the loan, and he would also pay me the money when I needed it. I told Mr. Jamison that under these circumstances, distinctly understood, that if he would give me good collateral, and pay me this money as I wanted it, I would make him the loan. He said it was all right. I said I would be in his office at ten o'clock the next day to arrange it with him. He said: 'Meet me at three o'clock this afternoon.' I went into his office, and Mr. Jamison was sorting a bundle of papers. He said: 'Charlie, I am looking over collateral for this money.' He threw out the collateral, and said: 'Here is a one thousand dollar deed of trust,—note secured by deed of trust; and here is another one for four thousand dollars.' He said: 'I want to give you two thousand dollars more;' and he looked through, and said: 'I cannot put my hand on more collaterals to-day, but I will fix that with you in a day or two, and will make that all right.' I hesitated then, and gave Mr. Jamison a check for six thousand dollars; but on his promise that he would give me that extra collateral in a day or two, and supposing at that time that Mr. Jamison was as solvent as any man in St. Louis, I drew up a check, and gave it to him. He gave me his note and these collaterals, one of which was four thousand dollars and one one thousand dollars. I gave him the money, the six thousand dollars, on the 17th of March, and got these collaterals on the same day, and before I gave him the check. I got this four thousand dollar note in controversy in this suit, and another thousand dollar note secured by a deed of trust, at that time when I gave him the check. At that time I had no knowledge or intimation in any way that Mr. Jamison held the notes upon in the capacity of a trustee. I supposed that Mr. Jamison had come into possession of the note by purchase, or some other way. I had no idea that he was the trustee of any such estate. I supposed he owned the note. I looked at the note, saw who the payees were. The payees were J. R. Farrar and D. D. Burns, trustees. Then I looked on the back of the note, and saw the indorsement: 'Without recourse. D. D. BURNS, J. R. FARRAR, Trustees.' Read the deed of trust, but paid very little attention to it; read the description of the property in the deed of trust. The beneficiaries were some parties named O'Fallon and Wall. Saw the note was overdue; asked no questions. Mr. Jamison simply said: 'Here are two good collaterals.' Looking upon the way in which the note was made, it satisfied me, and the description of the property that secured the note,—I was satisfied, and took them."

That the promissory note pledged by Jamison as collateral security for the loan which defendant made him, and for which he executed his individual note to the defendant, was a part of the trust fund; that the plaintiff is the trustee of that fund; that the money obtained by Jamison was not applied to any of the purposes of the trust, but to his own use,—is undisputed. But it is contended that, the instrument creating the trust, having conferred upon the trustees the power to change the character of the fund, the trustees had power to sell or vary the securities; and, in hypothecating the note as he did, he conferred upon defendant a perfect title, and could do so, although the defendant may have known that the note was trust property. This point was not overlooked by the learned judge before whom the case was tried below,

who furnishes an answer to this contention in the following language: "When a trustee with power to change investments, and professing to act on behalf and for the trust-estate, induces a third person to buy from him trust property, or to advance upon it, the third person, acting in good faith, will acquire a good title, although the trustee convert the proceeds of the sale or advance to his own use. The third party, acting under the circumstances stated, is not bound to see to it that the proceeds of his purchase or advance are properly applied by the trustee. But this rule has no application when the trustee is not professing to act for or on behalf of the trust-estate, or the third party is not dealing with him in good faith, believing that the trustee is making the sale or getting the advance on behalf of the trust-estate. In the case at bar the evidence shows that Jamison solicited Hoyle to make him a short loan upon good collateral. He did not mention the trust. He did not ask for a loan on behalf of the trust. He asked it for himself individually, and the loan was made to him individually. On the face of the transaction it was a clear case of the conversion by Jamison of a trust asset for his individual purposes, and later developments proved that it was nothing else. Under these circumstances, it would seem very clear that Hoyle cannot assert any title, as against the present trustee, if he took the note with notice that it was part of the trust property, or was chargeable with notice of that fact." Jamison, in pledging the note to defendant as security for his individual debt for the money loaned him by defendant, was guilty of a gross breach of his trust, and in that act was making a fraudulent misapplication of the trust fund. The defendant, in receiving the security, participated in the misapplication, but not in the fraud; the only ground upon which he claims in his evidence to be protected from the consequences of his conversion of the note belonging to the trust fund acquired by him through such fraudulent misapplication by Jamison is not that Jamison, in transferring the note to him, was exercising power conferred upon him by the instrument creating the trust, apparently for the purposes of the trust, but that, being the holder of the note by proper indorsement from the payees, defendant took it from him as security for the loan in good faith, without any knowledge that Jamison held it as trustee, but believing that he was the owner thereof in his own right. This was the only defense disclosed by the evidence, and thereupon the defendant asked the court to declare the law to be that "if he received the note in controversy from Jamison as security for and contemporaneous with a loan of six thousand dollars by him made to said Jamison, and at the time when said note was so received by him he had no actual knowledge that he (Jamison) held said note as trustee, and took said note in good faith, then the court should find that the defendant, Hoyle, acquired a good title to said note." The security taken being in the form of a negotiable promissory note, the defense would have been a good one, notwithstanding the fact that the payees were therein designated as trustees, and the deed of trust, given to secure its payment, delivered to the defendant with the note, pointed out the beneficiaries of the trust, if the note had not been overdue and dishonored at the time it was pledged. *Mayes v. Robinson*, 93 Mo. 114, 5 S. W. Rep. 611; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. Rep. 73. But there is this vital distinction between the rights of a transferee who received the paper before and one who received it after maturity. "The transferee of negotiable paper to whom it is transferred after maturity acquires nothing but the actual right and title of the transferor, and takes it subject to all the equities with which it was incumbered in the hands of the party from whom he received it." 1 Daniel, Neg. Inst. § 724a; *Ford v. Phillips*, 83 Mo. 523; *Julian v. Calkins*, 85 Mo. 202; *Wheeler v. Barret*, 20 Mo. 573. The defendant in this case, having received the note in controversy long after it became due, acquired, by virtue of its indorsement and delivery to him for value by Jamison, no higher or greater title than Jamison had. He stands in the shoes of his indorser. The bene-

fiduciaries of the trust are the real owners of the note. Jamison had no such title as could be set up by him against them, or the plaintiff in this case, in whom is vested the legal title to said note in trust for them, in an action for its recovery; and defendant, by the transfer to him, acquired no such title as could defeat plaintiff's action against him for its conversion, unless upon the evidence he is brought within the protection of the equitable principle that, when one of two innocent persons must sustain a loss occasioned by the fraud of a third, it must fall upon the one who puts it in the power of the third person to commit the fraud, which, in its application to negotiable paper transferred after maturity, has been formulated into a rule that has received the sanction of this court: "That if the true owner of a negotiable note overdue, or a non-negotiable note, clothes another with the usual evidence of ownership, or with full power of disposition, and third persons are led into dealing with such apparent owners, they will be protected in their dealings. Their rights in such cases do not depend on the actual title or the authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to be vested in the party making the conveyance." *Newhoff v. O'Reilly*, 98 Mo. 164, 6 S. W. Rep. 78; *Lee v. Turner*, 89 Mo. 489; *Bank v. Bank*, 71 Mo. 183. This is not a case, however, in which this principle, which operates by way of estoppel, can be invoked. Jamison was never clothed with full power to dispose of this overdue negotiable promissory note, or of the deed of trust given to secure it. His power of disposition was qualified and limited to the single purpose of disposing of it for reinvestment for the benefit of the trust. He had in fact no power to pledge it for his individual debt, nor was he the apparent owner of it in his own right. The apparent title that he had thereto was that derived from the payees of the note by their indorsement. These payees were designated in the body of the note as trustees. As trustees they indorsed it. The deed of trust to secure it was upon condition of payment to these indorsers as trustees, and in it the beneficiaries of the trust were pointed out and named. The character of the note was a trust asset, was stamped upon its face and its back, and proclaimed by the security which accompanied it. They needed simply to be interrogated to disclose the nature of the title by which Jamison held it. Yet the defendant took this overdue note to secure the individual debt of Jamison to him without making a single inquiry as to his title, or giving any heed to the contents of the note or deed of trust, which alone would have given any reasonably prudent man warning that Jamison was holding this note in a fiduciary capacity, and not in his own right. The trustees who had charge of this estate prior to Jamison's appointment, and from whom he received it, had furnished ample *indicia* upon the face of these papers, by which this note could be recognized as part of the trust property. The defendant, taking it after maturity, at his own risk failed to inquire and ascertain, as he might easily have done, that this was not Jamison's property, and that he had no power to pledge it for his private debt. He had confidence in Jamison, saw the note had been indorsed by the payees, was willing to risk Jamison's title, did risk it, and got just such title as Jamison had, and no other. He has become the victim of his own misplaced confidence and negligence, and not of the misplaced confidence or negligence of the real owners of the note, or of those from whom Jamison received it, neither of whom have done any act which should preclude the plaintiff in this action from setting up the superior title of such real owners against that acquired by defendant from Jamison.

The trial court held that, when the defendant received the note, he did so charged in law with notice that Jamison held it as trustee; that, having converted this trust note to his own use, he must respond to the plaintiff, the present trustee of the estate of which it was an asset, in damages to the

amount of the value of the note, and rendered judgment accordingly. We find no error in the ruling of the court, and the judgment is affirmed.

All concur.

SCOTT et al. v. SCOTT.

(Supreme Court of Missouri. May 7, 1888.)

DEED—DELIVERY—PROOF OF.

When it appears, in an action to annul a deed, that the deed was not recorded till after the death of the grantor, and that both grantor and grantee had made declarations inconsistent with its delivery, the presumption of delivery arising from possession of the deed will not be supported by the mere fact that the grantee received by mail an envelope, addressed in his own handwriting, in which the deed was contained when filed for record.¹

Appeal from circuit court, Nodaway county; H. S. KELLEY, Judge.

This was an action by Eleanor Scott, William B. Scott, Ella B. Scott, Nan-
nie M. Scott, and Mattie E. Scott, against David A. Scott, to cancel a deed
executed by Maggie R. Scott to defendant. Judgment for defendant, and
plaintiffs appeal.

T. J. Johnston, for appellants. Edwards Ellison, and W. W. Ramsay,
for respondent.

NORTON, C. J. This is a proceeding in equity instituted in the circuit
court of Nodaway county to vacate and annul a certain deed purporting to
have been executed on the 23d of April, 1883, by Maggie R. Scott, conveying
to defendant certain lands in the counties of Nodaway and Vernon, in this
state, and other lands in the states of Ohio and Nebraska, and also all the per-
sonal property of said Maggie, which said deed was filed for record in the re-
corder's office in Nodaway county on the 17th day of September, 1883. On
the trial of the cause the court rendered judgment for defendant, from which
plaintiffs have appealed. The grounds set up in the petition for vacating this
deed are substantially as follows: *First*, that the deed was never delivered to
defendant; *second*, that said Maggie R. Scott did not make the deed in the
form in which it now appears, and in which it was recorded; *third*, that, in
whatever form said deed was executed by said Maggie, if executed by her at
all, it was procured to be executed by fraud and undue influence on the part
of defendant, exerted by him over her in consequence of confidential relations
existing between them. The deed sought to be vacated conveyed to defend-
ant, "for and in consideration of the sum of being provided for during her
natural life as she desires, affection, and other very valuable considerations to
her in hand paid by the party of the second part, the receipt of which is ac-
knowledgeed," all the real and personal estate of said Maggie. It is dated the
23d of April, 1883, and has appended to it a certificate of acknowledgment
of the same date, taken by Robert Baird, notary public, and is attested by said
notary and W. E. Baird. It is admitted by the answer that all of the written
part of said deed, except the signatures of said Maggie, the notary, and W. E.
Baird, is in the handwriting of defendant. The evidence of the notary and
attesting witness sufficiently prove the execution of the deed, and its acknowl-
edgment before the notary. W. E. Baird testified that he was requested by
said Maggie to witness the deed; that he never read it or heard it read, nor
were the contents of the deed stated to him further than that it was a deed
from Maggie R. Scott to David A. Scott; that he could not say whether the
deed was filled out or not; that he did not look at it,—only when his signa-
ture was to be written; that said Maggie took the deed away with her. Rob-
ert E. Baird, the notary, testified that he took the acknowledgment of this

¹See, also, *Otto v. Doty*, (Iowa,) 15 N. W. Rep. 578; *Stewart v. Stewart*, (Wis.) 7 N.
W. Rep. 369.

deed, and also of another one a month or two before; that one of these deeds was handed by said Maggie to Scott in the hall, and his impression was that it was the last one acknowledged. This deed, so far as the fact is disclosed by the evidence, from the time it was executed and acknowledged, and handed by the notary to said Maggie, does not again appear till the 17th day of September, 1883, two days after the death of said Maggie, when it was given by defendant to one McMillan to be filed for record, and was by him on said day filed for record in the recorder's office of Nodaway county. Mr. Noel, the recorder, testified that, at the time the deed was filed, his attention was called to it, and he thought it was not all written at the same time; that there was at that time about three shades of ink; the ink in the descriptive part was lighter; the lower part of the description was lighter than the balance of it,—newer written; that the ink was more nearly alike when he testified than when it was filed for record.

Where a deed has been executed and acknowledged, the possession of it by the grantee is presumptive evidence of its delivery. *Yarnall v. Yarnall*, 6 Mo. 325. It is affirmed in the case of *Huey v. Huey*, 65 Mo. 689, that the lodgment of a deed, properly executed and acknowledged, by the grantor, in a place to which the grantee has access, and from which he can, without hindrance, transfer it to his own possession, with the intent on the part of the grantor that the grantee may, after his death, take it, and have it recorded, does not constitute delivery of the deed.

The first question to be considered is, do the facts in evidence overcome the presumption, arising from defendant's possession of the deed, that it was delivered. As preliminary to the discussion of this question, it is proper to state the relations the various parties sustained to each other. It appears that Alexander F. Scott died in 1865, in Harrison county, Ohio, the owner of a large amount of real and other estate, leaving said Maggie R. Scott, his widow, Eleanor, one of the plaintiffs, and the other plaintiffs in this suit, as his heirs; that defendant is the cousin of said Maggie, and commenced boarding in 1868 with the family of said Eleanor while going to school; that he assumed to act for said Eleanor as her agent in some matters pertaining to the estate of said Alexander,—induced her to sell some of the lands, and convey other lands to said Maggie; that he was authorized to sell certain lands in Vernon county, this state, at \$9 per acre, and was to receive \$1 per acre for making sale; that he sold the land for \$12.50 per acre, and accounted for it at \$9 per acre, and kept the balance. The evidence tended to show that Maggie was engaged to be married, in 1871 or 1872, to Roy Workman; that this engagement was broken off by the influence of defendant; that defendant's attentions to Maggie were displeasing to her mother, who some time thereafter, about 1876, refused longer to board him, and ordered him away; that Maggie, in January, 1878, left her mother's, and went to live with Samuel Scott, who lived 25 miles distant, and was her uncle and the father of defendant; that she returned to her mother's in the summer of 1881, and remained a week or two; returned again in the fall of 1881, and remained till May, 1882, and her last visit was in June, 1883. The evidence also tended to show that defendant acted as the agent of said Maggie in transacting her business, and in some instances as her attorney, and that he had full possession of her confidence. The facts disclosed by the following evidence are relied upon to overcome the presumption, raised by defendant's possession of the deed, that it was delivered. Lamon Scott testified as follows: "In May, 1883, after David A. returned from Ohio, I had a talk with him. Before this I had written a letter to Maggie about the partition of the lands in Vernon county. I met David on the street in Maryville, and asked him what Maggie wanted to do about the division of the land in Vernon county, and he said he intended to let her do as she pleased, as my mother had blamed him for meddling, and he would have nothing to do with it, and he did not know what Maggie intended to do

about it." The letter of this witness was replied to on the 14th May, 1883, by said Maggie, as follows: "Your letter of recent date at hand, and contents noted. I think the remaining lands ought to be divided, but in which of the two ways I scarcely know. It may not cost so much for to settle up by each of us making quitclaim deeds to each other; but would it be quite as satisfactory a way of doing business as to partition it through court?" The following letter of said Maggie, written to defendant, was also in evidence:

"E. SPRINGFIELD, JEFFERSON CO., OHIO, July 15, 1883.

"*Dearest Cousin:* Your letter of the 10th containing P. O. order at hand. If you think I had better start west without having my dresses fixed, I suppose about next Tuesday or Wednesday (24th or 25th) would be about as well as any time this month; cannot, at least, hear from you, and get ready earlier than this. If not at this time, I would prefer waiting until about the 6th of next month, as I do not care about traveling between the above-mentioned times. If we are to be married, you may meet me. If not, I would just as leave go alone. Can't you make it suit to meet me in St. Louis? Write me full instructions,—what time to leave here, and what train to take; and, if you are to meet me, I would rather you would be at the place named in advance of me, as I do not want to wait. Shall I pack my box, and have it taken to the station when I go, and shipped as freight, and what shall I do with Nellie's squirrel? I have never got any cage for her. Please answer me fully everything I ask you. * * * Hoping to hear from you right away, I will close,
As ever, M.

"Be sure, and write me full instructions."

Another letter of hers, dated July 28, 1883, was also read in evidence. So much of which as bears upon the questions involved is as follows: "Your letter of the 25th, containing instructions, came to hand last evening. I have nothing of importance to write you. I am afraid I will not have money enough. Do not think I will have my box shipped, as I want to have some money over and above what gets my ticket, but will pack it, and have it ready to go at any future time. If nothing happens to hinder me, will start on the 6th of August. * * * I suppose another week will finish up our writing to each other."

William Scott testified that "in August, 1883, Dave and I went to Vernon county to partition the lands there. David told me Maggie would be there, and I could see her about it. On the road to Vernon county he told me he and Maggie were going to be married. * * * I never heard Maggie say anything about their getting married while down there. The reason why they did not get married was because her trunk was lost, and all her clothes were in it. Trunk went on to Fort Scott." The deposition of D. H. Edwards is as follows: "In August last, [1883,] David A. Scott and his cousin, ——— Scott, came to my house, [in Nevada, Mo.] David had been to my house several years ago. David Scott said, when he came to my house last August, that he was there to look after lands of A. F. Scott's estate; that he was the agent and attorney of his cousin Maggie, and he expected she would be here in a short time. Within a day or two he brought a young lady to my house from the train, and introduced her to me as his cousin, Miss Scott. They staid at my house several days, and went to the country to look at the lands. They went to Balltown to look at the lands there, and, after their return, he said they went to look at the land, that she might choose the part that she would take in the division of the lands." Thirza Edwards testified, for plaintiffs, by deposition: "David Scott came to Nevada [Mo.] with his cousin last August, [1883:] that, within a day or two after David came, he brought a young lady to the house from the train, whom he introduced as his cousin, Miss Scott, and as the sister of the other young man named [William B.] Scott. David said, while here, that he was acting as the agent and attorney of his cousin Maggie; that they were here to look over the land in which Maggie

had an interest, coming from her father's estate, with a view of dividing it, and for her to make a selection of her part. Miss Maggie told me that she was here to look after her land; and, after she came back from Balltown, she said she had been to look at the land over there to see what part of the land she would take as hers. She called it her own land." Mary Scott testified as follows: "I know David A. Scott and knew Maggie B. Scott. Maggie came to Nodaway county in August, 1883. I met her then, and was with her about two weeks. I heard her speak of her lands several times during the week. I heard David Scott, the defendant, ask her how she liked the country. I did not hear her reply. David said to her: 'You had better build you a house on your land, and make up your mind to stay here.' This conversation was at Lawson Scott's house, about a week before the Nodaway county fair, which was held the last days in August, and first days in September,—one week. I believe she came away from there on Wednesday during the fair. David Scott came then, and took her away in a buggy." It appears that said Maggie was taken from the fair to the Luona Hotel, in Maryville, where defendant boarded, and that while there, during the sickness of which she died in about two weeks, she said to Anna Shepherd that "she came to marry Mr. Scott, but her folks objected, and she was in trouble; * * * that she had come out to marry Dave, and her folks objected, and she was worried; and that was the only talk she had with her." It further appears that, on the night of the 10th or 11th September, the life of said Maggie was despaired of; that she asked the doctors what her chances were, and they told her no chance, and she said: "Then, if no chance, I want to marry Dave that night." It appears on that night, about the time she became aware of her condition, she spoke, in the presence of defendant, of the manner she wished to dispose of her property. Salina Terry, who had been called in as a nurse for said Maggie, on the 3d or 4th September, and remained till she died, on Saturday, the 15th day of September, testified that, "when first called, Maggie wanted some underclothing; that they were in her trunk. Her trunk had not been opened, and she wanted us to bring her some. Her trunk was taken to David Scott's room, and remained there till after she died. I spoke about getting some clothing, and asked that her cousin go with me, and open her trunk to get it. She objected, and we went out, and brought her some. * * * I was there when they sent for Elder Gerhart. It was thought she was dying, and I sent a boy for Gerhart. She was at times out of her head, and we had to hold her in bed. She said she wanted a minister, and I sent for Gerhart. He came, and some one said: 'Here is the minister.' He stepped up, and shook hands. At intervals she would be rational, and then seemed to be irrational. Mrs. Smartwood, Drs. Moore and Nash, Mrs. Woodward, and her friends were there. I was not in when the conversation about the marriage came up; but, when I came in, Mrs. Smartwood said to Maggie: 'If I wanted to marry Dave, I'd do so.' When Hatch came, she was just in the condition she had been,—rational and irrational at spells. We thought she was dying. The doctors said she could not live. The parties then said she ought to be told her condition. I then spoke to the doctors, and they told her they could do nothing more for her. This was just before I sent for Gerhart. I heard her say to Gerhart that she wanted to be married, and he asked her if she thought she was in a fit condition, and refused to marry them. I was out when the ceremony took place, and when I came back she was just raving very much worse than I had ever seen her. She was just terrible,—was wild,—and we had all we could do to take care of her. David A. Scott was there, in and out. The next day she was moved. She was not conscious. She was very low. Never said a word about Dave. The next night after the marriage she asked Dr. Nash if she would recover. He said not. She said she came here to do business, and had done nothing. The last three or four days I think she uttered but few rational words. David Scott came after me to wait on her.

Dave was there nearly all the time, and we could not talk with her without him coming in. He staid in his room close by. The trunk was taken to Dave's room in about a week after I went there. I was not present when the trunk was opened. I did not know whether she directed her trunk to be opened. I saw it after it was in Dave's room,—open. I saw it every day, and its contents were lying on the floor. Papers and letters were scattered about. Saw it that way every day. The night of her marriage she spoke about her property. David A. Scott was there. She said she wanted to dispose of her property. She wanted to donate a part of it to some charitable institutions. She told Dave Scott she would give him \$2,000. She said, 'Is that not enough?' and Dave said, 'Oh, never mind me.' She then said to him, 'Ain't \$900 enough?' She wanted to give her uncle Samuel Scott \$4,000, and said something about her clothing." The evidence of this witness as to what was said concerning the disposition of her property in defendant's presence is corroborated by that of five other witnesses, one of whom, Mrs. Smartwood, testified that "she spoke of disposing of her property; wanted Dave to have \$2,000, her uncle \$4,000, his mother \$600, and the remainder divided among her brothers and sisters. When she mentioned Dave, he spoke up, and said, 'Never mind me; I am well enough off.'" William Scott testified that, "on the night of the 11th of September, Maggie asked Dr. Moore what her chances were. He said they were against her. She said, 'I reckon, then, I must die.' She soon after spoke of her property, and said she wanted to leave Sam Scott \$4,000, and David Scott \$2,000, and David said, 'Never mind me.' Maggie, on that night, said she wanted a minister. Wanted to get married. Rev. Gerhart came, and stood by her, and when she was talking to him she seemed all right. She spoke to David, and said, 'Are you going to fulfill your promise?' I did not hear what he said, but he went out and got a license. He was gone about half an hour. Rev. Gerhart told her not to think of such a thing. I did not hear her say she would get some one else. Rev. Hatch came. She seemed calmer, and he went through the ceremony. David A. stood up, and held her hand in his. She repeated after him. She said: 'Doctor, do you think I am really married?' And then some one said, 'That is the minister;' and then she said the same to him, and he said to her: 'Yes, you are really married.' When she was talking, she seemed rational. She was flighty just all the time. The next day she seemed better, and we all had hopes that she would recover; but she got worse." The evidence of David Lawson Scott is to the same effect as the above. Rev. Gerhart testified that he was called to see Maggie about midnight; that she was very sick, and he thought she was dying. "She asked the doctor how long he thought she would live, and then said she wanted to be married; but not in these words, but in disconnected sentences, but so that I understood her. I told her I should not think of such a thing. She was hinting all the time about being married. It is hard to say what she said,—just like a person who has an indefinite idea about something. I repeated several times that I would not think of such a thing as getting married. When she would utter a word, others put in, and no sentence was completed, so I could not get it. David was one who would put in, and say, 'Be quiet, and all would be right.' He said that several times I was there about an hour. I considered her irrational, and beside herself. I did not marry them."

William A. Hatch testified as follows: "I am a minister of the gospel, and was called upon to perform the marriage ceremony between David A. and Maggie Scott on the 11th or 12th day of September, 1883,—I do not know whether just before or after midnight. The parties were at the Luona Hotel. There were at least two present besides the contracting parties, and there may have been others. I asked the woman if she desired to be married; she said she did, and Mr. Scott requested me to make the ceremony as short as possible, and I cut it as short as I could, according to the form of our church. I said,

'If there is any objections to the persons being joined in the holy bonds of wedlock, now is the time to make it known.' I then had them join hands. I then asked Mr. Scott if he took this woman to be his lawful wife. He answered, 'Yes.' She answered the same way to the same question, and they both understood it. I asked her if she understood it. She said, 'Yes.' Had to speak a little loud, as her hearing was somewhat impaired. No right was exchanged. I did not require her to repeat all the ceremony; she was too weak; but I repeated to her, and asked her if she understood, and she said she did. But David repeated. I asked no question, but looked to see the papers were all right. David Scott had the license, and it was all right. I asked the doctors, before commencing the ceremony, if she was capable of understanding it and contracting marriage, and they said she was. My impression was that her mind was sound, but not in possession of all her faculties. When the ceremony was through, she asked me if she was really married; and, when I answered her she was, she seemed very happy. I remained in the room but a moment after the ceremony. I was not back to see her again before she died. I studied medicine, and was a practicing physician when I entered the ministry. I was in another room 5 or 10 minutes before the ceremony was performed, and was not in the sick room until the ceremony. She repeated some of the words, but did not repeat all. I asked all persons present whether there were any objections to the marriage. David A. was standing by the bed, or leaning on it. David A. came for me, near midnight; do not know whether just after or just before. She was buried on the 16th. On the night of the marriage the doctors told me they did not think she would live through the night. She was very low. I was in the room from 5 to 10 minutes. She was fully awake when I first spoke to her. Her hearing was impaired." Mrs. Smartwood testified that she was present the night of the marriage. "Hatch came in, and asked Maggie if she realized what she was doing, and she said she did. I think she was in her right mind at the time,—as sensible as any woman. She spoke about giving her money away. After the marriage she seemed better the balance of the night, and better for two days. She was out of her head a good deal while asleep, but when I would wake her up she would know everything. On being told by her doctors that there was no chance, she said: 'If no chance, I want to marry Dave that night.' I unpacked her trunk, and got her clothes. Dave came in next morning, and asked her if she realized that she was married, and she said, 'Yes;' and he asked her if she realized that he was her husband, and she said, 'Yes;' and seemed to know him as well as anybody. * * * I went to her trunk to get her clothes, and packed it, and put it in shape twice. It was in a small bed-room. I found once, after she was dead, on Monday or Tuesday, her trunk open, and things scattered. I repacked it. Do not know when it was opened." Mrs. Woodworth testified to the same effect, as to condition of Maggie's mind, as the above. Dr. Nash, attending physician, testified: "Was present in the room when Maggie was married. Could hear the minister, but could not hear what she said. I was in but a few minutes before the marriage. She had been roused up out of sleep, and I thought she was rational. She was taken sick about 1st September, 1888. Was sick with typhoid fever,—a very severe case. * * * She became flighty, and grew worse,—not more so than usual. She kept getting worse till the 10th, and Dr. Moore was requested to call in. She began to have alarming symptoms five or six days before the marriage. Delirious at times, but not so much as I have seen cases. She never got better, but grew worse and worse. There were times when she was free from fever; but at times the fever was higher, and then she was delirious." It was shown by the deposition of John Milone, who was postmaster at Uhrichsville, Tuscarawas county, Ohio, that he kept a receiving stamp with which he stamped the date when letters coming in the mail to his office were received; that a large en-

velope, directed to "David A. Scott, Uhrichsville, Tuscarawas county, Ohio," was stamped with said receiving stamp, on the opposite side, as received "April 26th, 8 o'clock A. M.;" and that his impression was said envelope was mailed somewhere in Ohio. It is also shown by the evidence of McMillan, to whom defendant, on the 17th of September, 1883, gave the deed in question to be filed for record, that it was in this envelope, and that the address on it to "David A. Scott, Uhrichsville, Tuscarawas county, Ohio," was in said Scott's handwriting.

¶ It has been said by an eminent chancellor: "Tell me what the parties have done under a deed, and I will tell you what that deed means." And in *Patterson v. Camden*, 25 Mo. 22, it is said: "I know of no better mode of ascertaining the meaning of a writing than is shown if all the parties acted on a particular meaning." So it may be said that this principle equally applies in the consideration of the question whether or not a deed has been delivered. The legal effect of the deed in question, if, after its execution and acknowledgment, it was delivered to defendant, was to pass to him the full title of Maggie Scott to the property conveyed, which, according to the evidence, was all the property, real and personal, which she owned or possessed. After its delivery the said Maggie owned nothing, and defendant became the owner of all her real and personal estate. The action of said Maggie, as well as the action of defendant, after the deed was executed and acknowledged, cannot be reconciled with the fact that this deed was delivered. As late as August after its execution, the land in Vernon county, which it purported to convey, was spoken of, both by said Maggie and defendant, as the land of said Maggie; and after she left said county, and went to Nodaway county, defendant said to her that "you had better build a house on your land, and stay here," when if this deed had then been delivered to him, he knew, as a lawyer, that she did not own a foot of land, nor a single dollar with which to build a house. If this deed had been delivered before she came to Vernon county, defendant knew that he alone was the owner of said Maggie's undivided interest in the land in said county belonging to the heirs of Alexander Scott, deceased; and yet he said he was there as her agent and attorney to look after these lands, and went with her to see them in order that she might choose that part of it she would take as hers. So in May, 1883, when, after his return from Ohio, he was asked what Maggie would do with reference to the division of the land in Vernon county, it would have been natural for him to have said, if the deed in question had then been delivered: "I own these lands, and not Maggie;" but, instead, he said he did not know what she would do about it, and that he did not intend to meddle with it, but let her do as she pleased. Coming on down to a later period, to the night of the 11th or 12th of September, 1883, when she was upon her death-bed, and informed that nothing more could be done for her, and impressed with the belief that she must die, and that the crisis was then pending, and, in view of approaching dissolution, she said, in defendant's presence, that she wished to dispose of her property, and gave directions as to the way in which she wished it disposed of; saying at one time she wished defendant to have \$2,000, and asked him if that was enough, and at another if \$900 would not be enough, to which he replied, never mind him. If, anterior to this time, she had delivered this deed to defendant, she must have known it, and have known that it conveyed to him everything, real and personal, that she had; and it is incredible to suppose that in this extreme moment she would undertake, if said deed had been delivered, to dispose of the property it conveyed, and designate the person to receive it after her death,—an event which she as well as those around her believed was then about to take place. The evidence shows her to have been an intelligent, accomplished woman; and the fact, is established beyond cavil or dispute, that she undertook to direct the disposition of many thousands of dollars worth of property as her own, in view of approaching death, is wholly

irreconcilable and inconsistent with the fact that she had delivered the deed in question to defendant, conveying to him everything that she owned or possessed.

The evidence relied upon by defendant to show delivery of the deed at the time it was executed and acknowledged, is not satisfactory. One of the attesting witnesses testifies that, after its acknowledgment, said Maggie took the deed with her when she went away. The notary testified that he had taken her acknowledgment to two deeds, and had an impression that one of them, the last one acknowledged, was handed to defendant in the hall of the house after it was acknowledged. The theory that the deed was then delivered is inconsistent with and contradictory of the other theory which defendant sought to establish by the evidence, viz., that the deed, after its acknowledgment, was sent to him through the mail, inclosed in an envelope directed to him at Uhrichsville, Tuscarawas county, Ohio, and received at the said post-office on the 26th April, 1883. From this fact, and the further fact that on the 17th of September, 1883, defendant handed the above envelope, with the deed in question in it, to McMillan to be filed for record, we are asked, in the absence of all evidence to that effect, to infer that the deed was inclosed in this envelope when it was taken out of the post-office to which it had been sent. Such an inference is too far fetched and unwarranted, when the other fact is considered that the address on this envelope was in the handwriting of defendant. If, when it was addressed, the deed was in it, the necessity of addressing it to himself, to be delivered at another place and time, when he must then have it in possession, cannot be perceived, and the evidence fails to show any such necessity. The authorities cited by counsel abundantly establish the proposition that marriage is such a valuable consideration as will support a deed, and we have so held in the case of *Lionberger v. Baker*, 88 Mo. 447. But a deed, if made on such consideration, before it can be operative as such, must, like all other deeds, be delivered, and after a careful examination of the evidence, we have reached the conclusion that the deed in question was never delivered; and for that, if for no other reason, plaintiffs are entitled to the relief sought in their bill.

If a contract of marriage, which the evidence tends to establish, existed between said Maggie and defendant, the evidence fails to show any willingness or effort on defendant's part to fulfill it till the night of the 11th or 12th of September, 1883, when the life of said Maggie was despaired of, and she, as well as her physicians, attendants, and friends, had abandoned all hope of her, and when the probability was apparent to all that the matrimonial bonds, if then assumed, would be dissolved and broken before the rising of another sun, and which were in fact dissolved by her death within four or five days. There is abundant evidence in the record to show that defendant acted as the agent and adviser of said Maggie, and in some instances as her attorney, and that he had possession of her confidence; but, in the view we have taken of the case, it is unnecessary to discuss the point made by plaintiff's counsel that the deed, if executed, acknowledged, and delivered, was procured to be executed by the undue influence of defendant over said Maggie growing out of such confidential relations.

The judgment will be reversed, and cause remanded, with directions to the circuit court to enter a decree in conformity with this opinion.

All concur, except RAY, J., absent.

CASSATT v. VOGEL.¹

(Supreme Court of Missouri. May 7, 1888.)

EXECUTORS AND ADMINISTRATORS — PROBATE PRACTICE — ALLOWANCE OF DEMAND NOT DUE.

Under Rev. St. Mo. §§ 205, 206, which enact that "when the demand or set-off is not due at the time of trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or judgment of the court;" and, "in case the parties do not agree to rebate the demand or set-off, no execution shall issue upon any judgment until the demand or set-off upon which the judgment was rendered shall become due and payable," the court should, on allowing a claim against an estate founded on a note not yet due, if the parties do not agree to a rebate, classify the demand, and order that no execution shall issue until after the maturity of the note.

. Appeal from St. Louis court of appeals.

Alexander J. Cassatt presented a claim against the estate of one Rudolph Bircher, of which estate John C. Vogel, the defendant, was executor, for an amount due him on a promissory note not then due, secured by a deed of trust. Rev. St. Mo. §§ 205, 206, enacts that, "when the demand * * * is not due at the time of trial, the court may adjust the same, and a judgment may be rendered thereon for the amount according to the finding of the jury or judgment of the court;" and, "in case the parties do not agree to rebate the demand, * * * no execution shall issue upon any judgment until the demand * * * upon which the judgment was rendered shall become due and payable." The court allowed the claim, classing it as a sixth demand, and ordering that no execution should issue until maturity of the note. Defendant appeals.

Broadhead & Haessler, for appellant. *J. I. & F. P. Blair*, for respondent.

NORTON, C. J. In June, 1881, plaintiff presented to the probate court of the city of St. Louis a demand for allowance against the estate of Rudolph Bircher, of which estate defendant, Vogel, was executor. The demand was founded on a note executed by said Bircher for \$20,000, dated January 8, 1878, payable five years after date, with 10 per cent. interest after maturity. The payment of the note was secured by deed of trust on property said to be worth \$50,000. The probate court allowed the demand for \$20,000, and assigned the same to the sixth class of demands, and ordered that said allowance should take effect from January 8, 1883, and from that date bear interest at 10 per cent. From this judgment an appeal was taken to the circuit court, when the same judgment was rendered as was rendered by the probate court. An appeal from this judgment was prosecuted to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, and from this judgment of affirmance defendant has prosecuted his appeal to this court. The opinion of the court of appeals is reported in 12 Mo. App. 323, in which sections 205 and 206, Rev. St., are construed as meaning that when a note not due, and bearing no interest till after maturity, is presented for allowance as a demand against an estate, and the parties do not agree to a rebate, that the probate court can allow and classify the demand, with interest after maturity, but with an order that no execution be issued till after the maturity of the note. We are satisfied with the correctness of the construction put upon the above sections of the statute, and the reasoning leading to it, and hereby affirm the judgment, in which all concur, except RAY, J., absent.

¹ Affirming 12 Mo. App. 323.

LYONS *et al.* v. MURRAY.

(Supreme Court of Missouri. May 7, 1888.)

1. FRAUDULENT CONVEYANCES — DEATH OF GRANTOR — RIGHT TO PROCEED AGAINST FRAUDULENT GRANTEE.

Creditors having general judgments against a debtor cannot issue executions thereon after the debtor's death; and, where the debtor's estate proves to be insolvent, they need not proceed further at law to entitle them to equitable relief as against the debtor's fraudulent grantees.

2. SAME—WHAT CONSTITUTES—VOLUNTARY PAYMENT.

On a creditors' bill to subject a certain fund to debts, it appeared that M., one of the firm of V., M. & Co., on the death of V., administered on the partnership estate; that at that time the firm was indebted to one L., in a large sum; that M. applied all his individual means in payment of L.'s debt, and on the final distribution of the partnership estate, having obtained an order therefor, paid 43 per cent. of L.'s debt out of the firm assets; and that M. was largely indebted at the time. *Held*, that such payment to L. out of the firm assets, being for no consideration, was in fraud of M.'s creditors, and void, though L. was innocent of any fraudulent intent.

3. PARTNERSHIP—PAYMENT OF FIRM DEBTS BY INDIVIDUAL PARTNER—REIMBURSEMENT OUT OF FIRM ASSETS.

A partner, on voluntarily paying firm debts out of his individual means, does not thereby become a creditor of the firm to the amount so paid, as partnership debts are joint and several. He has only the right to bring such payments into the partnership accounts, and, after payment of other debts due by the firm, to be credited therewith in a settlement between the partners.

4. SAME—DISSOLUTION OF—ORDER OF DISTRIBUTION—PARTIES.

Individual creditors of a partner who administered the partnership estate on the death of a former partner cannot be considered parties or privies to the order of distribution of the firm assets, the administering partner being alive at the date of the order, and his individual estate not being in liquidation.

5. CREDITORS' BILL—PLEADING—SUFFICIENCY OF BILL.

A creditors' bill to subject a certain fund to debts, where it was claimed that one partner, on the death of the other, administered on the partnership estate, and paid out of his individual means a debt due from the firm to L., and on the final distribution of the firm's assets, having obtained an order of court therefor, paid L. 43 per cent. of his debt out of the firm assets, showed what the firm debts were aside from that due to L., and alleged that the surviving partner had taken credit for a fictitious payment, so as to absorb the funds in his hands, and that the fund in equity belonged to him. *Held*, that the interest of such surviving partner in the amount paid to L. under order of court is sufficiently averred, as against a general demurrer, which points out no specific objections to the bill.

Error to Hannibal court of common pleas; THEODORE BRACE, Judge.

Sarah C. Lyons and others filed a petition in the nature of a creditors' bill against Marian B. Murray as administratrix of William Luce and Edward C. Murray, respectively, deceased. A demurrer to the petition was sustained, and plaintiffs bring error.

W. H. Biggs, for plaintiffs in error. *W. P. Harrison and Smith, Silver & Brown*, for defendant in error.

BLACK, J. Plaintiffs sued out this writ of error to review the judgment of the circuit court in sustaining a demurrer to the amended petition. Aaron McPike, one of the plaintiffs, recovered a judgment against Edward C. Murray, Archibald M., William M., and Walter J. Van Horn, partners, doing business under the firm name of Van Horn, Murray & Co., for some \$1,400, in the year 1870. The other plaintiffs, Sarah C. Lyons and the Bank of Pike County, obtained judgment against Murray; the former for \$142, and the latter for \$4,740. Thereafter, and in 1870, William M. Van Horn died, and Murray gave bond as surviving partner, and administered upon the partnership effects. In 1882, Murray died, and the defendant became the administratrix of his estate. The plaintiffs then had their judgments allowed by the probate court, and classed as demands against the Murray estate. The peti-

tion makes these further allegations: That, in 1870, William C. Luce had demands allowed by the probate court against the firm assets, amounting to \$12,566; that, prior to the 14th November, 1879, Murray sold and delivered to Luce all of his individual property, real and personal, in payment and in satisfaction of these firm debts held by Luce; that, on the last-mentioned date, Murray filed a settlement in the probate court, showing a balance of firm money in his hands of \$10,875; that he then procured an order of the probate court directing him to pay 42 per cent. of the demands allowed in favor of Luce out of the firm moneys; that Murray, with intent to hinder, delay, and defraud his creditors, and to cover up his property, paid to Luce, out of the firm moneys, on these allowed demands, the sum of \$8,972; that the previous payment of the same debts by Murray out of his individual property rendered him insolvent; that the other members of the firm of Van Horn, Murray & Co. are insolvent; and that in equity the \$8,972 belonged to Murray, and should, in the hands of Luce, be subjected to the payment of the debts held by the plaintiff against the Murray estate. Luce died pending this suit, and defendant qualified as his executrix. The petition, it will be seen, is in the nature of a creditors' bill seeking to reach money in the hands of Luce.

1. The point made by the defendant that this suit cannot be maintained because the plaintiffs have not exhausted their remedy at law by execution, is not well taken. They have had their general judgments allowed by the probate court against the Murray estate. Murray, the debtor here pursued, being dead, no execution can be issued on those general judgments as against his estate; and, that estate being insolvent, no further proceedings at law are required to lay a foundation for equitable relief against a fraudulent grantee. *Merry v. Fremont*, 44 Mo. 518; *Pendleton v. Perkins*, 49 Mo. 565.

2. The plaintiff insists that, where one partner voluntarily pays debts of the firm with his individual means, he thereby becomes a creditor of the firm for the amounts thus paid, and is entitled to be subrogated to all of the rights of the creditors whose debts he paid, and hence in equity the \$8,972 was the money of Murray. But under our law a partnership debt is joint and several. Murray was bound individually for the payment of these partnership debts held by Luce, and his individual property could have been taken on executions therefor; and this, too, though the partnership was dissolved and in liquidation by reason of the death of Van Horn. When Murray paid these partnership debts, he did not stand in the shoes of the creditors. He could not, with these debts paid by him, come in competition with the other firm creditors. He had the right, however, to bring these payments into his accounts, and after the payment of the other partnership debts, the amounts thus paid by him would go to his credit in a settlement as between the partners. Neither he nor his individual creditors could demand more than his proportionate share of the residue on a balance and settlement of the accounts as between the partners. 1 Colly. Partn. (6th Ed. by Wood.) § 109, and notes; *Mott v. Railroad Co.*, 80 Pa. St. 45; *Manufacturing Co.'s Appeal*, 82 Pa. St. 152. But for the amount due him on final settlement, augmented, as it would be, by the payments made to Luce, he had what is now called a lien on the firm assets. Colly. Partn. § 109; 2 Lindl. Partn. 680. He had a right to hold the money in his hands as surviving partner, and pay what was due to himself on such balance of accounts. To the extent, therefore, that he fraudulently disposed of his interest in this surplus, to that extent he defrauded his individual creditors. But it is said the petition does not show that Murray had any interest in this fund; for it may be, for aught that is stated, that he owed it all to his partners, and there would be nothing due to him on final settlement of the accounts as between the partners. It is shown by the petition that the firm debts, aside from those held by Luce, amounted to only \$2,134; that they have been paid except the \$1,400 due to plaintiff McPike. Murray was entitled to a credit of \$12,566, as between the partners, which he did not claim, but took

a credit for \$8,972 for a fictitious payment, so as to absorb the funds in his hands. These facts, with the allegation that this last amount in equity belonged to Murray, sufficiently show an individual interest in the fund as against a general demurrer, pointing out no specific objections to the petition.

3. But, aside from any lien to be worked out through the partnership, the petition states a cause of action. It must be taken that Murray paid the debts to Luce after they had been allowed by the probate court against the firm assets. This he did with his individual property, real and personal. He then procured the order to pay to Luce, on the same debts, from the firm assets, \$8,972. This it is alleged he did to defraud the plaintiffs. It may be that this second payment was a fraud on the other partners, for it is possible that Murray should have paid this money to them, besides having paid the firm debts held by Luce; but the record shows no such a case. Besides, the partners are making no complaint; and it is a most remarkable position taken by the defendant to say that the Luce estate is not liable to the plaintiffs because some other persons may have been defrauded. It is no answer to the fraud charged in the petition to say that the partners of Murray were also defrauded.

4. It is true, the petition does not in terms state that Luce received the last payment to aid Murray in defrauding his creditors, nor is it alleged that Luce had any notice of the intended fraud. The second payment, however, was without any consideration whatever, and Luce occupies no other position than that of a voluntary donee. Murray, being largely indebted, was bound to pay his debts before he could, as against his creditors, give away his property. As to existing creditors, the donee in such cases occupies no better position than the donor. The transfer of property under such circumstances is, as to both, fraudulent in law.

5. Finally, the executrix of the Luce will intrenches herself behind the order of distribution made in the partnership estate, and insists that this order is, in effect, a judgment, and is conclusive evidence of the validity of the payment of the 42 per cent. to Luce. For the purposes of this case let it be conceded that the order is to be regarded as a judgment, and that it is conclusive as between the parties thereto; and their privies, and cannot by them be attacked for fraud except by appeal, or a direct proceeding to vacate the order for fraud. But do the plaintiffs stand in any such relation to that order? Bigelow says the doctrine of the English cases is that no one who was a party to the former proceedings, or who might have intervened or appealed from them, can, in a collateral proceeding, allege that the judgment was obtained by fraud; while the contrary is true as to persons who could not have thus intervened or appealed. Bigelow, Estop. 148. Now, when this order was procured, and the money paid pursuant thereto, Murray was alive. His individual estate was not in liquidation, and his individual creditors had nothing to do with the partnership settlements and proceedings in the probate court. Even as to the deceased member of the firm, the allowance of partnership demands against the partnership estate would not bind the individual estate. Section 65, Rev. St. Murray's individual creditors had no right to appear in the partnership proceedings, and take appeals, or object to the judgments of the court. In no sense can it be said the individual creditors were parties or privies to the order of distribution. If A. should fraudulently confess a judgment in favor of B., and that judgment should come into collision with other creditors of A., they may, in a collateral proceeding, show that the judgment was collusive and fraudulent as to the creditors of A., and as to them void. The judgment will, as to the parties thereto, stand as valid; but as to the other creditors it will be void. It is therefore not essential to the plaintiff's right to follow the money fraudulently paid to Luce that the order of distribution should be set aside.

It may be said that one of the plaintiffs is a partnership creditor; but, as no question is made of a defect of parties, we will not stop to consider what,

if any, effect that has as to him. The judgment is reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

HAZELL v. BANK OF TIPTON.

(*Supreme Court of Missouri. May 7, 1888.*)

1. ATTACHMENT—ALLEGATION OF FRAUDULENT ASSIGNMENT—RIGHT TO OPEN AND CONCLUDE.

A plaintiff in attachment, whose answer to an interplea admits an assignment under which the interpleader claims, but alleges it to be fraudulent and void, is entitled to open and close the case both in the introduction of evidence and in argument to the jury.

2. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—ACTION TO IMPEACH—PROOF OF FRAUD.

On the trial of an issue as to the validity of an assignment for benefit of creditors, an attaching creditor may give in evidence a conversation had with the assignor prior to the assignment, in which he gave as a reason for making the assignment that he could then get a better settlement with creditors.

3. SAME—ACTION TO IMPEACH—PROOF OF FRAUD—CONVERSATIONS WITH ASSIGNOR AFTER ASSIGNMENT.

Conversations had with an assignor, in the presence of the assignee, shortly after an assignment for benefit of creditors, are admissible in evidence on the trial of an issue as to the validity of such assignment in the suit of an attaching creditor.

4. SAME—RIGHTS OF ATTACHING CREDITOR—REPRESENTATIONS PRIOR TO ASSIGNMENT AS TO DEBTOR'S SOLVENCY—ESTOPPEL.

An attaching creditor seeking to hold over an assignment for benefit of creditors is not estopped by representations made to other creditors, two or three months prior to the assignment, that, in his opinion, the assignors were solvent, and worth four or five thousand dollars above their liabilities and exemptions; it appearing that representations to that effect were made by the assignors to such creditor.

5. SAME—INTENT TO DELAY CREDITORS—WHAT CONSTITUTES.

When one in embarrassed circumstances assigns all his property for the benefit of his creditors, intending only such delay and hinderance to his creditors, as are incident to the assignment, such intent does not invalidate the same.

6. TRIAL—INSTRUCTIONS—WRIGHT OF EVIDENCE.

An instruction in the nature of a demurrer to the evidence is properly refused where there is some evidence, though slight, justifying the submission of the issue to the jury.

7. APPEAL—REVIEW—HARMLESS ERROR.

An erroneous instruction cannot be taken advantage of when the same error is committed in an instruction given at the request of the opposing party.

Error to circuit court, Moniteau county; E. I. EDWARDS, Judge.

Smith, Silver & Brown, for plaintiff in error. *Draffen & Williams* and *Boonville & Johnson & Son*, for defendant in error.

NORTON, C. J. The Bank of Tipton, defendant in error, instituted an attachment suit in the Moniteau county circuit court against Cochel & Bechtel, who were merchants engaged in the sale of hardware in the town of Tipton. The writ of attachment was levied upon a stock of goods as belonging to them. On the same day said writ was levied, viz., the 3d of January, 1885, and a short time before it was issued and levied, an assignment, executed by said Cochel & Bechtel, conveying all their property to one Banick as assignee for the benefit of all their creditors, was filed for record. In March following, the said Banick resigned his trust, and James E. Hazell was duly appointed to execute the trust. At the return-term of the writ of attachment, said Hazell appeared, and, by leave of court, filed an interplea, claiming, in virtue of said assignment, the property which had been levied upon. The plaintiff bank in the attachment suit filed an answer to the interplea, denying the right of assignee, and alleging, in substance, that the assignment was made with the intent to hinder and delay and defraud the creditors of

said Cochel & Bechtel, and that the assignee, Banick, was a party to said fraud, and acting in the interest of said firm to aid them in their fraudulent purpose; that said assignment was made to him because of his insolvency and willingness to serve them; that their intention was to put the property in the hands of Banick, and secure it from execution and attachment, and use the assignment as a means of coercing their creditors into a compromise, and that said assignment passed no title to the property, either to Banick, or to interpleader, Hazell, as his successor. The replication to this answer denied all fraud, and set up that said bank had full knowledge of the financial condition of said firm, and of their intention to make said assignment, and that, by reason of its representations made to other creditors of the solvency of said firm, and their good faith in making said assignment, the bank was estopped from contesting its validity.

The issue of fraud, thus made up, was tried before a jury, and a verdict returned in favor of the plaintiff bank in the attachment suit, upon which judgment was rendered, and from which Hazell, the interpleader, has appealed to this court; and, among other grounds of error, alleges that the court erred in holding that, under the issues as made by the pleadings, the plaintiff bank in the attachment suit had the right to open and close the case both in the introduction of evidence, and in the argument of the cause to the jury. We see no just ground of complaint to this ruling, since the answer was in the nature of confession and avoidance. It admits the assignment, but alleged it to be fraudulent and void; the burden of proving which was on the shoulders of the party averring it. *Albert v. Besel*, 88 Mo. 150.

Nor do we see any just ground of complaint to the action of the court in allowing witnesses Reavis and McClay to detail a conversation had with Cochel & Bechtel a short time before the assignment was made, in which Cochel gave as a reason for wanting to make an assignment that he could then get a better compromise with his creditors, and that he wanted to make it to get a better settlement with creditors; nor in allowing a conversation to be detailed, had with Cochel & Bechtel in the presence of Banick, the assignee, the day after the assignment was made, at a meeting of the creditors held for the purpose of effecting a compromise. The presence of Banick, the assignee, at this conversation, made what was there said admissible.

It is also objected that the court erred in excluding the deposition of one Elliott, to the effect that on January 1 and 2, 1885, as the representative of certain creditors, he asked the cashier of the Bank of Tipton for his opinion as to the financial condition of Cochel & Bechtel, and was told that they, in his judgment, were solvent; that they owed the bank two thousand dollars, for which the bank held no security, but they were not uneasy; that, in his judgment, the firm was worth four or five thousand dollars clear of the world, or above their exemptions. In view of the fact in evidence that Cochel & Bechtel had made a showing or representation to the officers of the bank to the effect that they had several thousand dollars of assets over and above their liabilities, we are unable to perceive the relevancy of this evidence offered.

It is also insisted, on the authority of the cases of *Holmes v. Braidwood*, 82 Mo. 610, *Shelley v. Boothe*, 78 Mo. 77, and *Albert v. Besel*, 88 Mo. 150, that the court erred in giving the following instruction: "No. 1. If the jury believe from the evidence that the assignment from Cochel & Bechtel to Banick was made by Cochel & Bechtel for the purpose and with the intent of hindering, delaying, or defrauding any of their creditors, and that said Banick had notice thereof, then said assignment was fraudulent, and the finding of the jury must be for the defendant." Conceding this contention to be well founded, the interpleader, under the ruling made in the case of *Holmes v. Braidwood*, *supra*, is not in a position to take advantage of it, since the same vice of which he complains in the above instruction is to be found in the eighth and ninth instructions given by the court at his own instance.

The action of the court in refusing instructions asked by the interpleader, numbered 6, 10, 11, 12, 13, 16, and 20, is also complained of. Among those refused is the following, viz.: "Although the jury may believe that the making of the assignment had the effect of hindering or delaying, and was made with the intent and purpose to hinder and delay, the creditors of said Cochel & Bechtel, or any one or more of them, yet, if the only hinderance and delay intended was such as would be incidental to and a result of carrying out the said deed of assignment, it cannot be fraudulent because of the effect and intent above stated." In refusing this instruction, we are of the opinion that the court committed error. See, in addition to the cases last above cited, the following: *Lane v. Ewing*, 31 Mo. 75; *Singer v. Goldenburg*, 17 Mo. App. 550. The right of a party in embarrassed circumstances to make an assignment of all his property for the payment of his debts, and the benefit of all his creditors, cannot be questioned; and if, in the exercise of this right, he only intends such delay and hinderance to his creditors as would follow as an incident to the assignment, such intent cannot invalidate the assignment as being fraudulent.

The sixth and twentieth refused instructions were in the nature of a demurrer to the evidence, and were properly refused, as there was some evidence, though slight, justifying the submission of the good faith of the parties to the assignment. The other refused instructions were substantially embraced in others that were given, and were for that reason properly refused.

As the error noted is sufficient to reverse the judgment, it is unnecessary to notice the objections made to the action of the court in refusing to submit special issues to the jury, inasmuch as the present state of the law on that subject takes that question out of the case. Judgment reversed, and cause remanded, in which all concur, except RAY, J., absent.

POWELL v. GREENSTREET.

(Supreme Court of Missouri. May 7, 1888.)

TAXATION—SALE FOR TAXES—TITLE OF PURCHASER.

A purchaser at a sheriff's sale, on execution in a tax suit acquires only the title of the defendant in the suit, and Rev. St. Mo. 1879, § 6889, which declares that his deed "shall be *prima facie* evidence of title, and that the matters and things therein stated are true," does not make the deed evidence of title in such defendant.

Appeal from Moberly court of common pleas; G. H. BURKHARTT, Judge. Ejectment brought by J. M. Powell against J. M. Greenstreet. Judgment for plaintiff. Defendant appeals.

H. Lander and A. W. Myers, for appellant. Sears & Guthrie and W. M. Rutherford, for appellee.

BLACK, J. Action of ejectment. Plaintiff put in evidence two deeds to himself, each for different portions of the premises sued for. The deeds were executed by the sheriff of Macon county, and are based upon judgments recovered in the name of the state to the use of the collector, in suits to enforce the state's lien for unpaid taxes. In one case the judgment was rendered against Mathsulah Bevier and W. D. Hicks, and in the other against W. D. Hicks. Plaintiff offered no other evidence of title whatever. It was admitted that the land had always been vacant up to the time defendant went into possession, that he had possession at the commencement of the suit, but it does not appear when or under whom he acquired possession. It must be taken as the settled law that purchasers at these sheriff's sales, made on executions in tax suits, acquire only the right, title, and interest of the defendants in the tax suits. *Watt v. Donnell*, 80 Mo. 196; *Bank v. Grewe*, 84 Mo. 478; *Evans v. Robberson*, 92 Mo. 192, 4 S. W. Rep. 941. But, conceding this, the plaintiff then insists that the deed makes out a *prima facie* case of title in the grantee, that is to say, of former ownership of the land by the defendants in the tax suits. This claim is based on section 6839, Rev. St. 1879, which declares that the deed "shall be *prima facie* evidence of title, and that the matters and things therein stated are true." The effect of this section is to make the deed evidence without production of judgment or execution; but it is evidence of no more than it, in contemplation of law, purports to be, namely, a conveyance of all of the title of the defendants in the execution. It is no evidence that the defendants in the special execution were the owners of the land. In this respect the deed is not unlike sheriffs' deeds in general. They are made evidence of the facts recited, but it has never been held or supposed that the deed was evidence of title to the land sold in the judgment debtor.

Some other questions are discussed in the briefs, but it is useless to consider them upon the present state of the record. The judgment is reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

HARRIS v. SIMPSON.

(Supreme Court of Arkansas. May 5, 1888.)

SET-OFF AND COUNTER-CLAIM—IN JUSTICE COURT—DEMAND ARISING OUT OF FALSE REPRESENTATION.

In an action in a justice's court for the rent of a farm, it is no objection to a counter-claim, based upon the fact that the farm was smaller than the lessor had represented, that such claim constitutes an action of tort, over which the justice had no jurisdiction, as such defense may be regarded as a plea of failure of consideration; or, if demanding more than the balance due plaintiff, as an action on an implied promise to repay sums wrongfully received.

Appeal from circuit court, Pope county; C. S. CUNNINGHAM, Judge.

Action by William Harris against J. I. Simpson for the balance due on a note given for payment of rent for a farm hired by defendant of plaintiff. Defendant refused to pay such balance, on the ground that plaintiff had misrepresented the size of the farm, and the capacity of a mill and gin situated thereon. Defendant obtained judgment, and plaintiff appealed to the circuit court, where defendant again prevailed, and plaintiff appeals to this court.

Jeff. Davis, for appellant. *Wilson & Granger*, for appellee.

COCKRILL, C. J. There was no exception to the introduction of any testimony, and no part of the court's charge to the jury was assigned as error in the motion for a new trial. The motion is directed only to the court's refusal to charge as requested by the appellant, and that the verdict is not sustained by the evidence.

1. The rejected requests to charge the jury were either inconsistent with a correct enunciation of the law, were not warranted by the testimony, or were covered by the court's charge to the jury.

2. The appellee's version of the transaction out of which the suit grew is sustained by the evidence, and the judgment in his favor is supported by the cases of *Goodwin v. Robinson*, 30 Ark. 585, and *Hanger v. Evans*, 36 Ark. 334.

3. The action originated before a justice of the peace, and it is argued here, for the first time, that the appellee's counter-claim is, in effect, an action of deceit, and therefore a tort, and that the justice had no jurisdiction to hear and determine the issue made by it. The position is not tenable. The defendant could have made the fraud practiced upon him by the appellant available as a defense to the extent of extinguishing the demand against him by a plea of failure of consideration. *Goodwin v. Robinson*, *supra*. And as to the recovery over against the appellant, the counter-claim may be regarded as an action by the appellee upon the promise which the law implied that the appellant would repay the money which he had wrongfully received. *Pom. Rem. & Rem. Rights*, § 568. Affirmed.

STATE v. ASHER *et al.*

(Supreme Court of Arkansas. May 5, 1888.)

FALSE PRETENSES—WHAT CONSTITUTES—REPRESENTING MORTGAGED PROPERTY AS UN-INCUMBERED.

A false representation by defendant that a mortgage which he gave was a first mortgage, being urged thus to represent by the actual first mortgagee, is not such false pretense as to render defendant guilty of larceny under *Mansf. Dig. Ark. § 1645*, providing that one who obtains anything of value from another by means of false pretenses, with intent to defraud, shall be guilty of larceny, etc., since the first mortgagee, by urging such false representation, waived his prior lien, and thus rendered the mortgage, fraudulently obtained, a first mortgage, and therefore the pretense was not actually false.

Appeal from circuit court, Phillips county; N. T. SANDERS, Judge.

At the May term, 1887, of the Phillips circuit court, appellees were indicted for violation of section 1645 of *Mansfield's Digest*; *i. e.*, obtaining money
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under false pretenses,—Asher as principal, and Fitzpatrick as accessory. It is charged in the indictment that on the 17th of April, 1885, said Asher applied to one J. P. Moore to purchase six mules; that he represented himself as being the absolute owner of the east half of lot 251, in the city of Helena; that it was free from incumbrance; that he could give a first lien on same; and produced a deed of conveyance to the same from L. A. Fitzpatrick, reciting the full payment of the purchase money, and offered to secure the payment of the purchase money of said mules by creating a first lien on said lot; that Moore did sell him said mules on a credit to expire November 1, 1885, and took a deed of trust on said lot to secure the purchase money of the mules, which deed of trust was executed by said Asher on the 17th, and was filed for record on the 18th, day of April, 1885; that said sale was made on the faith of the security afforded by a first lien on the east half of said lot. It is further charged that at the time Asher made these representations he had already executed to said Fitzpatrick a deed of trust upon the east half of said lot, to secure the purchase money of same, which was more than the value of the lot; that said lot was not free from incumbrance; and that Asher falsely made the representation that he could give a first lien on said lot, to deprive said Moore of his property; that Fitzpatrick's deed of trust was filed for record on the 17th day of April, 1885. Fitzpatrick is indicted jointly with him as accessory. At the November term, 1887, of the court, the defendant demurred to the indictment; the demurrer was sustained, and the state appeals.

Mansf. Dig. § 1645, provides that any one who obtains anything of value from another, with intent to defraud or cheat, by any false pretense, shall be deemed guilty of larceny, and punished accordingly.

J. P. Clarke and D. W. Jones, Atty. Gen., for appellant. P. O. Thweelt, I. J. Hornor, Compton & Compton, and J. C. Tappan, for appellees.

COCKRILL, C. J., (*after stating the facts as above.*) To constitute an offense within the meaning of section 1645, Mansf. Dig., something of value must be obtained by means of a false pretense with the intent to defraud. To obtain goods with the intent to defraud is not enough. It must be accomplished by a false pretense. "By the terms of the statute the pretense must be false; and the doctrine undoubtedly is that, if it is not false, though believed to be so by the person employing it, it is insufficient." 2 Bish. Crim. Law. § 417. The false pretense charged in this case is Asher's representation that the mortgage, upon the security of which he got the mules from Moore, was the first lien on the land. If the representation is true, there is no foundation for this prosecution, however reprehensible Asher's motive may have been, because the false pretense would not be established. Now, construing all the allegations of the indictment together, is it shown that the representation was false? It is charged that Asher had previously executed a mortgage to his co-defendant, Fitzpatrick, for the full value of the land, and that it was the prior lien; but it is also charged that Fitzpatrick counseled Asher to make the representation that the land was free from incumbrance, and aided him in obtaining the mules from Moore on the faith of it. The demurrer admits that these allegations are true. Being true, the legal conclusion is that Fitzpatrick waived the priority of his lien, and is estopped from asserting it against Moore. *Scott v. Orbison*, 21 Ark. 202; *Gill v. Hardin*, 48 Ark. 412, 3 S. W. Rep. 519; *Shields v. Smith*, 37 Ark. 47. Asher's representation that Moore's mortgage was the prior lien was therefore true. Moore got just what he bargained for, according to the allegations of the indictment, and he has not, therefore, been injured in any way. The statutory offense has not been committed. *Morgan v. State*, 42 Ark. 131. It is not, as counsel for the state argues, an attempt to have an offense condoned by repairing the injury done in its commission. There has been no criminal offense. Moore might have been injured by the transaction if Fitzpatrick's mortgage note had been negotiable accord-

ing to the law-merchant, and assigned to an innocent holder for value before maturity; but there is no allegation of the existence of either of these facts, and there is no presumption that that state of facts exists. *People v. Stone*, 9 Wend. 182, 190. Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. MORGART.

(Supreme Court of Arkansas. April 31, 1888.)

1. MASTER AND SERVANT—INJURY TO RAILROAD CONDUCTOR—DEFECTIVE TRACK—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for negligently killing plaintiff's intestate, it appeared that deceased was a conductor of defendant's freight train; that the accident occurred while deceased was running the train at an immoderate rate of speed over a bridge which was being repaired, so that it gave way. *Held*, that the company was not liable for not providing a safe track; it not appearing that the accident would have occurred if the train had been run at a proper speed.

2. SAME—INJURY TO CONDUCTOR—DEFECTIVE TRACK—NOTICE.

In an action against a railroad company for negligently causing the death of a freight conductor, it appeared that the accident occurred while deceased was running his train at an immoderate rate of speed over a bridge which was being repaired, when the bridge gave way. *Held*, that the company was not negligent in not giving the train-men notice of the condition of the track, where the conductor knew that the repairs were being made, and the "slow boards" were out.

3. SAME—NEGLECT OF MASTER—BURDEN OF PROOF.

In an action against a railroad company for negligently causing the death of a conductor of defendant's freight train, it appeared that the accident occurred while deceased was running his train at an immoderate rate of speed over a bridge which was being repaired, when the bridge gave way, and that the conductor knew that the repairs were being made. *Held*, that the burden of proof was on the plaintiff to rebut the presumption of negligence, and to show that the engineer was running contrary to the conductor's orders.

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.
Dodge & Johnson, for appellant. *Scott & Jones*, for appellee.

MCCAIN, Special Judge. The plaintiff's intestate was a conductor on a gravel train on defendant's railroad. This train was derailed at the south end of the bridge across Hurricane creek, in Saline county, while going south, about noon on August 17, 1888. In the wreck which ensued, the intestate was killed; and this suit was brought by his widow, as administratrix of his estate, to recover the damages sustained by her on account of alleged negligence of defendant in causing the death of her husband. This case is here for the second time; the former appeal being reported in 45 Ark. 318. For a more detailed statement of the facts, reference is made to the former opinion. By agreement of counsel, the testimony, as found in the bill of exceptions on the former appeal, was read in evidence on the trial as if taken by deposition, except that one of the witnesses at the former trial gave his testimony orally, and one additional witness was introduced by plaintiff. The latter was examined merely as an expert, and the evidence is substantially the same as on the former appeal. The second trial took place, on change of venue, in Nevada county, and resulted in a verdict of \$9,600 for plaintiff. Defendant appealed. A number of exceptions was reserved to the admission of testimony, and to the giving and refusing of instructions. These we have examined carefully, and in detail; but we have concluded to rest our opinion on the first and second grounds set up in the motion for a new trial, namely, that the verdict of the jury was contrary to the law and the evidence. The former opinion has become the law of the case, according to the well-established rule, and the questions therein determined are not open to further discussion on this appeal.

The first ground of recovery set up in the complaint was negligence in not providing a secure track. It is conceded, and in fact it is contended by plaintiff, that the train was being run at a reckless rate of speed over the bridge,

which was at the time undergoing repairs. In the former opinion it was said that "the jury could not have found that the condition of the track or of the trestle was the immediate cause of the wreck." If this point was open for reconsideration, we are not able to see any evidence that would justify the inference on the part of the jury that there would have been any accident to the train if it had been moving at a legitimate rate of speed.

The second ground of alleged negligence was in failing to give the trainmen timely notice of the temporary condition in which the track was being maintained during the progress of the repairs. As was determined before, the conductor knew that the track was being repaired at this point. "The jury could not have found that the proper danger signals had not been displayed. The uncontradicted evidence is that the 'slow boards' were out. The track was not impassable for trains running at the speed they indicated. Hence there was no impropriety in withdrawing the flag-men." Former opinion, p. 323.

The third ground of recovery was the incompetency and recklessness of the engineer. There was evidence tending to support this charge; but, on the defense of contributory negligence, it was said, on the former appeal, that "the presumption is that the train was being operated under his [the conductor's] orders." The contributory negligence claimed by defendant was the excessive speed at which the conductor was running the train. The burden of proof as to this would be on the defendant if it were denied. But it is conceded. To rebut this, it was necessary to show that the engineer was proceeding in violation of the conductor's wishes and efforts. Nothing was offered on this point to justify consideration, and it was determined on the former appeal that "it was impossible for the jury, with a proper regard for the undisputed facts of the case, to absolve Morgart from blame in the matter of the accelerated speed." Page 325.

We think the motion for a new trial should have been sustained, on the grounds indicated, and we deem it unnecessary to enter upon a discussion of the other questions argued by counsel. Let the case be reversed, and remanded, with instructions to sustain the motion for new trial.

BATTLE, J., being disqualified, did not sit.

NEVADA COUNTY v. HICKS *et al.*

(*Supreme Court of Arkansas. April 21, 1888.*)

1. COUNTIES—POWER TO ISSUE EVIDENCE OF DEBT BEARING INTEREST—INTEREST ON DECREE.

Const. Ark. art. 16, § 1, forbidding counties to issue any interest-bearing evidences of indebtedness, does not prevent a decree against a county for a sum of money from drawing interest.

2. SAME—INTEREST ON DECREE AGAINST.

Manst. Dig. Ark. §§ 4740, 4741, providing that all judgments shall draw interest at 6 per cent., make no exceptions in favor of counties; and a decree against a county for a sum of money draws interest from the time it is rendered, though it makes no mention of interest.

3. SAME—LIABILITY TO BE SUED—ALLOWANCE OF CLAIM BY COUNTY COURT.

Though act Ark. Feb. 27, 1879, provides that no suit shall be brought against a county, yet, where a claim against it has been presented to and allowed by the county court, it becomes a judgment against the county.

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.

Smoots, McRas & Arnold, for appellant. *A. B. & R. B. Williams*, for appellees.

MOORE, Special Judge. This case is no stranger here. This court has met it, and has introduced it to the public on two former occasions; once as reported in 38 Ark. 557, and again as reported in 48 Ark. 515, 3 S. W. Rep. 524. In

1878, appellant instituted suit at law against the appellees, in the circuit court of Hempstead county, where they resided, on a bond executed by appellees in a contract for building a bridge. Appellees answered, denying the forfeiture of the bond, and claiming pay for the bridge. The cause was transferred to the equity docket, and resulted in a decree in favor of appellees for \$1,800, the value of the bridge, and \$318.50 for interest that had accrued; making total amount of the decree \$1,618.50. This decree was rendered February 8, 1880. On appeal the decree was in all things affirmed by this court. See *Nevada Co. v. Hicks*, 38 Ark. 557. After the mandate of the supreme court had been filed and recorded, the appellees made out their account against Nevada county, and presented it for allowance to the county court. Pending action of the Nevada county court upon said claim, appellant, to avoid the decree of the court in *Nevada Co. v. Hicks*, *supra*, filed her bill in the Hempstead circuit court, in chancery, praying for a review of said decree, and pleading the act of the general assembly of 27th of February, 1879; which bill was dismissed by said circuit court on demurrer, and the decree of the Hempstead circuit court, in chancery, dismissing said bill, was affirmed, on appeal, by this court, in *State v. Hicks*, 48 Ark. 515, 3 S. W. Rep. 524. After this decree was affirmed, appellees pressed their claim to a determination in the circuit court of Nevada county. One of the items in the account presented is for \$907.51, being interest upon said original decree from the date of its rendition in the Hempstead circuit court until the presentation of said account to the Nevada county court, on the 2d day of April, 1883. The allowance of the account was resisted in the county court, principally on the ground of said item of interest; and the whole account was by the county court disallowed, and the order disallowing it was appealed to the Nevada circuit court. The case was heard by the Nevada circuit court, which, among other things, adjudged that the appellees should recover from the appellant the sum of \$704.05, for their interest on said claim, from the date of the rendition of the decree in the Hempstead circuit court, on February 8, 1880, until the date of the judgment here appealed from by the Nevada circuit court; being interest at 6 per cent. on said decree in the Hempstead circuit court, from the time of its rendition until the time of the judgment here appealed from. The appellant excepted to so much of the judgment as allowed said interest, and appealed to this court.

The issue made, and the only question here presented, is as to the correctness of the court below in rendering judgment against Nevada county for interest upon the amount of the decree rendered by the Hempstead circuit court on February 8, 1880. The learned counsel for appellant earnestly argue and insist that the allowance of interest on any claim, judgment, or decree against a county contravenes the provision of section 1, art. 16, of the constitution, which forbids counties to issue any interest-bearing evidences of indebtedness. This position is not tenable. The interest allowed in a judgment, where interest is not stipulated for in the contract sued on, is not by virtue of the contract between the parties to the suit, but is by operation of law, and is in the nature of a penalty provided by the law for delay in payment of the principal sum after it becomes due. In the case of a judgment rendered against a county by a court of competent jurisdiction, the rendering of the judgment cannot, in any just or reasonable sense, be regarded as a contract by the county. The judgment is the decision or sentence of the law fixing the amount due; and we fail to see how the allowance of interest in a judgment on a claim due by a county can be construed as the contract of a county to pay interest, or as the issuing by the county of interest-bearing evidences of indebtedness. The interest on every judgment, of course, ceases to run when the judgment is paid. The usual mode of discharging a judgment or any claim against a county, is by the issue of county warrants. Such warrants do not, and cannot be made to, bear interest; this being prohibited by the above-cited article

of the constitution, and as construed and decided in the case of *Jacks v. Turner*, 36 Ark. 89. This is all that is decided in *Jacks v. Turner*.

Appellant constructs an ingenious argument, based on the act of February 27, 1879, forbidding the suing of counties; and concludes that, as no suit can be brought against a county and prosecuted to judgment, and no effects or property of a county can be sold to satisfy a judgment, sections 4740 and 4741 of Mansfield's Digest contain no authority for the allowance of interest against a county. It seems hardly necessary to pass upon the point raised in this part of the argument of appellant, in view of the decision in *State v. Hicks*, 48 Ark. 515, 3 S. W. Rep. 524. However, we proceed to remark that the sections of the statute above mentioned provide that all judgments, where there is no contract for more than 6 per cent., shall bear that rate of interest "until the effects are sold, or satisfaction be made." There is no exception here in favor of counties, or any other judgment debtor. In the case of a county, the "satisfaction made" would be by paying money, or by issuing county warrants, as its effects cannot be sold. The argument of appellant would have applied with equal force before the passage of the act of February 27, 1879; and, if sound, no interest ever was legally collectible on a judgment against a county. While it is true that by the act of February 27, 1879, counties cannot be sued in the ordinary way of bringing suits, still judgments may be and are rendered against them. Every allowance of a claim by the county court is a judgment; and unquestionably, when an appeal is prosecuted from the action of the county court in allowing or rejecting a claim, the decision of the appellate court is a judgment; and, when the judgment of the county court is reversed, the judgment of reversal, when certified to the county court, is required to be entered as "the judgment of the county court." See section 2, Act Feb. 27, 1879. Since all judgments, without exception, by sections 4740 and 4741 of Mansfield's Digest, bear interest, the conclusion cannot be escaped that the judgment or decree of the Hempstead circuit court, on which the judgment under consideration is based, should bear interest.

Appellant also calls attention to the fact that the decree of the Hempstead circuit court of February 3, 1880, did not provide for interest in the decree. The statute provides that judgments shall bear interest,—and decrees are judgments; and while it is proper to mention the interest that a judgment should bear, and *semble* necessary, where the rate is to be more than 6 per cent., the judgment or decree will bear interest, whether noted in the record entry of the decree or not. "Interest upon a judgment, which is secured by positive law, is as much a part of the judgment as if expressed in it," says the supreme court of the United States in *Amis v. Smith*, 16 Pet. 303. See, also, *Jerome v. Commissioners*, 18 Fed. Rep. 873.

An argument is further made by appellant to show that counties should be classed as sovereign governments equally with the state or the United States, and therefore never liable to pay interest, because, theoretically, governments are supposed to be always ready to pay their just debts. Counties never were sovereign; and they partake less of sovereignty now, perhaps, than before their disincorporation by the act of February 27, 1879. This claim has been in the courts till it has grown into large proportions. By a mistaken zeal and jealousy of the supposed rights of the appellant, her county court has delayed and hindered appellees from collecting their claim for many years, and it would be unconscionable, if it were legal, to confine them to the recovery only of the amount of the original decree, rendered in 1880,—and that to be paid in county warrants, perhaps, of depreciated value. But the law does not require nor warrant this at the hands of the court. Let the judgment of the Nevada circuit court be in all things affirmed.

BATTLE, J., being disqualified, did not sit.

CRAIGHEAD COUNTY v. CROSS COUNTY.

(Supreme Court of Arkansas. May 5, 1888.)

1. COSTS—LIABILITY OF COUNTY FOR—RELEASE OF DEFENDANT ON NOLLE PROS.

Under Mansf. Dig. § 2343, providing that in all criminal cases, if defendant shall be acquitted, the costs shall be paid by the county, *held*, that the entry of a *nolle pros.* is not an acquittal, and the county is not liable for costs in a misdemeanor case which has been dismissed by a *nolle pros.*

2. SAME—LIABILITY OF COUNTY FOR—ADJUSTMENT BY CIRCUIT COURT.

Under Mansf. Dig. § 2345, providing that, in all cases where the county shall be liable to pay the costs in criminal cases, the circuit court in which the case was tried shall adjust the same, and cause the same to be certified to the county court, the certificate of such adjustment by the circuit court is not conclusive of the county's liability.

Appeal from circuit court, Craighead county; J. E. RIDDICK, Judge.
J. C. Hawthorne, for appellant. N. W. Norton, for appellee.

COCKRILL, C. J. An indictment for a felony was found in Craighead county. The prosecution was removed to Cross county on the defendant's application, and was there abandoned by the state, a *nol. pros.* being entered. Cross county paid the cost, and presented an account to the Craighead county court for allowance in her favor for the amount paid. The county court rejected the claim. On appeal to the circuit court, it was allowed; and from this judgment Craighead county appeals. In the case of *Stalcup v. Greenwood Dist.*, 44 Ark. 31, it was decided that the statute does not impose upon a county the payment of the costs incurred in the prosecution of a misdemeanor which has been dismissed by *nolle prosequi*. No distinction is made by the statute between a misdemeanor and a felony, as to the county's liability for costs in case of a *nolle pros.* Mansf. Dig. § 2343. Following the construction of the statute in the case cited, no liability was incurred by Craighead county for the costs paid by Cross, and there could be no recovery. The certificate of the adjustment of the costs for which a county is liable, which the statute requires to be made by the circuit court in which the cause was tried, (Mansf. Dig. § 2345,) is not conclusive of the county's liability. It was so held in *Ouachita Co. v. Sanders*, 10 Ark. 467, and in several subsequent cases. *Chicot Co. v. Kruse*, 47 Ark. 80, and cases cited. The statute does not authorize the circuit court to cause the certificate to be made except in cases where the cause is tried. A *nol. pros.* is not a trial. Those who serve the public must be content with such remuneration for their services as the law provides. If none is provided, none can be demanded. *Fanning v. State*, 47 Ark. 442, 2 S. W. Rep. 70. Reverse the judgment, and remand the cause.

BENJAMIN *et al.* v. BIRMINGHAM.

(Supreme Court of Arkansas. May 5, 1888.)

1. VENDOR AND VENDEE—ENFORCEMENT OF VENDOR'S LIEN—PERSONAL LIABILITY OF VENDEE.

In an action to enforce a vendor's lien securing \$1,600, deferred payments on land, evidenced by P.'s four notes, it appeared that B. sold the land to P., the agent of S. and others, his co-defendants; that the deed from P. to S., as "trustee for himself and others," recited that "for the further consideration of \$1,600 * * * to be paid to myself or to B. as follows, by said S., trustee, for himself and others," etc., that, when the first of P.'s notes fell due, S. and his co-defendants paid it, and afterwards they executed their obligation in payment of the second note. *Held*, that S. was personally liable to B., but that there was no personal liability on any of his other co-defendants for any deficiency after sale of the land.

2. INFANCY—GUARDIAN AD LITEM—APPOINTMENT—RECITALS IN DECREE.

Where, in chancery, the final judgment recites that a guardian *ad litem* of minors appeared in pursuance of a due and proper appointment by the court, such recital is a sufficient record entry to establish the guardian's authority.

2. JUDGMENT—RENDITION ON CONSTRUCTIVE SUMMONS—APPOINTMENT OF ATTORNEY—MANSE. DIG. ARK. § 5190.

Manse. Dig. Ark. § 5190, providing that, before judgment can be regularly rendered against a defendant who has been constructively summoned, and has not appeared, an attorney must be appointed at least 60 days in advance, to notify him of the action, and put in a defense for him, is mandatory, and to neglect to comply with its requirements is error.

4. EXCEPTIONS, BILL OF—WHEN NECESSARY—APPEARANCE OF EVIDENCE IN THE RECORD.

Where all the oral testimony heard by the court is in the record by the recitals in a decree, a bill of exceptions is not necessary in the cause.

Appeal from circuit court, Logan county; R. B. RUTHERFORD, Judge.

Suit in chancery to enforce a vendor's lien, by one Birmingham against Benjamin and others. Judgment for plaintiff, and defendants appeal.

M. W. Benjamin, for appellants. *Sam W. Williams*, for appellee.

COCKRILL, C. J. The appellants were defendants to a suit brought by the appellee to foreclose a vendor's lien upon lands, and obtain a judgment *in personam* for the residue of the purchase money that might remain unpaid after the sale of the land. Kidder, one of the parties sought to be charged, died pending the suit, and the cause was revived against his administrator and heirs. Personal service was had on the defendants Potts, Benjamin, and Dill, and the heirs and administrator of Kidder. Slack and Hellmich are non-residents, and were served by publication of warning order. There was no defense by any one, except through the guardian *ad litem* for Kidder's minor heirs. The complaint was taken as confessed against the defendants who were personally served, except the infant heirs of Kidder. The plaintiff adduced oral proof to sustain the complaint as to the others, the substance of which the court caused to be brought upon the record by embodying it in the recitals of the decree. The proof was no broader than the allegations of the complaint, except as to Kidder's personal liability. The decree condemned the lands to be sold to satisfy the full amount of purchase claimed in the complaint, and judgment of recovery was rendered against Potts, Benjamin, Dill, and Kidder's administrator. An appeal has been prosecuted on behalf of all the defendants. The non-resident defendants, who were only constructively served, assign it as error that no attorney *ad litem* was appointed in their behalf; the infant heirs of Kidder say that there is no record entry showing the appointment of a guardian *ad litem* to defend for them; and that the attorney who acted for them in that capacity, and filed an answer for them, was the attorney of record for their co-defendant Potts, whose interest was antagonistic to their own; Benjamin and Dill submit that the decree *in personam* against them is not warranted by the record; and Kidder's administrator assigns the same ground of error as to the judgment of recovery against his intestate's estate. As the complaint was taken as confessed against the defendants last-named, the correctness of the judgment against them is only a question whether the complaint sets forth facts sufficient to warrant the judgment. The complaint alleged that Birmingham, the appellee, sold the land to Potts, and delivered him a deed, for \$2,000,—receiving \$400 in cash, and Potts' four promissory notes for the residue, reserving a lien in his deed for the unpaid purchase money; that Potts, in making the purchase, acted as the agent of Slack, Benjamin, Kidder, Dill, and Hellmich; that, shortly after his purchase, Potts conveyed the lands to Slack as trustee for his co-defendants, upon the consideration that Slack, as trustee, should pay the purchase money which Potts had contracted to pay to Birmingham. The deed from Potts to Slack, which is made an exhibit to the complaint, does not name the parties for whose benefit Slack was to hold the title to the land; and neither Benjamin, Dill, Kidder, nor Hellmich are mentioned in it. The deed is a conveyance to Slack, "trustee, for himself and others," and contains these clauses, viz.: "For the further consideration of \$1,600, together with interest there-

on, to be paid to myself [Potts] or T. M. C. Birmingham, as follows, * * * by the said W. D. Slack, trustee, for himself and others;" and "if the said W. D. Slack, trustee, should choose to pay said moneys to Birmingham on my said notes, [meaning Potts' notes for the purchase money of the land,] that in that event he is to return said notes duly receipted." The complaint alleges that "the others" referred to in Potts' conveyance are Benjamin, Dill, Kidder, and Hellmich, for whom and the said Slack the lands were purchased by Potts; and that Slack, by accepting the deed for them, bound himself, and the others for whom he held the title, personally, to the payment of the purchase price due from Potts to the plaintiff; that, when the first of the Potts' notes fell due, Slack, and the others acting in conjunction with him, paid it off; and that, when the second one matured, they executed and delivered to the plaintiff their own joint and several obligation to pay the amount thereof at a future day. The three unpaid notes executed by Potts, and the note of Slack, Benjamin, and the others, were filed with the complaint as exhibits, or set out *in extenso* in it. Upon this state of record the learned counsel for appellee certified the cause as an appeal taken for delay merely; but to affirm the judgment *in toto* requires the adoption of several propositions which we cannot approve.

1. There was no error in the proceedings against Kidder's heirs. They, with their natural guardian, were regularly served with process. James F. Read appeared, and filed an appearance for them, as guardian *ad litem*, denying the allegations of the complaint; and the final judgment recites that Read appeared, in pursuance of a due and proper appointment by the court, as guardian *ad litem*. This was sufficient to establish his authority. See *Rust v. Reives*, 24 Ark. 359. As to the other objections made by them, we do not know judicially that James F. Read was attorney for any party in the cause, and for that reason ineligible to serve as guardian *ad litem*. Mansf. Dig. § 4958. Clendenning & Read sign Potts' answer as attorneys for him, but the identity of the surnames raises no presumption of the identity of the persons.

2. As to the non-resident defendants. Before judgment can be regularly rendered against a defendant only constructively summoned, and who has not appeared, an attorney must be appointed, at least 60 days in advance, to notify him of the action, and defend for him. The statute requires it, (Mansf. Dig. § 5190,) and the provision is mandatory, (*Bush v. Visant*, 40 Ark. 124.) It is error, therefore, to proceed to judgment without complying with the requirement.

3. The question of the personal liability of Benjamin, and the others standing with him, is more difficult to solve. It may be taken as settled that, when one deals with an agent without knowing of the agency, he may elect to treat the after-discovered principal as the person with whom he contracted, and maintain his action accordingly. *Foster v. State*, 45 Ark. 328; Whart. Ag. § 298. This is true, although the contract is in writing, and affects real estate. *Briggs v. Partridge*, 64 N. Y. 357; *Williams v. Gillies*, 75 N. Y. 580; *Schaefer v. Henkel*, Id. 378; *Nicoll v. Burke*, 78 N. Y. 580. It is not necessary to the validity of the contract, under the statute of frauds, that the writing disclose the principal, and it may be shown by parol that the agent who made the contract in his own name was acting for another. Cases, *supra*; *Ford v. Williams*, 21 How. 287. When it is sought to charge an undisclosed principal as the responsible purchaser, as in this case, the statute of frauds is no protection to him, because the contract of the vendee is not required to be in writing. *Briggs v. Partridge*, 64 N. Y. 357. But this doctrine of principal and agency, invoked by the appellees to sustain the liability of Benjamin Dill, and Kidder's administrator, can have no application in the solution of the question raised by them, because the allegations of the complaint go to show that the extent of Potts' agency, and of his au-

thority to bind these defendants, is just what is evidenced by his conveyance to Slack, as trustee. Construing the allegations of the complaint most liberally, we can infer only that this conveyance executes the power in pursuance of which Potts purchased the land for the defendants from Birmingham. If he was not authorized to bind his co-defendants personally in making the purchase, the act of purchasing in his own name did not have that effect. The intention of the parties as to the extent of their obligation is the controlling test, and that intention must find expression in words or acts in order to give the vendor a cause of action against the undisclosed vendees. It found expression, in this controversy, in the conveyance from Potts to Slack as trustee. The stipulations in it about the payment of the purchase money, set forth above, are in effect an agreement by Slack, as trustee, to discharge the debt which Potts owed Birmingham, and which was secured by a lien on the land. The acceptance of the deed by Slack, to hold for himself and others, containing this provision, bound him as effectually as though the deed had been signed by him. *Binsse v. Paige*, 1 Abb. Dec. 138, and note; *Urquhart v. Brayton*, 12 R. I. 169; *Hand v. Kennedy*, 83 N. Y. 149; *Lamb v. Tucker*, 42 Iowa, 118; *Furnas v. Durgin*, 119 Mass. 500; *Crawford v. Edwards*, 33 Mich. 354. And Birmingham, for whose benefit the agreement was made, can maintain his action against Slack directly to recover the debt assumed by him. Cases *supra*; *Ringo v. Wing*, 49 Ark. 457, 5 S. W. Rep. 787; *Johnson v. Walker*, 25 Ark. 196. But the question presented by this appeal is, are Benjamin, Dill, and Kidder's administrator bound equally with Slack? They are not named in the deed; but the complaint alleges, and Potts testified, that they were the parties referred to as the "others." But there are no words used in the instrument implying an undertaking on the part of the "others" to pay the Birmingham debt; and it throws no light on the question of personal liability to show that the "others" there referred to are the parties above named. The fact that they were beneficiaries under that deed is not enough to establish a personal liability to discharge the debt due from Potts to his grantor for the purchase money. In order to give that effect to the acceptance of the Potts conveyance, the language of the instrument should express that intention. *Collins v. Rowe*, 1 Abb. N. C. 97; *Binsse v. Paige*, 1 Abb. Dec. 138; 3 Washb. Real Prop. *672, § 35a. The obligation assumed by Slack cannot be said to be the promise of the others. The insertion of the words "trustee for himself and others," after his name, is only as matter of description to show the character in which he acts, for his after-protection, and it does not affect the rights or remedies of the other parties. *Duwall v. Craig*, 2 Wheat. 56. The direct, express obligation of a trustee does not bind the persons for whose benefit he acts, but himself only. Story, Prom. Notes, § 63; *Conn v. Scruggs*, 5 Baxt. 567; *Underwood v. Milligan*, 10 Ark. 254; *McDaniel v. Parks*, 19 Ark. 671. His powers are limited to the performance of the duties imposed upon him. He has no principal to bind. There is nothing in this record to show—nothing from which it can be inferred—that Slack's obligation to pay is the act of the others. It may be that the others were willing to enter into an agreement between themselves and with Potts to enjoy a community of interest in the land, upon the condition that Slack alone should be personally liable for the debt to Birmingham. Motives of prudence would prompt such an agreement. It was competent for them to make that arrangement; and, if it was satisfactory to Potts, Birmingham cannot complain. As far as the record shows, Potts was content to rely solely upon Slack's obligation to hold him harmless; and Birmingham cannot claim to be subrogated to any greater right than his debtor, Potts, is shown to possess. The fact that these defendants joined in making the payment of the first installment of the purchase money for which Potts had given his notes, and in entering into a personal obligation to pay the second, after the execution of the deed to Slack by Potts, does not of itself establish a ratifi-

cation of Potts' acts so as to raise a promise to pay the residue of his indebtedness. It may have seemed to their interest, at that time, to discharge that part of the incumbrance, and relieve their title to that extent; but the discharge of a part of the purchase-money incumbrance, which they were under no legal obligation to pay, raises no presumption of a promise to pay off the residue. The act is consistent with their non-liability. *Williams v. Gillies*, 75 N. Y. 201. They became personally bound to Birmingham to the extent of their written obligation to him to discharge Potts' second note, and to that extent the court was warranted by the record in rendering a personal judgment against Benjamin, Dill, and Kidder's administrator. Counsel have not touched upon the question whether the proof shows that Kidder, unlike the others, confirmed all that Potts did by acts *in pais*, and we therefore waive it.

The appellee argues that we should presume that the decree is sustained by sufficient evidence, because the record discloses that oral testimony was adduced at the hearing, and there is no bill of exceptions. But the oral testimony heard by the court was reduced to writing, and embodied as a recital in the record of the decree, and is thus brought upon the record with as much certainty as could have been done by means of a bill of exceptions. The decree shows affirmatively that all the evidence considered by the court is in the record. No bill of exceptions was necessary.

No suggestion of error as to Potts has been made. The decree will be reversed as to Slack and Hellmich. As they have entered their appearance by prosecuting the appeal, no attorney *ad litem* need be appointed for them in subsequent proceedings. Their appearance in the cause is general. *Hodges v. Frazier*, 31 Ark. 58. The judgment *in personam* against Benjamin, Dill, and the estate of Kidder, in excess of the amount due on the note executed by them and Kidder to Birmingham, is reversed. Otherwise the decree is affirmed. The cause will be remanded to the Logan circuit court for further proceedings in accordance with this opinion.

LEHMAN *et al.* v. LOWMAN *et al.*

(Supreme Court of Arkansas. May 12, 1888.)

ATTACHMENT—FAILURE TO FILE COMPLAINT—CURED BY AFFIDAVIT, WHEN.

Where an affidavit for attachment contains the essentials of a complaint, the absence of the separate complaint required by the statute is not a defect that goes to the jurisdiction or power to issue the order of attachment, but is an irregularity only, subject to be cured by amendment.

Appeal from circuit court, Desha county; JOHN A. WILLIAMS, Judge.
M. W. Dickinson, for appellants. X. J. Pindall, for appellees.

COCKRILL, C. J. Lehman & Sons caused their affidavit and bond for attachment against Lowman & Bro. to be filed in the office of the clerk of the Desha circuit court. The order of attachment and summons for the defendants issued and was executed. No separate complaint was filed before the summons and order of attachment were issued. The defendants appeared and filed a motion to quash the attachment proceeding because there was no suit pending when the order issued, and upon other grounds that are not insisted upon here. Before the motion was heard, the plaintiffs filed a separate complaint. The defendants' motion was sustained, the order of attachment was quashed, and the attached property released; leave being extended to the plaintiffs by the court to cause a new order to issue as of the date of the filing their separate complaint. The plaintiffs took judgment *in personam*, and prosecute this appeal to reverse the judgment quashing their attachment.

The case of *Sannoner v. Jacobson*, 47 Ark. 31, decided since the judgment in this cause was rendered, is decisive of the question presented. It was

there determined that, if an affidavit for attachment contains the essentials of a complaint, the absence of the separate complaint required by the statute is not a defect that goes to the jurisdiction, or power to issue the order of attachment, but is an irregularity in practice only, subject to be cured by amendment. In this appeal the affidavit contains all the requisites of a complaint pointed out in *Sannoner's Case*, and the plaintiffs in apt time availed themselves of the right to amend by filing a separate complaint conforming to the strict requirements of the practice. It was error, therefore, to quash the attachment.

Reverse the judgment appealed from, and remand the cause for further proceedings.

LANDFAIR *et al.* v. LOWMAN *et al.*

(*Supreme Court of Arkansas. May 12, 1888.*)

ATTACHMENT—AFFIDAVIT BY ATTORNEY—WAIVER OF OBJECTIONS.

An affidavit for attachment, made by an attorney upon belief that the matters set forth are true, is not a nullity, and, by failure to object, the irregularity is waived, and cannot be taken advantage of on appeal.

Appeal from circuit court, Desha county; JOHN A. WILLIAMS, Judge.

Landfair & Co. caused their affidavit and bond for attachment against Lowman & Bro. to be filed, and an order of attachment and summons issued thereon. The affidavit was made by plaintiff's attorney upon belief that the matters set forth are true. No separate complaint was filed before the summons and order of attachment were issued. Defendants appeared and moved to quash the attachment proceeding because there was no suit pending when the order issued. Before the motion was heard, plaintiffs filed a separate complaint. The motion was sustained, and leave extended to the plaintiffs to cause a new order to issue as of the date of filing their separate complaint. Plaintiffs took judgment *in personam*, and prosecute this appeal to reverse the judgment quashing their attachment.

M. W. Dickinson, for appellants. *X. J. Pindall*, for appellee.

COCKRILL, C. J. The facts in this case and in that of *Lehman v. Lowman*, *ante*, 187, just determined, are the same so far as the question raised by the appeal is concerned, except in this, viz., the affidavit for attachment in this case was made by the plaintiff's attorney upon belief, as the jurat states, that the matters set forth were true. The motion to quash was not made upon that ground, and it is evident that the court made the order of quashal for the same reason as in the other case; for here, as in that case, leave was given to the plaintiffs to cause a new order of attachment as of the date of the filing of the separate complaint, thereby affirming the sufficiency of the affidavit. If the objection had been made and sustained by the court on the ground that the affidavit was insufficient, leave to amend and cure the defect must have been extended to the plaintiffs, as we decided in *Sannoner v. Jacobson*, 47 Ark. 81. The affidavit was not a nullity, and, by failing to object, the defendants waived the irregularity, (*Id.*) and cannot avail themselves of it here for the first time. Reverse and remand.

STATE *ex rel.* GARLAND COUNTY v. BAXTER *et al.*

(*Supreme Court of Arkansas. May 12, 1888.*)

COUNTIES—LEASE OF COUNTY LANDS—ACTION TO SET ASIDE—PROOF OF FRAUD.

Under Mansf. Dig. Ark. § 1407, allowing county courts to dispose of real or personal property belonging to the county, and appropriate the proceeds to the county's use, such courts are trustees of the county; and where it appears that land donated by congress to a county for public buildings was leased by such court for 99 years, without regard to the statute requiring that sales of county lands should be

by a commissioner appointed by the county court, and without advertising that the land was to be leased, to persons paying an inadequate consideration therefor, such lease may be set aside by the county on the ground of fraud.

Appeal from circuit court, Garland county; L. LEATHERMAN, Special Judge. Action by the state *ex rel.* Garland county against George W. Baxter, Walter A. Moore, and others, to set aside a lease. Judgment for defendant, and plaintiff appeals.

R. G. Davies, for appellant. E. W. Rector, for appellees.

BATTLE, J. This action was instituted in the Garland circuit court, on the chancery side thereof, by appellant, for the purpose of setting aside a lease of a certain block of ground in the city of Hot Springs, by the county court of Garland county, to George W. Baxter and Walter A. Moore, for 99 years, for the consideration of \$1,025. Baxter and Moore, and all parties in possession of the leased premises at the time the action was brought, were made defendants in the bill. The cause was tried on an issue of fact. The judgment of the court was in favor of the defendants, and plaintiff appealed. This is the second time this action has been here on appeal. The substance of the complaint is set out in the opinion delivered on the first appeal, and reported in 38 Ark. 464-466. It is alleged in the complaint that the county of Garland is ready to, and will, if permitted to do so, use and occupy the block for the purpose it was granted by congress. Appellees answered, and denied all of the material allegations of the complaint, and alleged, in effect, that the land granted to the county was unsuitable for public buildings of the county, at the time it was leased, and unsuitable for buildings of any kind, until it was laid out and improved by appellees; that the money procured from said lease was used in the purchase of the grounds and the house thereon, now owned and used by Garland county as a court-house; that the price paid for said lease was the best price that could be obtained, and that open and repeated efforts were made by the county judge for more without avail. By amendment to their answer they also allege that, since said lease was made, Garland county has bought, built, and owns a court-house, jail, and public buildings elsewhere in said county; that appellees had made improvements upon said land in controversy, before the suit was brought, aggregating in value \$25,000; that said improvements were made peaceably and in good faith, with the belief that said lease was valid, and that no objection to said improvements upon the part of the officials of Garland county was made. They make their answer a cross-complaint, and asked, if said lease be canceled, that an account be taken of their improvements, and that they be paid for them in full before they are required to surrender them. Appellant replied to the answer of appellees, denying, among other allegations, that appellees improved the land in question to the extent of \$25,000, and alleging that the improvements put upon the land were made while suit for cancellation of the lease was pending, and that the rental value of the land for the time Garland county was kept out of possession by appellees exceeds the value of the improvements and the \$1,025 Baxter and Moore agreed to pay, and that appellees have never paid taxes on their improvements. Section 19 of the act of congress entitled "An act in relation to the Hot Springs reservation in Arkansas," approved March 3, 1877, is as follows: "That a suitable tract of land, not exceeding five acres, shall be laid off by said commissioners, and the same is hereby granted to the county of Garland, in the state of Arkansas, as a site for the public buildings of said county: provided, that the tract of land hereby granted shall not be taken from the land herein reserved for the use of the United States." In pursuance of this section, the commissioners appointed to carry into effect the provisions of the act laid off and set apart the block in question to the county of Garland. The effect of the grant was to vest in Garland county the title to the block so laid off and set apart. Whether the title was

subject to be divested by the failure of the grantee to use it as a site for public buildings or not is a question not now presented for decision. The United States only can take advantage of such failure, if any one can. *Martin v. Skipwith*, 6 S. W. Rep. 514.

Having the title, did the Garland county court have the power to lease the block for 99 years, and, if so, can and should the lease be set aside in this action for fraud? In *U. S. v. Arredondo*, 6 Pet. 729, it is said: "It is a universal principle that where power is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made, or the act done, by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law." Under the laws of this state, the county court is vested with full power and authority to control and manage all the property, real and personal, for the use of the county; "to purchase or receive by donation any property, real or personal, for the use of the county; and to cause to be erected all buildings and all repairs necessary for the use of the county; and to sell and cause to be conveyed any real estate or personal property belonging to the county, and appropriate the proceeds of such sale for the use of the county." In directing how this power and authority shall be exercised, the statutes of this state provide that "the county court may, by an order to be entered on the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county; and the deed of such commissioner, under his hand, for and on behalf of such county, duly acknowledged and recorded, shall be sufficient, to all intents and purposes, to convey to the purchasers all the right, title, interest, and estate whatever which the county may then have in and to the premises to be conveyed;" and that, whenever the county court shall make an order for the erection of any public building, it shall appoint some suitable person as commissioner of public buildings, who shall superintend the erection of the same; and that, if there be no suitable ground belonging to the county on which to erect the building, "the commissioner shall select a proper piece of ground at the seat of justice, and may purchase or receive by donation a lot or lots of ground for that purpose, and shall take a good and sufficient deed in fee-simple for the same to the county, and shall make report of his proceedings to the court at its next term; and that the court shall examine the proceedings of the commissioner, and if it finds the title to such property so purchased to be good, and otherwise approve his proceedings, it shall state the approval of the same on the record, and make an order accepting the same, and directing the payment of the purchase money, if any, out of the county treasury." Mansf. Dig. §§ 1069, 1092, 1095, 1096, 1407. Under these laws the county courts are constituted the guardians of the property interests of their respective counties. "They occupy a position of trust" in that respect, "and in that relation are bound to the same measures of good faith towards the counties which is required of an ordinary trustee towards his *cestui que trust*, or an agent towards his principal." *Andrews v. Pratt*, 44 Cal. 317. When this cause was here on appeal the first time, this court said: "The bill alleges, in effect, that the county judge made an improvident, fraudulent, collusive, and illegal lease to Baxter and Moore of the land donated by congress to the county for public purposes; that the lease was a perversion of the purposes of the grant. If this be true, * * * the county had a demand against the lessees to have the lease revoked, and suit for that purpose might be brought

under the statute, in the name of the state, for the use of the county." The lease made by the county judge was ratified by the county court, the same judge presiding. But this does not alter the case. If the lease was the result of fraud, participated in by the lessees, it is void, and the ratification by the county court, the judge who made the lease presiding, could give it no additional force. Was the lease fraudulent? It is a most remarkable lease, and bears upon its face the impress of fraud. The county court, while accepting the grant of congress, refused to use it for the purpose for which it was made, and leased the block granted to Baxter and Moore for the term of 99 years. The lease amounts substantially to a sale of the block for \$1,025. In the disposal made the county court totally disregarded the statute providing that the sale should be made by a commissioner, and limiting its power to the conveyance of the right, title, interest, and estate of the county; and in the name of the county covenanted with Baxter and Moore that the county of Garland had a right to lease and demise the block in controversy for the term of 99 years, and that the county would "warrant and defend the lessees, their executors, administrators, and assigns, in the possession of the same, and against all damages whatever that may accrue by reason of the lease, or any act or acts of the lessor," and that the payment of the \$1,025 should be in full of all demands of whatever kind for rent or assessment of and on said block for the full and entire term of the lease. The covenant against assessments was evidently intended as a contract on the part of the county that the land leased should be free and exempt from taxation for all county purposes for the 99 years; and the effect of the lease, if valid, and could be carried into execution according to its terms, would be to give the leased premises to the lessees for the term of the lease. The covenants, it is true, are illegal, but in connection with the whole lease are evidence of its fraudulent character. The block was not advertised for sale or lease. The county judge, without any previous order of the court directing it to be sold or leased, offered privately to one person to lease it to him for \$600, and he refused to give it, after consulting with his attorney. He, the county judge, told Baxter he wished to lease it. Baxter requested him to find out what he could get for it, and let him know how much he was offered before he leased. He offered it to as many as three other persons. The highest price offered was \$1,000. He so informed Baxter, who then offered \$1,025, and he agreed to take it for a lease of 99 years. Baxter and Moore then leased it for 99 years, and the lease was executed, and the county court afterwards ratified it. These irregularities go to strengthen the evidences of fraud. The property leased was worth at least \$5,000, and the lease of it for 99 years at least \$4,000. One witness testified it was worth that, and a lease of it for 99 years was worth \$1,000 less. Baxter says he thought \$1,025 was a fair price for the lease, and Moore says he thought \$1,000 as much as he could afford to give for it. But they seem to have acted under an apprehension that the lease might not be valid, and made their estimates accordingly. In the execution of the lease they took covenants to secure them in the event they should fail to hold. They divided the block into 19 lots, and sublet $14\frac{1}{2}$ of them to many persons, and, in each lease made by them, only leased such interest as they had, and stipulated with their lessees that they should not be held liable for damages in the event they were dispossessed. In about one year after the execution of the lease by the county judge they leased 7 of the $14\frac{1}{2}$ lots for \$2,275, and in about three and a half years leased the $14\frac{1}{2}$ lots for \$6,375, and still had $4\frac{1}{2}$ lots left. We think that the lease executed by the county judge was a fraud upon the county of Garland, and for that reason should be set aside. The lessees to whom Baxter and Moore leased, and their lessees, do not stand in the attitude of innocent purchasers. The evidences of their own title was sufficient to put them upon notice of its invalidity. *Miller v. Fraley*, 23 Ark. 735; *Gaines v. Saunders*, 7 S. W. Rep. 301. Appellees should be severally charged with the rental

value of such parts of the block as they have, respectively, had possession of, for the time such possession continued, and should be credited with the value of improvements made before the county demanded possession; or suit was instituted to cancel the lease. In charging the appellees with the rental value of the block, they should be charged with such rents and profits as it would have yielded without the improvements, and credited with the value of improvements at the time of their recovery for the use of the county. If anything be due any one of the appellees for improvements after deducting the rents for which he is charged, he should not be dispossessed until the amount so due is paid. The appellees Baxter and Moore should be credited with so much of the \$1,025 as was paid to any officer of Garland county authorized to receive the same, or was appropriated to the use and benefit of the county. *Summers v. Howard*, 33 Ark. 490; *Grider v. Driver*, 46 Ark. 117; *Shaw v. Hill*, Id. 333.

The decree of the court below is therefore set aside, and this cause is remanded for decree and proceedings not inconsistent with this opinion.

SMITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 7, 1888.)

1. CRIMINAL LAW—CONTINUANCE—ABSENCE OF MATERIAL WITNESS.

Where a person charged with murder is tried at the same term at which the indictment is preferred, the court should grant a continuance to enable accused to procure an absent witness by whom he proposes to prove that deceased had threatened and was disposed to bully him, thereby corroborating the latter's testimony that deceased commenced the affray.

2. TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge that the jury are the sole judges of the weight of evidence, and the credibility of the witnesses, is improper, as the jury may take it as an intimation by the court that some of the witnesses are not entitled to credit, and some of the testimony without weight.

3. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW—MISCONDUCT OF COUNSEL.

The conduct of an attorney which is not excepted to at the time, and passed on by the lower court, cannot be considered on appeal.

Appeal from circuit court, Whitley county.

Lewis Smith was indicted for murder. The jury found him guilty, and he appeals.

R. L. Ewell and Smith & Perkins, for appellant.

LEWIS, J. The homicide with which appellant is charged was committed November 26, 1886, and the indictment against him was returned December 7, 1886, when the case was set for trial to take place during that term. In his affidavit for a continuance, appellant stated the absent witness, Walters, would prove that the deceased had threatened to whip him if he voted at the election just passed for a certain candidate.

There is proof in the case of previous hostility between the appellant and the deceased, who were brothers-in-law, and also of threats of each against the other. But something more than a mere threat was involved in the statement of the deceased which appellant swore he could prove by Walters. It showed a disposition and intention on the part of the deceased to hector and bully the appellant, and would have been corroborative of the testimony of appellant, supported by that of his son, that the deceased commenced the difficulty by advancing upon and striking him with a club before the latter made any hostile demonstration. For, notwithstanding there were several persons in the store-room where the killing took place, none of the witnesses state that appellant advanced upon the deceased, or commenced the difficulty; though none of them, except appellant and his son, are clear or precise in their testimony as to how the fight did really begin. We think—in view of the short time which elapsed from the killing to the trial, and the want of opportunity

afforded appellant to prepare for his defense, having been in jail—that the case ought to have been continued; for the facts even as proved on the trial do not by any means clearly show the killing was not done in self-defense, and reasonable opportunity ought to have been given the defendant to exculpate himself, which under the circumstances we think was not accorded to him.

We perceive no other error of law occurring at the trial which constitutes a ground for reversal. The conduct of the commonwealth's attorney complained of cannot be considered by this court, because it was not excepted to at the time, and passed on by the lower court.

The instructions are all correct except the fifth, in which the jury are told they are the sole judges of the weight of the evidence, and credibility of the witnesses. That instruction is unnecessary, and ought never to be given; for, while it may not in every case be taken by the jury as an intimation by the court, that some of the witnesses are not entitled to credit, and some of the testimony is without weight, it is sometimes so interpreted by them, and, when such is the case, it is prejudicial and erroneous.

For the error indicated the judgment of conviction is reversed, and cause remanded for a new trial.

GILLON v. KENTUCKY NAT. BANK.

(*Court of Appeals of Kentucky.* April 7, 1888.)

1. PRINCIPAL AND SURETY—RELEASE OF SURETY—NEGLIGENCE OF CREDITOR.

In a suit against a surety on a note, negligence of the holder in collecting the note, and in selling certain whisky left as collateral, is not shown, so as to discharge the surety, when it appears that the whisky was sold at its full market value, though defendant testifies that it was worth to him greatly more than it was sold for.

2. SAME—RELEASE OF SURETY—REPRESENTATIONS BY BANK PRESIDENT.

Where defendant is surety on a note held by a bank, representations by the president, which he denies having made, that he would not hold defendant, as the collateral would be sufficient, thereby misleading defendant, and preventing him, as he claims, from protecting himself, the representations having been made without other consideration, and three months after defendant became bound as surety, will not discharge him.

3. SAME—DISCHARGE OF SURETY—USURY.

In a suit against a surety on a note, usury in the note cannot affect the surety where the claim of the payee amounts to more than the note for which the surety is bound.

Appeal from Louisville chancery court.

Suit against John Gillon, surety on a promissory note. Judgment for complainant, and defendant appeals.

Richards & Harris and *Elliott & Hemingray*, for appellant. *Carey & Spindle*, for appellee.

PRYOR, C. J. The appellant is the surety of Huette & Son to the Kentucky National Bank on a note for \$2,500. When sued on the note he pleaded that the bank had ample collaterals to pay all the indebtedness by Huette & Son, including the debt on which the appellant was liable. It is further alleged that the bank agreed to look to the collaterals for payment, and, in consequence of that fact, the appellant neglected to provide means to obtain from Huette & Son indemnity. (2) That, having collaterals sufficient to pay off the indebtedness, the bank, by its carelessness and negligence, caused the whisky to be sacrificed, selling it for greatly less than it was worth, causing the loss on the appellant, and therefore he should be released; that the bank, if it had used diligence, could have made the debt shortly after the maturity of the notes, and besides, if the collaterals had been sold at an earlier date the debts could have been made.

From the testimony in this case we see no reason for charging the bank with a want of diligence, or any neglect on its part that should result in the discharge of the surety. The collaterals consisted of warehouse receipts for

whisky, and the whisky was disposed of at the market price. Huette & Gillon testify that the whisky was worth to them greatly more than it was sold for, but the testimony of those entirely disinterested in this controversy shows that it sold for its full market value, and some of it was, in fact, sold by Huette himself, and it brought greatly less than the sum realized by the bank. By the terms of the pledge, Huette & Son had the same right to sell the whisky that the bank had, and did sell a portion of it, applying the proceeds to the payment of the notes the collaterals were intended to secure. Some of the paper, and perhaps all of it, was renewed from time to time, with the hope that whisky might advance, and in that way a sufficient sum be realized from the collaterals to pay off all the debts. The renewals were for the benefit of the debtors, Huette & Son, and, if the whisky had been sold at the maturity of the notes, such a sale would have been regarded as a sacrifice also, if the price of whisky had advanced. The bank, under the pledge, had the right to sell when the notes matured, or it had the right to renew, still holding the collaterals for its protection. Huette & Son, as well as Gillon, had notice that the whisky would be sold, and, if selling for less than its market value, should have purchased it, as they state it was worth more to them than the market price. There is nothing in this record to release the surety by reason of the sale of the collaterals, or the whisky, or by reason of any neglect on the part of the bank. It is said, however, by the surety that Fetter, the president of the bank, represented to him that the collaterals would pay all the indebtedness, and that he would not look to him for payment, and, relying on Fetter's statement, he was misled and failed to protect himself against danger of loss. This Fetter denies, and the statements of the two are directly in conflict, but, whether so or not, these representations, if true, were made three months after the appellant became bound as surety, when Fetter had no right to release Gillon—and particularly in the absence of any other consideration than that the bank already had. It is improbable, too, that Fetter, who had declined to discount any more of Huette & Son's paper on the faith of the security the bank then had, should exact security for the additional borrowing, and then, in three months after the surety had become bound, release, or attempt to release, him from all liability. It is inconsistent with the conduct of the most ordinary business man, and certainly inconsistent with the usual mode of conducting bank transactions. These collaterals were pledged to secure certain specific debts, and, after that, by an agreement with the bank, any surplus of the collaterals was to be applied to any other paper held by the bank; and this included the debt on which Gillon is bound as surety. There was no surplus left, but, on the contrary, Huette & Son still owe the bank more than \$3,000. The \$2,250 loaned Huette & Son after the agreement to apply the surplus was money advanced to pay tax on whisky taken in pledge to secure a note of \$750 loaned before February 23, 1883; this whisky did not sell for enough to pay the amount of loan and the tax. The exhibit filed by the bank shows the entire transaction, and there is no reason for disturbing the judgment below. If there was any usury in the notes, and there doubtless was, it cannot affect the surety, as the claim of the bank unpaid amounts to more than the note for which the surety is bound. Judgment affirmed.

HARROLD v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 21, 1888.)

1. CRIMINAL LAW—APPEAL—REVERSAL OF JUDGMENT—ERROR IN TRANSCRIPT.

Where a conviction of willful and malicious shooting was reversed on appeal because it appeared by the transcript that the indictment charged simply willful shooting and on the second trial defendant was again convicted on the same indict-

ment, which on the second appeal appears to have been good at first, the mistake having been in the transcript, reversal will not be ordered again simply because the indictment was held defective before.

2. SAME—HARMLESS ERROR—JUDGMENT FOR A LESS PENALTY THAN IS ASSESSED BY THE JURY.

Where the jury find defendant guilty of felony, and fix his punishment, but recommend that he have credit for the time already served under a previous conviction, and the court renders judgment reducing the time by six months served, the irregularity is not prejudicial error entitling defendant to a reversal.

3. SAME—PERMITTING JURY TO TAKE INDICTMENT TO JURY-ROOM.

Under Crim. Code Ky. 1883, § 248, providing that, "upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause," as it is usual to give them the indictment, it is not reversible error if upon it is indorsed a previous jury's verdict of conviction.

*** Appeal from circuit court, Kenton county.**

Indictment and conviction of John A. Harrold for willful and malicious shooting. Defendant appeals.

Hallam & Meyers and Fisk & Fisk, for appellant. *W. W. Cleary and P. W. Hardin*, for appellee.

LEWIS, J. Appellant was indicted for the statutory offense of willfully and maliciously shooting and wounding another with intent to kill, and at the August term, 1887, of the trial court, convicted and sentenced to confinement in the penitentiary for four years; but, upon appeal to this court, that judgment was reversed, and case remanded for further proceedings consistent with the opinion then delivered. 6 S. W. Rep. 121. The ground of that reversal was that, as shown by the transcript then before us, the indictment charged appellant simply with willfully shooting and wounding another with intent to kill, and the jury were instructed, upon that hypothesis, to find him guilty of a felony. Upon the return of the case he was retried under the same indictment; and the jury having found him guilty, and fixed his punishment at confinement in the penitentiary for three years and six months, he again appeals to this court. The principal ground relied on for reversal is that inasmuch as this court in the former opinion decided the indictment, as it was by mistake then made to appear, was defective, we should adhere to that decision, though the indictment, as it in the present transcript truly and correctly appears to us, is entirely free from the supposed defect. The effect of sustaining such a proposition would be to place it in the power of a ministerial officer to defeat justice, not merely for the time being, but permanently and effectually. The result of reversing the former judgment has been a new and distinct trial, and the only question proper for us to now consider is whether there has been any error of law committed, to the prejudice of the substantial rights of appellant. It now clearly appears to us, and it is not disputed, that the indictment actually returned by the grand jury, and under which appellant has each time been tried, contains a charge of the offense of willfully and maliciously shooting and wounding another with intent to kill, which is by statute made a felony; and consequently the lower court was authorized to instruct the jury upon that hypothesis, as was done; and the verdict, if sustained by the evidence, about which there is no controversy, must stand, if there be no other error of law.

It seems the jury, after finding appellant guilty, and fixing his punishment, recommended in their verdict that he have credit for the time already served in the penitentiary, and the court in its judgment undertook, perhaps improperly, to reduce the time of confinement from three years and six months to three years and thirteen days, by giving him credit for the time he had been confined under the previous conviction. But, though it is not the province of the jury to make any suggestion or recommendation for a reduction of punishment below the period actually fixed in their verdict, nor of the court to render judgment for a less or different punishment than that prescribed in

the verdict, we are unable to perceive how appellant has been prejudiced by the irregular proceeding of the lower court. So far from it, he has been really benefited by the judgment; for the time of his confinement has been thereby lessened, and cannot exceed the period fixed by it.

Section 248, Crim. Code, provides that, "upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause;" and, as it is usual and proper for them to take the indictment, we do not think the court erred in that respect, although there was written upon the indictment the verdict of the previous jury. Nor do we see how appellant has been prejudiced; for it is almost impossible to conceal from a jury the result of a previous trial, if one has taken place. Moreover, as the present verdict is less than the former one, it is clear the jury was not influenced by what had previously taken place.

There being, in our opinion, no error of law in the trial of this case prejudicial to the substantial rights of appellant, the judgment is affirmed.

MCCAULEY *et al.* v. BUCKNER *et al.*

(Court of Appeals of Kentucky. April 26, 1888.)

1. WILLS—CONSTRUCTION—NATURE OF ESTATE.

A testator devised lands to his daughter "and the lawful heirs of her body," declaring his wish that her husband should have no control or management of the property, and appointing a trustee for his daughter and "her heirs" in the management of the same. *Held*, that such devisee took an absolute estate in the lands, "heirs" being used as a word of limitation.

2. SAME—CONSTRUCTION—INTENTION OF TESTATOR—EVIDENCE.

The testimony of the draughtsman of a will is not admissible to prove the intention of the testator.

Appeal from circuit court, Christian county.

McCauley, Peacher & Co., judgment creditors of H. C. Buckner, a son of S. A. Buckner, caused execution to be levied upon H. C. Buckner's interest in "the lands devised by the will of Samuel Gordon to Sarah A. Buckner and the lawful heirs of her body." Subsequently they filed their petition in equity against S. A. Buckner, H. C. Buckner, and the other children of S. A. Buckner, setting forth the above-mentioned judgment, execution, and levy upon the land in controversy, and asserting that H. C. Buckner owned an interest in said land by reason of the terms of the will of Samuel Gordon, praying an interpretation of said will and a sale of H. C. Buckner's interest in the land under the same. S. A. Buckner answered, claiming a fee-simple estate in said land, while all her children disclaimed any interest therein. Plaintiffs offered to prove by the draughtsman of Samuel Gordon's will what the testator's expressed intention was at the making of the will, which testimony was rejected. From a decree declaring S. A. Buckner the owner of a fee-simple estate in the land, plaintiffs appeal. It is to be observed that Sarah A. Buckner is in the will of Samuel Gordon designated as Sarah E. Buckner.

H. P. Phelps & Son, Breathitt & Stites, Campbell & Ferguson, and C. H. Bush, for appellants. *Petree & Downer and John Feland & Son*, for appellees.

LEWIS, J. The question in this case is whether Sarah A. Buckner took under the will of her father, S. Gordon, probated in 1852, an absolute or estate for life in the property devised to her. For if she had only an estate for life, then her son H. C. Buckner has an interest in remainder, which may be subjected to the satisfaction of appellant's debts; otherwise not. The will is as follows: "*Second*. I wish my son William M. Gordon to have five negroes out of my estate which shall be equal in value to the following five, which were given to my daughter Sarah E. Buckner in the year 1837; and I also

give and bequeath to my son the Oak Grove and Waggoner tracts of land. *Third.* I give and bequeath unto my daughter Sarah E. Buckner, and the lawful heirs of her body, lands of my estate of equal value to those given to my son William M. If after the division is made there should be any landed estate remaining, then I wish such remnant to be equally divided between my son William M. Gordon and Sarah E. Buckner and the lawful heirs of her body. *Fourth.* I wish the balance of my estate, real and personal, to be equally divided between my son, William M. Gordon, and Sarah E. Buckner and her lawful heirs. It is my wish that F. W. Buckner, the husband of my daughter Sarah E. Buckner, shall not have any control or management over any part or parcel of the property left by me to my daughter Sarah E. Buckner and her heirs, and I hereby appoint my friend W. H. Pendleton trustee for my daughter S. E. Buckner and her heirs in the management of the property of my daughter, for the benefit of her and her heirs, etc."

"Lawful heirs of her body" under our statutes, as often construed by this court, are words of limitation import, and, unless a contrary intention plainly appears from the will itself, are to be regarded as giving to the devisees an absolute estate. The words quoted are twice used in the will as descriptive of the estate devised to Mrs. Buckner, and the words "her heirs" are used the same number of times, apparently for the same purpose, and as the devise to William M. Gordon, son of the testator, is unaccompanied by the same or any words descriptive of the estate devised to him, it might be inferred that they were intended by the testator to be understood in the sense and meaning of the "children" of Sarah E. Buckner; in which case her interest under the will would be held as either an estate for life, remainder to her children, or else a joint estate with them. But if, looking at the whole will and giving meaning to each part of it, it can be reasonably inferred the testator had some other object or purpose for the frequent and seemingly unnecessary repetition of the words "heirs of her body" and "her heirs," it should be construed so as to effectuate that purpose, rather than pervert the well-settled meaning of such words. The testator clearly manifests in the will a fixed purpose that the husband of his daughter should have no control or management of any part of the property devised to her; for not only does he use full and emphatic language for that purpose, but in order to secure it beyond contingency, he appoints a trustee to manage the property for the benefit of her and her heirs. And it is proper to remark that, in connection with that subject, he uses words "her heirs" instead of "heirs of her body." It is not a reasonable supposition that he intended the trustee to hold the property after her death for the use of her children, but his object evidently was to create for her a separate estate in it, and place it beyond the reach or control of her husband. We do not, therefore, think there is enough in the context of the will to authorize us to assume that the testator intended his daughter to take a less, or different, estate in the property devised to her than the language of the will, as heretofore interpreted by this court, and as it must be presumed it was understood by him, clearly and legally imports. The purport and effect of the testimony of the person who wrote the will is simply to prove, not what the testator expressed,—for about that there is no controversy,—but what he intended to express; and, as heretofore held by this court, it is for that purpose incompetent. *Wheeler v. Dunlap*, 13 B. Mon. 291. If the testator intended to devise to his daughter merely a life-estate, it would have been easy for him to have said so, and no better evidence of the utility and necessity of the rule of evidence just stated could exist than is afforded by the effort to prove, by the draughtsman, nearly 40 years after he wrote the will, that the language used was intended to convey a meaning entirely different from what it imports. Judgment affirmed.

P'POOL *et al.* v. THOMAS *et al.*

(Court of Appeals of Kentucky. May 3, 1888.)

1. TRUSTS—RESULTING—ACTION TO ESTABLISH—EVIDENCE.

In an action to establish a resulting trust in land, alleged to have been paid for with money of M., and the title, in violation of agreement, taken in the name of T., there was evidence that T. had agreed with M., his wife, to purchase the land, using her money, and have the deed made to her; that he often promised to make her a deed to the land, and, a short time before her death, told her he had done so. On the other hand there was evidence that he had said that he had paid for the land with a crop of tobacco raised on the farm. *Held*, that the proof of the agreement, consisting of the recollection of witnesses 26 years after it is alleged to have been made, of what they heard T. and M. say about it, and the admissions of T. being at most in general terms, was not sufficiently clear and satisfactory to establish the trust.

2. SAME—ACTION TO ESTABLISH—EVIDENCE—DEGREE OF PROOF.

A resulting trust in land may be established by parol evidence; but such evidence must be clear and satisfactory.¹

Appeal from circuit court, Caldwell county.

Action by Nancy A. P'Pool and others, heirs at law of Mary M. Thomas, against Amanda C. Thomas and another, to establish a resulting trust in land. Plaintiffs' petition was dismissed, and they bring this appeal.

G. W. Duvall, for appellants.

BENNETT, J. In 1859 C. C. Thomas and Mary M. Thomas, being husband and wife, and residents of the state of Tennessee, the former came to Caldwell county, Ky., and there purchased a tract of land containing 200 acres from — Miller, for which land said Thomas agreed to pay \$700. He took a bond for a title to said land,—as is probable, from the evidence,—in his own name. In 1865 said Miller made to said Thomas a deed to the land. Said Thomas and his wife, Mary M. Thomas, moved upon said land in 1859, and resided thereon as their home. In 1876 Mrs. Mary M. Thomas died, and in the same year C. C. Thomas married the appellee, Amanda C. Thomas, with whom he lived until 1885, when he died. By Amanda C. Thomas, C. C. Thomas had two children, one of whom is living. C. C. Thomas left a will by which he devised to Amanda C. Thomas said tract of land during her life, and remainder to his children by Amanda C. Thomas and Mary M. Thomas. Amanda C. Thomas renounced the provisions of the will and claimed a homestead in said land, which, not being worth exceeding \$1,000, was allotted to her as a homestead. The appellants, the children of C. C. Thomas by his first wife, Mary M. Thomas, instituted this action in equity in the Caldwell circuit court against the appellee Amanda C. Thomas, and her child by C. C. Thomas, for the purpose of setting aside the deed to C. C. Thomas, and having the said land conveyed to them, upon the ground that C. C. Thomas purchased and paid for said land with money belonging to Mary M. Thomas, by an agreement with her that the purchase was to be made for her and the deed taken to her and her bodily heirs; but that he violated said agreement, and had the deed made to himself. Upon the hearing of the cause the circuit court dismissed the appellants' petition, and they have appealed to this court.

There is proof in the case which tends to show that C. C. Thomas agreed with his wife, Mary M. Thomas, to use the money which she was to receive from her father's estate in the purchase of a home in this state, and have the deed made to her and her bodily heirs; that, after the purchase of the land in controversy, he paid for it with the money that he received from her father's

¹A resulting trust in real estate may be proved by parol testimony; but such proof must be full and clear. *Lofton v. Sterrett*, (Fla.) 2 South. Rep. 887; *Walton v. Karnes*, (Cal.) 7 Pac. Rep. 676; *Mallagh v. Mallagh*, (Cal.) 16 Pac. Rep. 535; *Sullivan v. Sullivan*, (Tenn.) 6 S. W. Rep. 876. Respecting resulting trusts, see *Smith v. Brown*, (Tex.) 18. W. Rep. 573; *Bedford v. Graves*, (Ky.) 1 S. W. Rep. 534, and note; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604, and note; *Carter v. Challin*, (Ala.) 3 South. Rep. 313.

estate; that he often promised her to make her a deed to the land, and he a short time before her death told her he had done so. On the other hand, there is proof in the case that he said that he had paid for the land with the proceeds of a crop or crops of tobacco he had raised on the farm. The proof of the agreement consists in the recollection of the witnesses, 26 years after it is alleged to have been made, of what they heard C. C. Thomas and Mary M. Thomas, his wife, say about it; and the proof of these witnesses does not clearly establish the fact of the agreement, but at most their evidence is only moderately persuasive that such an agreement was made. As to the payment for the land with Mary M. Thomas' money, the proof, while it tends in that direction, by no means clearly establishes the fact, and when it is considered in connection with the proof that C. C. Thomas claimed that he had paid for the land with the proceeds of his tobacco, the dubiousness as to the truth of the matter is still more serious. While it is the established law of this state that resulting trusts may be established by parol evidence, yet it is equally well established that the evidence establishing such trusts should be clear and satisfactory. It was formerly held that parol evidence was not admissible to prove that the holder of the legal title to land purchased the same with trust money and took the conveyance to himself, in violation of a verbal agreement with the person for whom he was acting, whereby to raise a trust as to title in the *cestui que trust*; but this court, as well as others, has departed from this rigid rule, and allows such trusts to be established by parol evidence; but such evidence must establish the trust clearly and satisfactorily. *Snelling v. Utterback*, 1 Bibb, 609; *Letcher v. Letcher*, 4 J. J. Marsh. 593. The facts of this case illustrate the wisdom of this rule, for here, after a lapse of 26 years, and nearly 10 years after the death of Mary M. Thomas, and after C. C. Thomas had married again, and died, leaving his second wife and one child by her, the appellants attempt to establish the trust by their own proof of the admissions of C. C. Thomas, which belongs to that class of evidence denominated as the weakest in law, and which admissions, at most, are in general terms, and do not show with reasonable certainty that the agreement was made with his wife, or that her money was actually used to pay for the land, both of which facts must concur in order to establish such a trust. The judgment of the lower court is affirmed.

WHEELER v. BRAMEL.

(Court of Appeals of Kentucky. March 27, 1888.)

1. **TAXATION—LISTING LAND IN THE NAME OF ONE NOT THE OWNER—LEGALITY OF SALE.**
Under Gen. St. Ky. p. 749, § 1, providing that land must be listed for taxation in the county where it lies, no matter where the owner is, and, to enable the assessor to ascertain the proper person in whose name to make the list, he can swear witnesses, etc., a tax sale of land which has been listed in the name of a person who is neither the owner nor an agent, will not pass a valid title to the purchaser at such sale.
2. **SAME—FAILURE TO SUBJECT PERSONALTY—SALE OF LAND.**
A sale of land for taxes, where it appears that no effort was made to first subject the personal property of the owner to the payment of the tax due, and no tax receipt was tendered him before the sale, is invalid, and passes no title to the purchaser.
3. **SAME—VOID TAX SALE—RIGHT OF PURCHASER TO REIMBURSEMENT.**
Where a purchaser of land at a tax sale sues for its recovery, claiming no lien on the property for the taxes paid by him, and it appears that, before the suit was commenced, defendant offered to reimburse the purchaser for the amount so paid, and that the purchaser may still recover it, the failure of the court, after finding that the purchaser has no title to the land sued for, to render judgment against the property for the amount of taxes paid by him, is not error.

Appeal from circuit court, Robertson county.

Suit in equity by M. E. Wheeler against Charles Bramel, to recover certain land purchased by plaintiff at a tax sale. Judgment for defendant, and plaintiff appeals.

W. W. Kimbrough, for appellant. *Alvin Duvall*, for appellee.

LEWIS, J. The tract of 40 acres purchased by appellant at the sale by the sheriff for taxes appears to have been listed in the name of M. V. Prather, or, rather, the assessor simply copied from the book of a previous assessor, without attempting to ascertain who was the owner of the land; and, according to the first report made by the sheriff, he sold it as the property of W. V. Prather, though subsequently, after the report was filed and recorded, he added words describing Prather as attorney. The land, at the time it was assessed, belonged to Armstrong & Taylor, residents of an adjoining county; and there is no evidence showing that they authorized Prather, as their agent or otherwise, to list the land for taxes, or to pay them. The statute requires real estate to be listed, in the county where situated, against the owner of the first freehold estate therein; and, to enable the assessor to ascertain the person in whose name to make the list, he is empowered to swear witnesses, and compel them to testify. He has also access to the evidence of title and ownership to be found in the clerk's office. It seems to us reasonable diligence should be required on the part of the assessor in listing, or causing to be listed, land in the name of the proper person; and, while it is not in all cases practicable to ascertain the names of owners of land residing out of the county, the assessor is not excusable for listing land in the name of a person who neither owns nor claims the land, nor is authorized, as agent, to list or pay taxes on it. And we think, when land is thus listed in the name of a person who is neither the owner nor agent, that the sheriff cannot sell it for taxes, and pass a valid title to the purchaser. The tract of two acres, purchased by appellant at the same time, appears to have been listed in the name of the owner, who we think the evidence shows continued a resident of the county some time after the sheriff commenced collecting taxes due for that year; but no effort was made to subject his personal estate to payment of the tax due, nor was a tax receipt tendered to him before the land was sold. Appellee is now in possession of and claims both tracts, and we think the lower court properly adjudged appellant's deed from the sheriff did not invest him with the title, nor the right to recover the land. But, having bid for and paid the amount of taxes due on the two tracts, we think the court should have adjudged he had a lien thereon for the amount so paid by him; and have directed a sale to satisfy it upon the refusal of appellee to pay it; and for that error the judgment dismissing the action must be reversed for further proceedings in accordance with this opinion.

ON REHEARING.

(May 15, 1888.)

LEWIS, J. The only relief asked for in the petition of the plaintiff (appellant) is judgment for the two tracts of land. There is no lien on the land for the amount bid at the tax sale, \$13.85, claimed, or judgment prayed therefor. On the contrary, it is proved that appellee, before the commencement of the action, offered to reimburse appellant all he had paid on account of the taxes; but he refused to accept it, preferring to sue for the land. While we should not have reversed the judgment upon the sole ground, the lower court had required appellee to pay back to appellant the amount bid by him at the tax sale, if such had been the case, and appellant may still recover it, it does not seem to us, upon a rehearing, that the chancellor, as the record stands, erred in failing to render such judgment, and the former opinion is so changed as to simply affirm the judgment, and the mandate must be modified to correspond therewith.

NEWPORT & L. T. P. R. Co. v. FITZSIMMONS *et al.*

(Court of Appeals of Kentucky. April 24, 1888.)

EASEMENTS—ENFORCEMENT OF RIGHTS—INJUNCTION.

In a petition to enjoin an encroachment on a right of way over a strip of land, the evidence of both the ownership and possession of such strip was confused and contradictory. *Held*, that the disputed facts should have been submitted to a jury in a legal action.

Appeal from chancery court, Campbell county.

Action by the Newport & Licking T. P. R. Company against Patrick Fitzsimmons and others, to enjoin them from encroaching on a right of way. Judgment for defendants, and plaintiff appeals. For former opinion, see 7 S. W. Rep. 609.

J. C. Wright and Geo. Washington, for appellant. *John S. Duckert*, for appellees.

HOLT, J. In considering the petition for a rehearing we have read the brief for the appellant, which was not on file when this case was decided. Counsel are in error in assuming that the averments of the amended petition, filed October 28, 1885, were not denied. Waiving the question whether the pleadings theretofore filed by the appellees had not in substance already put them in issue, yet by an order made on January 13, 1886, they were, by consent, "traversed of record." This order certainly related to the amended petition filed in October, because the appellees pleaded to that filed on April 18, 1885. Upon a reconsideration of the case, we see no reason for not adhering to the opinion already delivered. The action is in nature to quiet title. The remedy sought is by injunction, and summary. The party seeking such relief must show a clear right. The exact extent and location of the appellant's right of way, as well as its extent of possession, when this action was instituted, is left in doubt by the conflicting testimony. Upon this record the relative rights of the parties to this contention are in doubt. At least, the case is not clear for the appellant. It is not, therefore, one for summary equitable intervention. The chancellor passed upon the evidence, and appears to have been of this opinion. We concur in his view, and the petition for a rehearing is overruled.

KENTUCKY CENT. R. CO. v. KINNEY.

(Court of Appeals of Kentucky. April 28, 1888.)

LIMITATION OF ACTIONS—TIME PRESCRIBED BY CHARTER OF COMPANY—RIGHTS OF SUCCESSORS.

In an action for damages against a railroad company for killing a cow, it appeared that the road on which the injury occurred was operated at the time by defendant as successor of a company whose charter prescribed a limitation of six months within which such actions could be brought against it, but that the road was originally owned by another company whose charter did not contain such limitation. *Held*, in the absence of evidence as to the terms under which defendant held possession, that it must be presumed that the road was operated under authority of the charter of the company originally owning the same; that the fact that such company still has a corporate existence shows that it retains an interest in the road, and that such action may be maintained if commenced within one year after the cause arose.

Appeal from circuit court, Bourbon county.

Action by William Kinney against the Kentucky Central Railroad Company, to recover damages for the killing of plaintiff's cow. It appeared that the line of road on which the injury occurred was constructed, and for a time operated, by the Maysville & Lexington Railroad Company, and that, at the time of the injury, the defendant was controlling and operating the same. The charter of the Covington & Lexington Railroad Company, whose successor

defendant is, required all actions for injuries to live-stock to be brought within six months after the injury, and, this action not having been commenced within that time, it is insisted that it is barred. The trial court held that defendant was operating the road under the charter of the Maysville & Lexington Railroad Company, and judgment was rendered for plaintiff. Defendant appeals.

G. C. Lockhart, for appellant. *McMillan & Talbott*, for appellee.

LEWIS, J. It seems to be conceded in argument that the railroad from Paris to Lexington passing over the land of the appellee was originally constructed and owned by the Maysville & Lexington Railroad Company. But although the road between those two points was, at the time appellee's cow was killed, and now is, in the possession of appellant, the Kentucky Central Railroad Company, it does not appear in what manner, or upon what terms it was acquired, whether by lease or purchase; nor does it make any difference, for, in the absence of evidence to the contrary, it must be presumed the road is now operated under the authority conferred by the charter incorporating the original company and owner, and subject to the terms and conditions therein prescribed. And the fact that the Maysville & Lexington Railroad Company still has a corporate existence shows it retains and has an interest in the road, and that the provisions of its charter govern and regulate the operation of the road. It may be, and doubtless is, true that the possession and control of the road by appellant is legal, and exists in virtue of statutory enactment; but it does not follow,—any more than it would if an individual had become the owner or lessee,—that the original charter has been repealed, and the conditions and restrictions under which it was intended the road should be operated have been abrogated. In our opinion, therefore, the provision in the charter incorporating the Covington & Lexington Railroad Company, under which appellant claims title, prescribing the limitation of six months within which an action for killing cattle may be commenced, does not apply to the road from Paris to Lexington, but such action may be maintained if commenced within one year from the time the cause arose. As the lower court so ruled, and no other ground for reversal is made, the judgment is affirmed.

SMOOT v. SCHOOLER.

(Court of Appeals of Kentucky. March 29, 1888.)

HIGHWAYS—ESTABLISHMENT BY STATUTORY PROCEEDINGS—DESCRIPTION OF LAND TO BE CONDEMNED—SUFFICIENCY.

A writ of *ad quod damnum*, which directs the sheriff to summon a jury to meet on the land of the proprietors over which it is proposed the road shall run, and to assess the damages in the mode specified by statute, that mode being set forth in the writ, sufficiently describes the land, under Gen. St. Ky. 1883, c. 94, § 8, providing that a writ of *ad quod damnum* shall be awarded commanding the proper officer to summon a jury to meet on the land of the proprietors over which it is proposed the road shall run, and assess the damages for the land proposed to be taken.

Appeal from circuit court, Owen county.

On motion of J. C. Smoot, the county court of Owen county appointed viewers to examine the route of a proposed new road. The viewers' report was filed, showing the line of the proposed road by courses and distances. Thereafter, on application of Thomley Schooler, a writ of *ad quod damnum* issued, under Gen. St. Ky. 1883, c. 94, §§ 8, 9, providing that a writ of *ad quod damnum* shall be awarded commanding the proper officer to summon a jury to meet on the land of the proprietors over which it is proposed the road shall run, and assess the damages to each for the land proposed to be taken. When the inquest of the jury was filed, Schooler moved to quash the writ and inquest because the writ did not sufficiently describe the land. The motion was

overruled, and the road established. Schooler appealed to the circuit court, which court reversed the order of the county court. From this judgment Smoot appealed.

E. E. Settle, for appellant. *J. W. Greene*, for appellee.

PRYOR, C. J. This appeal is from a judgment of the circuit court reversing an order of the county court establishing a public road. There is no evidence found in the record applying to many of the exceptions taken to the proceeding in the county court, and the result of the controversy must therefore depend on the regularity of the proceedings, consisting of the application for the appointment of viewers, their report, and the judgment based upon it. The application made in this case for the appointment of viewers could not well be more definite, in the absence of an actual survey; and the report of the viewers, accompanied by the survey made, shows the entire line of the contemplated road by courses and distances. The statute has been strictly followed both in the application and the viewers' report, and the only question left for this court to pass on arises from the action of the circuit court in reversing the order of the county court because the writ of *ad quod damnum* was not sufficiently specific. The writ directs the sheriff to summon a jury to meet on the land of the proprietors over which it is proposed the road shall run, and to assess the damages in the mode specified by the statute, that mode being distinctly set forth in the writ. The day was fixed, and the appellee notified. The writ was asked for by the appellee, and under it the inquest was held, and returned to the county court, where, upon evidence being heard, the road was established. When the writ and inquest were returned, the exception was made that it was too indefinite, and a motion made to quash it for that reason. It is not urged here, nor was it insisted on in the county or circuit court, so far as appears from this record, that the jury went upon and assessed other land of the appellee than that proposed to be condemned. They were required to meet on this land, and no other, and it was the duty of the sheriff, or the appellee, if he desired it, to point out the land, which he did, and the inquest was held. The appellee, as well as the sheriff, could have obtained a copy of the survey or the viewers' report. The quantity of land, the route, and the distance appear on its face; and, while they may not have seen proper to do so, the fact exists that the sheriff complied with his duty, and this is the more patent, as the only exception made is to the writ itself. The requisites of a petition for the recovery of land, or of a viewers' report, are not required in a writ of *ad quod damnum*. If the sheriff fails to perform his duty, or the jury had valued other land than that authorized, it is the subject of an exception; but, where no such objection is made, the writ following the statute, the exception that it is not sufficiently descriptive is unavailing. In all such proceedings the particularity required, applies to the application and to the report of the viewers, constituting, as they do, the foundation of the proceeding, and upon that the writ issues.

The circuit court erred in quashing the writ, and for that reason the judgment is reversed, and remanded for proceedings consistent with this opinion.

PEET *et al.* v. COMMERCE & E. S. RY. CO.

(*Supreme Court of Texas.* April 20, 1888.)

1. WILLS—CONSTRUCTION—DESCRIPTION OF LEGATEES—LEGAL HEIRS.

A wife devised to her husband her half of the homestead for life, "with remainder to my legal heirs," and also certain property "in trust for my legal heirs," and directed the revenue of the property paid "to my legal heirs, with remainder after my husband's death, or the relinquishment of said trust, * * * to my legal heirs." The husband was authorized to sell any of the property, and reinvest the proceeds as he might deem beneficial to her legal heirs. The wife had no descend-

ants at her death. Her father, mother, brothers, and sisters survived her. *Held*, that the husband did not take, under the will, as "legal heir," under Rev. St. Tex. art. 1646, providing that, in the distribution of separate estates, the surviving husband shall take all the separate personal estate, etc., where the deceased wife leaves no descendants.

2. **SAME—CONSTRUCTION—DESCRIPTION OF LEGATEES—DECLARATIONS OF TESTATOR.**

Declarations by the testator, made about the time the will was executed, are inadmissible to show what persons the testator intended should take under the will; parol evidence not being admissible to contradict, add to, or explain the contents of a will.

3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—WHAT IS—PROOF.**

Under Rev. St. Tex. art. 2353, providing that all the effects the husband and wife possess at the dissolution of the marriage shall be regarded as common effects, unless the contrary be satisfactorily proved, evidence that the property claimed as a deceased wife's separate property was purchased during marriage, and possessed by the husband at her death; that the wife, at marriage, had property invested in another state, which was subsequently reinvested in Texas, mostly in a homestead, recognized as common property; and that part of the property claimed was made by the husband with her money in such a way as to make it common property,—is insufficient to show that the property was the wife's separate estate, though she attempted to dispose of it as such by will.

Appeal from district court, Dallas county.

H. B. Robertson and Wright, Wright & Eckford, for appellants. *Leake & Henry*, for appellee.

STAYTON, C. J. Appellants, being judgment creditors of H. W. Keller, caused a writ of garnishment to be served on the appellee, through which they seek to reach shares of stock in the company claimed to belong to Keller. The appellee denied having anything in its hands belonging to Keller, and the answer was controverted. The shares stand in the name of the wife of Keller, who died testate prior to the time the writ of garnishment was served. There are two issues in the case: (1) It is claimed that Keller, under the terms of his wife's will, became the owner of the shares; (2) that the shares were owned in community by Keller and wife, and therefore subject to the payment of the debt, whether Keller took his wife's interest under the will or not. Mrs. Keller died on May 17, 1883, leaving a will, made but a few days before her death; and, at the time of her death, she left surviving neither child, children, nor descendants, but left father, mother, and brothers and sisters. By the will of Mrs. E. L. Keller she bequeathed to her husband, H. W. Keller, her half community interest in their homestead for life, "with remainder to my legal heirs." By the third clause she says: "I give and bequeath to my beloved husband, in trust for my legal heirs, my street-railroad property in the city of Dallas, known as 'Commerce & Ervay Street Railroad,' together with all stock, live and rolling, franchises and rights, pertaining to the same, and direct that he superintend the management of the same, * * * and, after paying all expenses incidental to the running, maintaining, and keeping said property in good condition, the remainder of the revenues derived from the management of said property I direct shall be paid over to my legal heirs, share and share alike, with remainder after my husband's death, or the relinquishment of said trust by him for any cause or reason whatever, to my legal heirs." The sixth clause bequeathed her furniture and her paintings and pictures to her husband absolutely. The seventh clause appointed H. W. Keller executor, and authorized him to sell any of her property, and reinvest in any property or enterprise he may deem beneficial to her legal heirs. The court held that, under this will, said 61 shares of stock were held by H. W. Keller, not in his own right, but in trust for Mrs. Keller's legal heirs, and that the same was not subject to garnishment as the property of H. W. Keller. It is claimed by appellant, under the facts stated, that H. W. Keller took under the will as "legal heir."

Under the statutes regulating the descent and distribution of an intestate's separate estate, a husband, the wife leaving no child, children, or their de-

scendants, would take all of her personal estate and one-half of her realty, without remainder to any person; and, if the wife leave neither father, mother, nor brothers or sisters, or their descendants, then the husband would be entitled to her entire estate. The proposition contended for by the appellants is that, by the term "legal heirs," the husband takes, under the will, the shares of stock in controversy, on the ground that, as to such property, the statute, in case of intestacy, makes the husband the legal heir. For the purposes of this case it may be conceded that the words "legal heirs," nothing appearing to show that they were used in a will in a different sense, mean the person on whom the law casts title to property owned by an intestate, and not next of kin. But can such a meaning be given to the words used in the will of Mrs. Keller, when it is considered in its entirety? We think not. If the meaning which the testatrix intended should be given to the words "legal heirs" can be ascertained from the will itself, then such meaning they must bear, whether this be their technical meaning or not; and, in arriving at the real intention of the testatrix, we must look to her surroundings at the time of her death, for with reference to these she must be presumed to have used the language found in the will. The paragraph in which she disposes of her interest in the homestead evidences that she did not include, within the words "my legal heirs," her husband; for the estate which she devises to such heirs is only a remainder, to be enjoyed after her husband's death. In the third paragraph, by which the parties concede that she intended to dispose of the shares of stock in controversy, the bequest to her husband was "in trust for my legal heirs," who are shown to have been the persons intended to be benefited by the legacy; for the net means resulting from the operation of the railway were to be paid to them by the trustee, share and share alike, so long as he should live, or execute the trust, with remainder to the persons designated her "legal heirs" after her husband's death, or such time as he should relinquish the trust. The word "remainder," used in this paragraph of the will, was evidently not used in its technical sense; but its meaning, as used, is obvious. The creation of the trust, the husband being made trustee without being given any beneficial interest, with specific directions that the net means should be paid to persons who are designated as the legal heirs of the testatrix until the happening of one of two contemplated events should terminate the trust, one of which would occur at the very moment the life of her husband would cease, while the other might occur at any time, when the intended beneficiaries should take absolutely, forbid the holding that the testatrix intended her husband should take as a legal heir. The testatrix throughout recognized the fact that more than one person would take under this, the preceding, and seventh paragraphs of the will, which could not have been had she intended him to take as legal heir; and the persons she intended should take, during the life of her husband, were to receive, and from him as trustee, share and share alike. The seventh paragraph invests the husband with a naked power, to be exercised in the sale of property belonging to the estate of the testatrix, and in the reinvestment of the proceeds, as he may deem beneficial to her legal heirs,—a power unnecessary if it had been her intention to give the property to him. When the testatrix conferred upon her husband a right or power, she did so by designating him as her "beloved husband, H. W. Keller," or as her "beloved husband;" and this is done in such connection as clearly to show that she did not intend to include him in the bequests made to the persons whom she designated as her legal heirs; for some of these bequests or devises were not to be fully enjoyed by the persons designated as legal heirs until the death of her husband. We conclude that it was not the intention of the testatrix to give the shares in controversy to her husband, in whole or in part, but to her relatives by blood,—to her next of kin.

The intention of a testator "must be ascertained from the meaning of the words in the instrument, and from those words alone. But as he may be

supposed to have used language with reference to the situation in which he was placed, to the state of his family, his property, and other circumstances relating to himself individually, and to his affairs, the law admits extrinsic evidence of those facts and circumstances, to enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the particular facts in the case." *Hunt v. White*, 24 Tex. 652. Parol evidence, however, cannot be introduced to contradict, add to, or explain the contents of a will, by proving declarations made by the testator before, at the time of, or subsequently to the making of a will. The court should have excluded the evidence of declarations made by Mrs. Keller, about the time the will was written, as to the persons she intended should take under it. *Id.* 651.

The testatrix and H. W. Keller were married in the state of Mississippi, in the year 1866; and it is claimed that the stock in controversy was bought with money, or the proceeds of money, she then had. No proof seems to have been offered as to the laws in force in the state of Mississippi at the time of the marriage; and if we assume them to have been the same, in reference to the property rights of persons then contracting marriage, as the laws in force in this state, then any property bought with money, or the proceeds of money, owned by Mrs. Keller at the time of her marriage, was her separate estate. But the statute declares that "all the effects which the husband and wife possess at the time the marriage may be dissolved, shall be regarded as common effects or gains, unless the contrary be satisfactorily proved." Rev. St. art. 2853. The shares of stock in controversy were purchased during the marriage, and were possessed by the husband and wife at the time of her death; and from this it follows that the burden of proving that they were the separate property of Mrs. Keller rests upon the appellee. The evidence bearing on this question is very loose and unsatisfactory. There is evidence tending to show that Mrs. Keller, at the time of her marriage, may have had something over \$3,000, which was invested in a house and furniture in the state of Mississippi that was afterwards sold, and the proceeds sent to Texas, and invested in some property here; but the evidence tends strongly to show that the most of the proceeds of this property was invested in the homestead disposed of by the will, and therein recognized to be community property. The homestead in Mississippi was shown to have been sold for \$3,000, and it is stated that this money was sent to Dallas, but whether so immediately after the sale is not made to appear. This is all the money which, with any clearness, is shown to have been the separate estate of Mrs. Keller and brought by her into Texas; yet we find that, near the time this money is claimed to have reached Texas, her brother claims to have had in his hands seven or eight thousand dollars of her separate means, of which he received four thousand two hundred dollars from J. L. Harris & Co., of New Orleans. Whether the sum last named embraced the money received from the sale of the homestead in Mississippi is not made clearly to appear. In reference to this matter, H. W. Keller testified as follows: "She sold the homestead for \$3,000, and the money was brought to Dallas. I am not sure whether it was all put into Mr. Dooms's hands or not. I used some of the money for her, buying and speculating in cotton, and shipping it to New Orleans. The money went into the hands of J. L. Harris & Co., of New Orleans. Some of it Harris & Co. sent to her, and they sent some of it to Mr. Downs, here in Dallas. That was in the spring of 1876, prior to our coming to Texas. The money went to Dooms in a check from New Orleans. Sometimes I would buy drafts from parties, and send them to New Orleans, and make a few dollars that way. We had no banking facilities then." From this evidence the inference is almost irresistible that the money, in part at least, which is claimed to have been the separate property of Mrs. Keller, was money made in speculating in cotton that may have been bought with her money. We have seen that Dooms received from Harris & Co. \$4,200, and that firm seems to have sent a further

sum to Mrs. Keller. Such evidence is not sufficient to trace separate property. On the contrary, it tends to show that a part of the money claimed to have been the separate property of Mrs. Keller was acquired in such way as to make it community under the laws of this state. The broad statement of conclusions as to the character of the funds, made by H. W. Keller, cannot override the legal conclusions that arise from the facts stated by him. We have no disposition further to comment upon the evidence in this case. In fact, in view of another trial, it would be improper to do so; but we feel constrained to hold that the evidence is not sufficient to show that the shares of stock in controversy were purchased with the separate means of Mrs. Keller. If they were not, they are subject to sale for the payment of her husband's debts, notwithstanding her will.

The judgment will be reversed, and the cause remanded, that the case may be more fully developed, and the rights of the parties more definitely shown, than they are by the record before us. It is so ordered.

Ex parte SUNDSTROM.

(Court of Appeals of Texas. 1888.)

CONSTITUTIONAL LAW—POLICE POWER—SUNDAY LAWS.

Pen. Code Tex. art. 186, which provides that "any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of any such person, who shall sell or barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement, on Sunday, shall be fined," etc., is constitutional.

On rehearing. Appeal from criminal district court of Galveston county; G. COOK, Judge.

Habeas corpus. Applicant was charged with selling liquor on Sunday, in violation of article 186, Pen. Code, and sued out a writ of *habeas corpus*. The statement of facts is in full as follows: "It was proven that the applicant is, and was on October 3, 1887, a licensed retail liquor dealer in the city and county of Galveston, state of Texas, and, as such, on said day, the same being Sunday, sold at retail a drink or glass of whisky, the same being an intoxicating liquor, to one W. Cushman, as charged in the complaint, a copy of which is annexed to the application, and is in evidence. Said sale was made in the morning before 9 o'clock. There is an ordinance of the city of Galveston in force and effect which is as follows: 'No. 9. An ordinance providing for the punishment of persons selling or bartering on Sunday. Be it ordained by the city council of the city of Galveston: Section 1. Any merchant, grocer, or dealer in wares and merchandise, or trader in any lawful business whatever, who shall barter or sell on Sunday, between the hours of 9 o'clock A. M. and 4 o'clock P. M., shall be fined not less than twenty nor more than fifty dollars. Sec. 2. The preceding section shall not apply to the sale of burial or shrouding material, drugs, medicine, ice, milk, newspapers, and the sending of telegraph messages.' * * * It was further proved that a large proportion of the merchants of the city of Galveston, as well as other dealers and other traders, are Jews, and of the Jewish religion or faith, which requires the observance of Saturday as a day of rest and cessation from labor and business, just as the Christian religion requires a like observance of Sunday as the Sabbath, or day of rest. The charter of the city of Galveston was also considered in evidence. It was also proven that there has never been a local option election held in the city or county of Galveston, or any precinct thereof, nor any vote of the voters thereof, for the purpose of determining whether the sale of intoxicating liquor should be prohibited in said city, county, or precinct, under the local option laws. The petition for *habeas corpus*, and its exhibits, the fiat of the judge, the return of the officer, the sheriff of Gal-

veston county, elsewhere appearing in record, are also agreed to be taken as a part of this statement without being copied therein." After hearing, the applicant was remanded, and from the judgment he appealed. The judgment being affirmed, the court rendering an oral opinion, this motion for rehearing was made. Article 186, Pen. Code, and the articles preceding and following it, are as follows: "Art. 183. Any person who shall hereafter labor, or compel, force, or oblige his employes, workmen, or apprentices to labor, on Sunday, or any person who shall hereafter hunt game of any kind whatsoever on Sunday within one-half mile of any church, school-house, or private residence, shall be fined not less than ten nor more than fifty dollars. Art. 184. The preceding article shall not apply to household duties, works of necessity or charity; nor to necessary work on farms or plantations in order to prevent the loss of any crop; nor to the running of steam-boats or other watercrafts, rail cars, wagon trains, common carriers; nor to the delivery of goods by them, or the receiving or storing of said goods by the parties, or their agents, to whom said goods are delivered; nor to stages carrying the United States mail or passengers; nor to foundries, sugar-mills, or herders who have a herd of stock actually gathered and under herd; nor to persons traveling; nor to ferrymen, or keepers of toll-bridges, keepers of hotels, boarding-houses, and restaurants, and their servants; nor to keepers of livery stables and their servants; nor to any person who conscientiously believes that the seventh or any other day of the week ought to be observed as the Sabbath, and who actually refrains from business and labor on that day for religious reasons. Art. 185. Any person who shall run or be engaged in running any horse-race, or who shall permit or allow the use of any nine or ten pin alley, or who shall be engaged in match-shooting, or any species of gaming for money or other consideration, within the limits of any city or town on Sunday, shall be fined not less than twenty nor more than fifty dollars. Art. 186. Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of any such person, who shall sell or barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement, on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term 'place of public amusement' shall be construed to mean circuses, theaters, variety theaters, and such other amusements as are exhibited, and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives, and places of like character, with or without fees for admission. Art. 186a. The preceding article shall not apply to markets or dealers in provisions as to sales of provisions made by them before 9 o'clock A. M., nor to the sale of burial or shrouding material, newspapers, ice, ice-cream, milk; nor to the sending of telegraph or telephone messages at any hour of the day; nor to keepers of drug-stores, hotels, boarding-houses, restaurants, livery stables, barber shops, bath-houses, or ice-dealers; nor to telegraph or telephone offices. Art. 187. The preceding article shall not apply to the sale of drugs and medicines on Sunday.

J. B. Stubbs, for appellant, cited, upon the question of the constitutionality of article 186, *Cooley*, Const. Lim. 476, 484-486, 488-494, 580, 589, 590; *Tied. Lim. Police Power*, 5, 6, 176, 185; *Black*, Const. Prohib. § 54; *Ex parte West-erfield*, 55 Cal. 551; *Gordon v. Association*, 12 Bush, 110; *In re Parrot*, 1 Fed. Rep. 481; *Slaughter-House Cases*, 16 Wall. 97; *Ah Kow v. Numan*, 5 Sawy. 562; *Strauder v. West Virginia*, 100 U. S. 303; *City of Canton v. Nist*, 9 Ohio St. 439; *Cincinnati v. Rios*, 15 Ohio, 225; *Johns v. State*, 78 Ind. 332; *Ex parte Neuman*, 9 Cal. 502.

Asst. Atty. Gen. Davidson, for the State.

The statement of facts brings this case within the rules laid down by this court in the case of *Flood v. State*, 19 Tex. App. 584, and *Bohmy v. State*,

21 Tex. App. 597, 2 S. W. Rep. 886. The relator is subject to the punishment as denounced by Pen. Code, art. 186, and Acts 20th Leg. 108. He does not come within the exceptions set out and enumerated in the succeeding articles, 186a and 187. Article 186a, Acts 20th Leg. 108; Pen. Code, art. 187. The statement of facts records the fact that there are in Galveston city many Jews, who regard Saturday as the Sabbath, but it does not show that the relator is a Jew, nor does it show that he has a religious right in selling whisky from his saloon to Jews on Sunday. He does not assert that he is a Saturday religionist, or that he observes Saturday as a holy day, or a day of sanctified rest. From an inspection of the record it will be seen that the applicant is charged with violating article 186, Pen. Code, and that he does not bring himself within the exemptions and exceptions of articles 186a and 187. By proving that Jewish citizens inhabit the city of Galveston, it is inferred that appellant's idea is that the exception in article 184 of the Code, with reference to parties who observe Saturday religiously, is to be ingrafted upon said articles 186, 186a, and 187. By the terms of said article 184, it is seen that it applies alone to article 183, and does not extend beyond that article with its exceptions. The idea of theology and religion and religious observance does not enter into article 186, as it does into articles 183 and 184. It is strictly a police regulation, and reaches no further. He also sends up the copy of an ordinance of the city of Galveston prohibiting sales, etc., by merchants on Sunday, limiting the hours from 9 A. M. till 4 P. M., and that between those hours no sale can take place. The charter of Galveston is not sent up, and its power to pass such an order, contravening the statute, is not shown. What power said city has to pass a valid ordinance of this character is not made to appear, and this court cannot know judicially. The said ordinance is in derogation of our laws; and, if the charter gives the city council the authority to pass same, it should be made to appear. Adjudicated cases show that such power does not exist under our Revised Statutes. *Flood's Case*, 19 Tex. App. 584; *Bohmy's Case*, 21 Tex. App. 597, 2 S. W. Rep. 886. If the writ is intended as a thrust at the constitutionality of the law, then it is answered that such argument is fallacious, and is in the face of the books and the decisions. Such laws are constitutional, and clearly within the police power of the legislature to pass. This matter is too long and too well settled to doubt now, or be called in question, or to need authority to support it. On the whole subject, see the following authorities: *Potter's Dwar*, St. 444, 450-462; *Cooley*, Const. Lim. 476-478, 588-594, 713, 715, 719; *Tied. Lim. Police Power*, 1-9, 175, 178, 612; *Bohl v. State*, 3 Tex. App. 683; *Albrecht v. State*, 8 Tex. App. 313; *Gabel v. Houston*, 29 Tex. 343; *The Sunday-Law Cases*, 30 Tex. 527; *Ex parte Andrews*, 18 Cal. 679; *Ex parte Burke*, 59 Cal. 6; *Ex parte Koser*, 60 Cal. 177; *Thorpe v. Railroad Co.*, 27 Vt. 140; *State v. Noyes*, 47 Me. 189; *Lake View v. Cemetery Co.*, 70 Ill. 192; *Specht v. Com.*, 8 Pa. St. 312; *State v. Amb's*, 20 Mo. 214; *Com. v. Dexter*, 149 Mass. 28-32, 8 N. E. Rep. 756; *Voglesong v. State*, 9 Ind. 112; *Shover v. State*, 10 Ark. 259; *Bloom v. Richards*, 2 Ohio St. 387; *Lindenmuller v. People*, 33 Barb. 548.

WILLSON, J. Sundstrom, the applicant, being held in custody by the sheriff of Galveston county under a warrant of arrest issued upon a complaint charging him with selling liquor on Sunday, he being a retail liquor dealer, he sued out a writ of *habeas corpus* before the Honorable GUSTAV COOK, judge of the criminal district court. Upon the hearing of said writ, Judge Cook remanded the applicant to the custody of the said sheriff, and from said judgment applicant appealed to this court. At the last term of this court at Tyler, said judgment was affirmed. Applicant, by his counsel, filed a motion for rehearing, accompanied by an able and elaborate brief and argument, assailing the constitutionality of the law under which the applicant was being prosecuted, to-wit, article 186, Pen. Code. This motion was taken under advise-

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ment, and transferred to this branch of the court, in order that the questions presented might be thoroughly examined into, and that the assistant attorney general might have the opportunity of replying to the brief and argument of the counsel for applicant. The assistant attorney general has filed a brief and argument in which he has fully, and, to our minds, satisfactorily and conclusively, answered the propositions and arguments advanced by counsel for the applicant. He has cited and reviewed the decisions bearing upon the questions, and we find, upon examination, that his conclusions are fully supported by the authorities. It would be a useless consumption of time on our part to enter upon a discussion of the questions involved, which discussion would be necessarily lengthy, when they have been so ably and exhaustively discussed by the assistant attorney general. We shall therefore content ourselves by referring to and adopting his brief as our opinion in this case. The motion for rehearing is overruled.

MORRIS v. HAND *et al.*

(*Supreme Court of Texas.* April 17, 1888.)

COURTS—JURISDICTION TO DECREE SALE OF LANDS IN ANOTHER STATE.

In a suit brought in New York, where defendant resided, for specific performance of a contract to convey land in Texas, a judgment was rendered requiring defendant to execute a deed according to the contract, and, in default thereof, to pay plaintiff a certain sum of money, or the value of the land. Afterwards defendant was adjudged insane, and his committee was decreed by the court to convey the land in question to plaintiff. *Held*, that a deed executed in pursuance of such decree is ineffectual to pass title to the land, the court of one state not having power to compel a sale of land in another state to be made by one in a fiduciary capacity.

Commissioners' decision. Appeal from district court, Montague county.

Davis & Garnett, for appellants. *Stephens, Mattock & Herbert*, for appellees.

MALTBIE, J. This suit was brought on the 5th day of June, 1884, by the appellees, James Hand and others, the only heirs of Jacob S. Hand, against the appellant, J. S. Morris, to recover a tract of land in Montague county patented to the heirs of John J. Hand. The evidence puts the title to the land in appellees unless their claim is defeated in whole or in part by other facts proven on the trial. The land was patented September 6, 1855, by virtue of a certificate issued to the heirs of John J. Hand, on account of services rendered by said Hand in the Texas revolution. John J. Hand was massacred at Goliad, leaving Jacob S. Hand his only heir at law. Appellees derive their title as heirs at law of Jacob S. Hand. It was shown that on the 17th day of May, 1854, Jacob S. Hand entered into a written contract with Leander Fox by which Hand agreed to give Fox one-half of all the lands to which he was entitled in Texas as the heir of his son John J. Hand, in consideration that Fox should recover the same from J. C. Cordova and R. R. Royal, obligating himself to convey to Fox one-half of the land, and acknowledging that Fox was the owner of one-half of such land, and that he (Hand) had no claim or title to such half. It appears that both Fox and Hand were residents of Montgomery county, in the state of New York, and that they continued to reside there until the death of Hand, which occurred in the year 1860. Appellant introduced in evidence a transcript of the proceeding of the supreme court of Montgomery county, N. Y., in the matter of Lewis C. Brown, committee of Jacob S. Hand, which showed that on 7th day of April, 1859, Hand was adjudged a lunatic, and that Brown was appointed committee of his estate. It also contained the petition of Brown as such committee, filed in the supreme court of Montgomery county on January 28, 1860, showing that, during the year 1857, Leander Fox commenced in said supreme court against Jacob S. Hand a suit for the specific performance of the above contract of May 17,

1854, and that, afterwards, on 17th day of November, 1858, judgment was rendered requiring Jacob S. Hand within 20 days thereafter to execute to Leander Fox a deed to one-half of all the lands in Texas to which he, Jacob S. Hand, was entitled as heir of John J. Hand, and, in default thereof, that Jacob S. Hand pay to Fox the sum of \$2,500 as the value of the lands; that Hand failed to comply with the decree, and that judgment was rendered against him for \$2,855.32, as the value of the land and costs and damages, which judgment was a lien on all of the real estate of Hand situated in Montgomery county. The petition further represented that Brown, as committee, had obtained a stay of the judgment, with leave to file an answer, but, not believing that he would be able to successfully defend the suit, he had entered into an agreement with Fox to compromise it, Fox to take the whole of the Texas lands in satisfaction of the judgment; and asked that such compromise be approved by the court as beneficial to the estate. The court, after taking proof, adjudged that it would be beneficial to the estate of Jacob S. Hand that the compromise be made, and ordered that Lewis C. Brown, as committee, make a deed to the land to Leander Fox. The compromise was approved March 27, 1860, and a deed made in pursuance thereof on 10th of April thereafter, which was read in evidence. Appellant proved that Fox conveyed the land to E. W. Wood on 22d of July, 1878, and that he was in possession, claiming under Wood. The trial was before the court without a jury, and resulted in a judgment in favor of appellees for all of the land.

The supreme court of Montgomery county, N. Y., had jurisdiction of the parties and the subject-matter of the suit, and the fact that it did not have the power to enforce its decree against the land in Texas constitutes no objection to the right to entertain the suit. 1 Story, Eq. Jur. 730, 731, § 744; Wat. Spec. Perf. 65. The court being one of general jurisdiction, the presumption is that it had the right to render an alternative judgment against Jacob S. Hand, and make it final against him personally for dollars and cents upon his failure to comply with its decree ordering him to convey one-half of his Texas lands to Leander Fox. But it is settled without conflict of authority that courts of one state or country have no authority under any circumstances to divest the title to real estate situated in a foreign state or country, or to direct the sale of such land to be made by any one occupying a fiduciary capacity; the extent of the power in such cases being to decree that the person invested with the title make conveyance of it, which may be enforced by personal process against the owner. But the decree is not effectual unless the owner of the land in person executes a conveyance to it. *Moseby v. Burrow*, 52 Tex. 404; *Paschal v. Acklin*, 27 Tex. 175; *Watts v. Waddle*, 6 Pet. 400; *Booth v. Clark*, 17 How. 322; *Watkins v. Holman*, 16 Pet. 25; *Page v. McKee*, 3 Bush, 135; Whart. Conf. Laws, §§ 278, 288. It follows that the deed from Lewis C. Brown, committee of the estate of Jacob S. Hand, to Leander Fox, made by virtue of a decree of the supreme court of New York, was ineffectual to pass the title to the land in controversy. But appellant was in possession under a contract from Jacob S. Hand to convey one-half of his Texas lands to Leander Fox when recovered by him; also acknowledging that he had no claim, right, or title to one-half of any of the lands so recovered by Fox; and we think that possession under this contract by a vendee of Fox, after the lapse of 30 years, would raise the presumption that its conditions had been fulfilled. However this may be, the supreme court of New York, in rendering judgment against Jacob S. Hand for failing to comply with his contract to convey one-half of the land to Leander Fox, must necessarily have determined that Fox had complied with his part of the contract. Under the facts of this case it would be inequitable for appellees to recover all of the land, and we are of opinion that the judgment should be reversed, and here rendered giving to appellant one-half of the land, and to appellees the other half.

STAYTON, C. J. The report of the commission of appeals examined, their opinion adopted, and the judgment reversed and rendered in accordance with said opinion.

TERRELL v. STATE.

(*Supreme Court of Tennessee. May 1, 1888.*)

1. MAYHEM—WHAT CONSTITUTES—INTENT.

A specific intent to maim is not necessary to conviction under Code Tenn. § 5357, providing that a person who unlawfully and maliciously disfigures or maims another shall be, on conviction, imprisoned, etc.

2. SAME—PROSECUTION FOR—WEIGHT AND SUFFICIENCY OF EVIDENCE.

The testimony of the prosecutor, corroborated by several witnesses, showed that defendant made a violent and unprovoked assault on the former, thereby severely injuring him. Defendant's unsupported testimony went to show provocation and apprehension of danger from the prosecutor when the assault was made. *Held*, that the evidence is sufficient to support a verdict of guilty.

TURNER, C. J., and SNODGRASS, J., dissenting.

Error to circuit court, Weakley county; W. H. SWIGGART, Judge.

C. M. Ewing, for plaintiff in error. *The Attorney General*, for the State.

CALDWELL, J. The plaintiff in error, Ned Terrell, stands convicted of the crime of mayhem, and is under sentence of two years' confinement in the penitentiary. The indictment charges him with having unlawfully, feloniously, willfully, and maliciously made an assault upon the prosecutor, James Wilson, and struck him in one eye with a stone, or some other hard substance, whereby the eye was put out, and the prosecutor was maimed and disfigured. It is shown in the proof, and admitted by the prisoner, that he struck the prosecutor in one eye with "a half of a brick," and that the prosecutor was thereby rendered entirely blind, having previously lost the other eye. On the trial of the case his honor, the circuit judge, quoted to the jury the statute under which the prisoner is presented, and then charged them further, and among other things, that "in order to convict the defendant in this case, it must be shown by the proof that he did put out the eye of the prosecutor, as alleged in the indictment, by willfully and maliciously striking him in the eye with the brick or other hard substance; and that it was done unlawfully,—that is, without lawful excuse, * * *" and that if he did this "from feelings of malice toward the prosecutor * * * he would be guilty as charged." The prisoner's counsel requested the court to instruct the jury, in addition, that unless "the defendant did of his malice aforethought inflict the blow, with purpose or intent to put out the eye, or inflict some other mayhem on the prosecutor, then the defendant would not be guilty of mayhem." This request was refused by the court, and that refusal is assigned as error.

Upon this action arises the inquiry, is a specific intent to maim a necessary element of the crime of mayhem? This precise question never having been decided in this state, its solution can be best arrived at by a brief review of some of the authorities and statutes upon the general subject. "Mayhem, at common law," says Mr. East, "is such a bodily hurt as renders a man less able, in fighting, to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem." 1 Whart. Crim. Law, (8th Ed.) § 581. Anciently the judgment against the offender was that he should suffer loss of the same member of which he had deprived his victim. *Id.* § 583. Or, as elsewhere more briefly expressed, "the judgment was *membrum pro membro*." 1 Russ. Crimes, 719. "If the complaint be made against a woman who has deprived a man of his members, she shall have judgment to lose a hand, being the member wherewith she committed the offense." 1 Britt.; cited in note 3, § 851, 2 Bish. Crim. Proc. Another writer defines the offense thus: "This maiming is a dismembering of a man, or taking away some

member, or part of his bodie, or the use thereof; as when a wound, blow or hurt is given, or done by one person or more to another person, whereby he is the lesse able to defend himself in time of warre, or get his living in time of peace." Pulton, in note 2, § 1001, 2 Bish. Crim. Law, (7th Ed.) That a specific intent to commit mayhem upon the person dismembered was not necessary to constitute the offense of mayhem, at the time he wrote, is very forcibly illustrated in an example given by the author last quoted. He says: "If A. doe strike at B., and the weapon wherewith he striketh, breaking or falling out of his hand by force of the blow, doth put out the eyes of D., this shall be adjudged a maihem, for that A. hath an intention at first to doe some hurt in striking at B." Id. Mr. Roscoe, under the title, "Proof of the intent to maim, disfigure, or disable," defines mayhem, and then says: "Though the primary intent of the offender be of a higher or more atrocious nature, viz., to murder, and in that attempt he does not kill, but only maims, the party, it is an offense within the fourth section of the recent statute; for it is a known rule of law that if a man intend to commit one kind of felony, and in the prosecution of that commit another, the law will connect his felonious intentions with the felony actually committed, though different in species from that he originally intended. 1 East, P. C. 400." Rosc. Crim. Ev. 733. The same rule of evidence was applied in a case "decided upon the Coventry act, * * * which, like the 9 Geo. IV. and the recent act, contained the words 'with intent to maim or disfigure.'" Id. The earlier American statutes were based more or less upon the Coventry act. "It is 22 & 23 Car. II, c. 1, (A. D. 1670,)" and enacts "that if any person or persons shall, on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out an eye, * * * of any subject; with intention in so doing to maim or disfigure him, * * * that person or persons so offending * * * shall be declared to be felons, and suffer death as in cases of felony, without benefit of clergy." 2 Bish. Crim. Law, § 1003. The North Carolina act, passed in 1754, is as follows: "That if any person or persons, * * * on purpose, shall unlawfully cut out or disable the tongue, put out an eye, * * * of any subject of his majesty, in so doing to maim or disfigure, * * * the person or persons so offending * * * shall be, and are hereby, declared to be felons, and shall suffer as in cases of felony. * * *" Act of 1754, c. 15, Scott's Laws Tenn. p. 88. This act is substantially the same in legal meaning as the Coventry act, and differs from it in language only by the omission of the phrases "of malice aforethought," "by lying in wait," "with intention," and "without benefit of clergy." The legislature of Tennessee in 1801 passed a law identical in language with the North Carolina act of 1754, except that from the first line it omitted the words "on purpose," and in a proviso gave the offender the benefit of clergy, and the injured party an action for damages. Acts 1801, c. 22, § 7, (Scott's Laws Tenn. p. 710.) Six years later, the general assembly of this state enacted another law with respect to the offense of mayhem, in which the terms of the Coventry act, in the description of the offense, were adopted almost literally, but the grade of the crime, and the punishment therefor, were greatly diminished. That act was in these words: "That whosoever shall, on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, ear, or lip, or cut off or disable any limb or member, with intention of so doing to maim or disfigure any person, * * * shall, on conviction, be fined in a sum not exceeding \$50, and be imprisoned not exceeding three months, for the first offense, and for the second offense such person shall be fined and imprisoned in manner aforesaid, and shall be disqualified to hold any office of honor, profit, or trust, either civil or military, under the authority of this state." Acts 1807, c. 73, § 13, (Scott's Laws Tenn. p. 1058.) Upon the same and other subject, it was enacted in section 55, c. 23, Acts 1829, that "No person shall unlawfully and maliciously cut off the tongue or disable the

tongue, of another by clipping, biting, or wounding. No person shall unlawfully and maliciously put out an eye, slit, cut off, or bite off the nose, ear or lips of another, or any part of either of them, whereby any person shall be maimed or disfigured. No person shall unlawfully and maliciously cut off or disable the hand, arm, leg, or foot of another, or any part of either of them, whereby the person so injured shall lose the proper use of any of those members. No person shall unlawfully and maliciously shoot or stab another. No person shall unlawfully and maliciously, by cutting or otherwise, cut off or disable the organs of generation of another, or any part thereof. Whoever shall commit any of the offenses mentioned in this section shall undergo confinement in said jail and penitentiary house for a period not less than two, nor more than ten, years: proviso, if any of said offenses shall be done in self-defense, or without malice aforethought, the person charged shall be excused from the operation of this section." Car. & N. Laws, p. 325. Persons who "in personal combat bite off the finger or thumb" of their adversaries were exempted from the operation of this statute by section 1, c. 84, Acts 1831, (Id. p. 328.) This fifty-fifth section of the act of 1829 is the law of this state at this time, and upon its construction depends the question before us. On being carried into the Code of 1859 it was changed in form and arrangement merely, by being subdivided according to subjects, viz.: Mayhem, (section 4606,) malicious shooting and stabbing, (section 4608,) and defense—the proviso—(section 4609.) The amendment by the act of 1831 was made section 4607, as exceptions to the section preceding it. In the new Code (by Mill & V.) these are sections 5357, 5358, 5359, 5360. A marked change from the language of the former acts is readily observed in this act of 1829, and the change is not only noticeable in the form of expression, but it is material as affecting the meaning intended to be conveyed. The former acts, after describing the injuries, followed the description with the pregnant phrase, "with intention of so doing to maim or disfigure," or "in so doing to maim or disfigure," thereby indicating, it may be said with great plausibility, that an element of the offense should be a specific purpose or intention in the mind of the offender to maim or disfigure his victim, and not to inflict some other injury upon him. These phrases are entirely omitted from the act of 1829, and no words of the same or of similar import are substituted for them. The omission is an important one, and must have been made advisedly. The failure to include in the act words so usual in former acts could hardly have been the result of mistake or oversight, but the inference is fair that the omission was deliberately made for the very purpose of excluding the idea that a person who puts out the eye, or cuts off the tongue of another, or otherwise maims or disfigures him, in any of the forms stated, may be excluded from the penalty of the statute, because it may not be shown that he intended to inflict the particular injury charged and proven, instead of a different one. Whether or not the omission was in fact the result of a desire to exclude the idea mentioned, the eighty-second section repealed all existing laws within the purview of the act, and, if there had been no express repeal, the omission itself would have operated as a clear repeal by implication, (*The Druggist Cases*, 1 Pickle, 450, 3 S. W. Rep. 490; *Poe v. State*, 1 Pickle, 495, 3 S. W. Rep. 658; *U. S. v. Tynen*, 11 Wall. 88;) and in either case the act must necessarily stand upon its own terms, which manifestly do not call for or authorize an interpretation that would include such an idea.

The words characterizing the forbidden acts are "unlawfully and maliciously." They are used alike with respect to every offense mentioned in the section, and must be given the same significance as applied to each of them. They mean the same thing when applied to mayhem that they do when applied to malicious shooting or stabbing. "Unlawfully" always means without legal justification; but "maliciously" has different meanings, which it is not important now to give in detail. Its signification as used in the fifty-fifth sec-

tion of the act of 1829 is well stated and illustrated in *Wright v. State*, 9 Yerg. 343, 344. Wright was indicted and convicted for malicious stabbing under that section, and on appeal in error to this court it was insisted, in his behalf, that the proof did not show that degree of malice necessary to constitute the offense charged. Judge TURLEY, delivering the opinion of the court, said: "It is true that the statute requires that this offense shall be committed with malice aforethought, by which is not meant such malice as is required by the third section of the same act to constitute the crime of murder in the first degree, but malice according to its common law signification, which is not confined to a particular animosity to the person injured, but extends to an evil design in general, a wicked and corrupt nature, an intention to do evil." * * * "The question then arises, is the proof in this case of a character to justify the jury in having found the existence of malice according to the definition given? We consider it unnecessary to go into a minute investigation of the testimony on this point. It shows beyond a doubt that the prisoner stabbed Lewis Underwood, the prosecutor. Upon this proof the law presumes malice." With this approved interpolation, applied, as it must be, in reference to each of the offenses enumerated, the use of the word "maliciously" in the statutes is shown to afford no justification for the contention that the crime of mayhem can be committed only when the blow is stricken for the purpose of inflicting that particular injury upon the sufferer. The character of malice necessary to the crime of mayhem has in fact been held by this court to be the same as that defined in the case of malicious stabbing just quoted. *Werley v. State*, 11 Humph. 175. Wesley was convicted for the castration of his slave. In his defense it was shown that the slave was of very lewd character, and that his master's purpose was to reform him. Upon the facts it was argued that the necessary malice was wanting. The decision was that the act was unlawful, and, that being so, malice would be implied unless circumstances of provocation be shown to remove the legal presumption. The conviction was affirmed. No more do the concluding words, "whereby any person shall be maimed or disfigured," imply the necessity of a fixed design to maim or disfigure, as an element of the crime. Such an implication we regard as unnatural and unwarranted by anything appearing upon the face of the act, or any sound rule of interpretation. It is true those words should be used in the indictment,—that an indictment without them is bad; and it is also true that "maimed" is a word of art, which the law has set apart for the description of this particular offense, and which cannot be supplied by any other word. *Chick v. State*, 7 Humph. 165. But it by no means follows from all this that mayhem can be committed only when that specific crime is in the mind of the offender. In North Carolina, in the case of the *State v. Girkin*, 1 Ired. 121, the defendant was indicted for that he "unlawfully and on purpose did bite off the left ear of one James Watson, * * * with intent to disfigure the said James Watson. * * * The defendant's counsel insisted, * * * secondly, that it was necessary for the state to prove malice aforethought, or preconceived intention, and that the act was done with an intent to disfigure." The defendant was found guilty, and, after an ineffectual motion for a new trial, appealed. RUFFIN, C. J.: "Both parts of the second objection taken for the prisoner are in opposition to the cases of *State v. Evans*, 1 Hayw. (N. C.) 281, and of *State v. Crawford*, 2 Dev. 425, which establish that the intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute." 1 Archb. Crim. Pr. & Pl. (8th Ed. by Pomeroy,) 879, 880, note 1. We have not had access to those cases, or the statute upon which they were decided, but enough appears from Mr. Pomeroy's full note, just quoted, to clearly indicate that the North Carolina statute requires a specific intent to disfigure, and that proof of disfigurement

meets even that requirement and puts the burden of exculpating himself upon the person charged. Upon a statute very much like our own, the supreme court of Texas recently held that a specific intent to maim is not necessary to constitute the crime of mayhem, and that the unlawful use of such means (a shot-gun) in the commission of the offense as would ordinarily result in maiming would raise a legal presumption of an intention to maim. *Davis v. State*, 2 S. W. Rep. 631. Without further elaboration or discussion, we hold that a specific intent to maim is not, under our statute, a necessary ingredient in the crime of mayhem; and that the refusal of the trial judge to charge it to be so was right and proper.

It is next insisted that, even under the charge of the law as given to the jury, the verdict is not supported by the evidence. Upon this contention, the whole of the evidence has been given a very careful consideration by this court, but it is not deemed necessary to enter into a minute statement or discussion of it in this opinion. It is sufficient to say that the prosecutor's testimony makes a strong case of an unexpected, unprovoked, and violent assault upon him in the night-time, resulting, as already stated, in the destruction of his only eye, and rendering him totally blind. The only countervailing testimony is that of the defendant himself, introduced for the purpose of showing provocation and apprehension of danger from the prosecutor when the blow was stricken. The other testimony in the record is in conflict with his statements, and corroboration of those of the prosecutor.

We are well satisfied with the verdict. Let the judgment be affirmed.

TURNER, C. J., and SNODGRASS, J., dissent.

STATE v. STEWART.

(*Supreme Court of Missouri. May 7, 1883.*)

CRIMINAL LAW—VENUE—FAILURE TO PROVE.

Judgment of conviction for felonious assault will be reversed if no venue of the offense is proven.

Appeal from circuit court, Hickory county; W. I. WALLACE, Judge.
T. G. Rechow, for appellant. The Attorney General, for the State.

SHERWOOD, J. Indictment for felonious assault. Conviction, and punishment assessed at a fine of \$100. No venue of offense proven. The attorney general concedes as much. Therefore judgment reversed, and cause remanded.

All concur, except RAY, J., absent.

STATE v. ASHCRAFT.

(*Supreme Court of Missouri. May 7, 1883.*)

CRIMINAL LAW—DISCHARGE OF DEFENDANT ON MOTION—RIGHT OF STATE TO APPEAL.

The state has no right of appeal in a criminal case, where defendant, as provided by Rev. St. Mo. § 1923, was discharged on motion because not brought to trial before the end of the third term of the court in which her cause was pending.

Appeal from circuit court, Carter county; JOHN G. WEAR, Judge.
Indictment of Caroline Ashcraft and Robert Ashcraft, the latter for murder in the first degree, and the former for being present, aiding, etc., in the crime. The defendant Caroline, on motion, was discharged, and the state appeals.
B. G. Boone, Atty. Gen., for the State. S. M. Chapman, for respondent.

SHERWOOD, J. On motion of defendant, she was discharged, because not brought to trial before the end of the third term of the court in which her

cause was pending. Section 1923, Rev. St. The correctness of this action of the trial court cannot be considered, for the reason that the state is not allowed an appeal in this sort of a case. The state is only allowed an appeal, in any criminal prosecution, where the indictment is quashed, adjudged insufficient on demurrer, or where judgment therein is arrested. *Id.* §§ 1985, 1986; *State v. Bollinger*, 69 Mo. 577. Therefore appeal dismissed.

All concur, except RAY, J., absent.

STATE v. WILLIAMS.

(*Supreme Court of Missouri. May 7, 1888.*)

LARCENY—INTENT TO STEAL—EVIDENCE.

On indictment for stealing a cow from one R. it is admissible for defendant to testify that he had purchased a due-bill on R., having been informed that R. would let the cow go in payment of the bill, and that he took her under the belief that this was so, and with no intent to steal.

Appeal from circuit court, Dunklin county; JOHN G. WEAR, Judge.

Indictment and conviction of E. L. Williams on a charge of grand larceny.

Defendant appeals.

S. M. Chapman, for appellant. *The Attorney General*, for the State.

NORTON, C. J. Defendant was indicted by the grand jury of Dunklin county, and charged with grand larceny in stealing a cow, the property of one William Rambow. He was tried and convicted, and from the judgment of conviction has appealed to this court. The evidence tended to show that Rambow had a cow in a lot on the farm of defendant, and about sunup defendant, accompanied by his brother, took the cow from said lot, and removed her to another lot on his farm, on a public road, where she remained a day or two, and was then removed, and tied in the woods; that defendant, at the time of the taking, told his brother to tell the "folks" that he had taken the cow. The defense relied upon was that defendant had bought a due-bill on Rambow, and, at the time of the purchase, was informed that Rambow was willing to let the cow go in payment thereof; and that, under the belief that this was so, he took the cow, without any intent to steal. In cases of larceny the intent to steal by the taking is the *gravamen* of the offense; and it is settled by the following cases that it is competent for the defendant to testify as to the intent with which an act was done, where the intent with which it was done is material. *State v. Banks*, 73 Mo. 592; *State v. Palmer*, 88 Mo. 568, 573. The principle above stated was ignored by the trial court in its refusal to allow defendant, while testifying, to state that he purchased a due-bill on Rambow, and, having been informed and believing that Rambow would let the cow go on the due-bill, he went and got her, believing that he had a right to do so, and with no intent to steal the cow or do a wrong. The act of defendant in taking the cow, in the light of the evidence, is more in the nature of trespass than larceny; and for the error above noted the judgment is hereby reversed, cause remanded.

All concur, except Ray, J., absent.

STATE v. MARTIN.

(*Supreme Court of Missouri. May 7, 1888.*)

APPEAL—PRACTICE—RECORD—BILL OF EXCEPTIONS.

Where the motion for a new trial is not preserved either in the bill of exceptions or transcript, the supreme court can examine only the record proper, under act Mo. 1885, providing that a motion for a new trial need not be copied into the bill of exceptions when it is copied by the clerk into the record.

Appeal from criminal court, Jackson county; HENRY P. WHITE, Judge.

Appellant, T. F. Martin, was convicted of an assault with intent to kill. Act Mo. 1885 (Sess. Acts 1885, p. 219) provides that the motion for a new trial need not be copied into the bill of exceptions if the bill of exceptions contains directions to the clerk to copy the same into the record, and it is so copied.

Sherry & Hughes and *W. M. Burris*, for appellant. *The Attorney General*, for the State.

SHERWOOD, J. Indicted for an assault with intent to kill, on purpose and of malice aforethought, one John Martin, a police officer, by shooting him with a pistol, the defendant was found guilty; and, the jury failing to agree as to his punishment, the court assessed the same at 10 years in the penitentiary. The indictment and verdict are in proper form, and the evidence fully warrants the verdict. As the motion for a new trial is not preserved either in the bill of exceptions or in the transcript, (Sess. Acts 1885, p. 219,) we are precluded from examining anything but the record proper. *State v. Janson*, 80 Mo. 97. Finding no error, the judgment must be affirmed.

All concur; RAY, J., absent.

STATE v. BRANNUM.

(*Supreme Court of Missouri. May 7, 1888.*)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.

On trial of an indictment for shooting at one G. with intent to kill, a half-brother of G. was asked, "where is your brother now?" and answered, "My brother is dead," but stated that it was over a year after he was shot before he died. *Held*, that such testimony is competent to account for G.'s absence from the trial.

2. APPEAL—REVIEW—RULINGS ON EVIDENCE—FAILURE TO STATE OBJECTIONS.

Where the grounds of an objection to evidence are not stated at the time it is made, they will not be considered in the appellate court.

3. SAME—REVIEW—OBJECTIONS NOT RAISED BELOW—FAILURE TO EXCEPT TO THE GIVING OF INSTRUCTIONS.

Where the record does not show that any exceptions were taken, at the time, to the action of the court in giving and refusing instructions, such instructions will not be reviewed in the appellate court.

Appeal from circuit court, Dunklin county; R. P. OWEN, Judge.

Thomas J. Brannum was indicted for shooting at Dixie Glover with intent to kill. There was a conviction, and defendant appeals.

S. M. Chapman, for appellant. *The Attorney General*, for the State.

NORTON, C. J. Defendant was tried at the May term, 1884, of the Dunklin county circuit court, under an indictment charging him with having shot at one Dixie Glover with intent to kill, and was convicted, and his punishment assessed at four years' imprisonment in the penitentiary. From this judgment he has appealed. In the progress of the trial, during the examination of one Mezell, a half-brother of Glover, was asked, "Where is your brother now?" and the witness was allowed to answer over defendant's objection, and said, "my brother is dead;" and further stated that it was a good deal over a year after he was shot before he died. This action of the court is assigned for error. It was entirely competent for the state to account for the absence of Glover, who was shot, by showing that he was dead, in order to shut off unfavorable inferences which could have been drawn from the non-production of Glover as a witness; and we are not able to perceive how it could in any way have prejudiced the jury, especially as no attempt was made to show that his death was the result of the shooting; but, on the contrary, the statement made, that so long a time intervened between the time he was shot and his death, would repel such a presumption.

Defendant was examined on his own behalf; and, in the course of his examination in chief, stated that "Glover's half-brother was about 3½ feet from me when the pistol was fired." On his cross-examination, he was asked: "Do

you know whether the pistol was fired at Mezell or Glover?" He answered: "To the best of my opinion, I guess it was fired at Glover." When the above question was propounded, the record shows an objection to it in the following language: "Question objected to." It does not show that any grounds for the objection were stated, and it is urged before us that the objection ought to have been sustained, because the examination in chief of defendant did not authorize it. The trial court had no opportunity and was not asked to pass on that question, and we have repeatedly held that, unless the grounds are stated on an objection to evidence when it is made, we will not consider them here. *Shelton v. Durham*, 76 Mo. 434; *Holmes v. Braidwood*, 82 Mo. 610; *State v. Price*, 9 Mo. App. 581. But, if the specific ground of objection now made to the question had been made in the trial court, it ought to have been overruled, inasmuch as defendant had stated in his examination in chief that, when the pistol was fired, Mezell was three and one-half feet from him, and inasmuch as the statute authorizes a defendant to be cross-examined as to "any matter referred to" in his examination in chief. Section 1918, Rev. St. As the record does not show that any exceptions at the time were taken to the action of the court in giving and refusing instructions, they are not before us for review.

There is no error in the record justifying an interference with the judgment, and it is hereby affirmed, in which all concur, except RAY, J., absent.

STATE v. HAVENS.

(*Supreme Court of Missouri. May 7, 1888.*)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INDICTMENT—SUFFICIENCY.

Under Rev. St. Mo. § 1262, providing that "every person who shall * * * assault another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, * * * such person * * * shall be punished," etc., an indictment charging that "defendant feloniously assaulted * * * one R. with a large * * * stone, a deadly weapon likely to produce death, * * * and him, the said R., did then and there strike * * * with great force, likely to produce death, against," etc., is sufficient.

2. APPEAL—REVIEW—RULING ON EVIDENCE—FAILURE TO OBJECT AT TRIAL.

The rulings of the lower court, where no exceptions are saved at the time they are made as to the admission or rejection of evidence, will not be reviewed in the appellate court.

Appeal from circuit court, Jasper county; M. G. Mcgregor, Judge.

Norman Havens was indicted for an assault with intent to kill one Jasper Reed. There was a conviction, and defendant appeals.

T. B. Houghawout, for appellant. *The Attorney General*, for the State.

NORTON, C. J. The defendant was indicted at the September term, 1887, of the Jasper county circuit court, under section 1264, for a felonious assault on one Jasper Reed. After making an unsuccessful motion to quash the indictment, he pleaded not guilty, and, being put upon his trial, was convicted, and his punishment assessed at three years' imprisonment in the penitentiary. The indictment "charges that defendant feloniously assaulted and wounded one Jasper Reed with a large and heavy stone, a deadly weapon likely to produce death and great bodily harm, and him, the said Jasper Reed, did then and there strike, beat, wound, and ill treat with great force, which was likely to produce death, against the peace and dignity of the state." The motion to quash the indictment was properly overruled, on the authority of the following cases: *State v. Brown*, 60 Mo. 141; *State v. Moore*, 65 Mo. 606; *State v. Hays*, 67 Mo. 692. No exceptions were saved to the rulings of the court in the admission or rejection of evidence, and its action in that respect, for that reason, is not subject to review here. *State v. McDonald*, 85 Mo. 539; *State v. Burk*, 89 Mo. 635, 2 S. W. Rep. 10. Exception was taken

to the action of the court in giving and refusing instructions, but no attempt has been made to show wherein the instructions given are erroneous, and, upon an examination of them we find no error in them. They were fair to defendant, and are strictly confined to the crime alleged, and the evidence adduced in support of and against it. Instructions numbered 2, 3, and 4, asked by the defendant and refused, were fully covered by those given by the court on its own motion, and instruction No. 1 was properly refused because it did not state the law applicable to the case. Judgment affirmed, in which all concur, except RAY, J., absent.

STATE v. WOODWARD.

(*Supreme Court of Missouri. May 7, 1888.*)

1. CRUELTY TO ANIMALS—INDICTMENT—SUFFICIENCY.

An indictment for shooting a heifer, which charges the time and place of the offense, and that defendant "feloniously, willfully, and maliciously wounded a certain heifer," by then and there shooting said heifer with a shotgun loaded with gunpowder and leaden shot, which said shot, so discharged from said gun, * * * entered into the flesh of said heifer, * * * thereby causing and inflicting a wound," etc., is sufficient.

2. NEW TRIAL—WHEN GRANTED—NEWLY-DISCOVERED EVIDENCE.

A motion for a new trial will not be granted, on the ground of newly-discovered evidence, where such evidence is merely cumulative.¹

3. SAME—SEPARATION OF JURY.

An alleged separation of the jury, without leave of the court or consent of the parties, consisting in a brief absence of one of the jurors, during which he conversed with no one concerning the trial, affords no ground for a new trial.

Appeal from circuit court, Jasper county; M. G. MCGREGOR, Judge.

Henry Woodward was indicted for shooting and wounding a heifer. There was a conviction, and defendant appealed.

McReynolds & Halliburton, for appellant. *The Attorney General*, for the State.

NORTON, C. J. Defendant was tried in the Jasper county circuit court under an indictment charging him with maliciously and feloniously shooting and wounding a two-year old heifer. He was convicted of the charge, and fined \$100, and from this judgment he has appealed to this court; and, no brief having been filed on his behalf, we are driven to an inspection of the record for ascertainment of the grounds on which he relies to support his appeal. The first ground which the record presents, is to the action of the court in overruling defendant's objection to the introduction of any evidence because of an alleged insufficiency of the indictment. This objection was properly overruled. Leaving out the formal parts of the indictment, it charges "that on ——— day of August, 1885, at the county of Jasper and state of Missouri, Harry Woodward did then and there feloniously, willfully, and maliciously wound a certain two-year old heifer, the property of one Albert Mussar, by then and there shooting said heifer in the left foreleg, with a shotgun loaded with gunpowder and leaden shot, which said shot, so discharged from said gun, entered into the flesh of said heifer, and through its skin, thereby causing and inflicting a wound on the left leg of said heifer," etc. The indictment charges the offense in the language and as laid down in the forms, is explicit, and in all respects sufficient. It is also insisted that the court erred in overruling motion for new trial because of discovery of new evidence, and because the jury separated without leave of court, or consent of parties. The alleged newly-discovered evidence was merely cumulative in its character, and afforded no ground for a new trial. *State v. Butler*, 67 Mo. 59. In *Cook v. Railroad Co.*, 56 Mo. 380, it is said motions for a new trial, founded on newly-discovered evi-

¹ See note at end of case.

dence cumulative in its character, "are regarded with a jealous eye, and construed with remarkable strictness by the courts, which generally hold that they should be tolerated, not encouraged; viewed with aversion rather than with favor; granted as an exception, and refused as a rule." *State v. Ray*, 53 Mo. 345. The separation of the jury, which the affidavits accompanying the motion tended to establish, was that one of the jurors was allowed to separate himself from the other eleven, to obey a call of nature; and that, during his absence, he had no opportunity of conversing, and did not converse, with any person, except to say, as he passed the sheriff, that it was a very cold day, to which the prosecuting attorney, who was standing by, responded that it was. Such an objection is frivolous in the extreme, and is without the shadows of merit. The instructions given by the court fairly presented the case to the jury; and, no error being found in the record, the judgment is hereby affirmed, in which all concur, except RAY, J., absent.

NOTE.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE. Newly-discovered evidence is a ground for a new trial. *People v. Carty*, (Cal.) 8 Pac. Rep. 600. A new trial, on the ground of newly-discovered evidence, will be refused when it appears that the witnesses, whose testimony it is proposed to introduce, were known to the defendant before or at the time of the trial, and no effort was made to secure their attendance. *Bryant v. State*, (Ga.) 4 S. E. Rep. 853; *Spurlock v. State*, Id. 891; *Barrow v. State*, (Ga.) 5 S. E. Rep. 64; or if it was in the power of the person so moving to have produced the evidence on the first trial, *People v. Jones*, (Cal.) 8 Pac. Rep. 611.

It is not error to refuse defendant a new trial on the ground of newly-discovered evidence, where he was informed, three weeks before trial, that the witness from whom the evidence is expected, might be a material witness for him, and he neither procured his attendance, nor procured a continuance to enable him to procure it. *Dingman v. State*, (Wis.) 4 N. W. Rep. 668. A mere showing that a witness for the prosecution testified to one state of facts on the trial for an assault and battery, and to a different state of facts on the trial of a civil action for the same assault, for which the accused was prosecuted, will not justify a new trial, as this is not newly-discovered evidence. *Hoffman v. State*, (Wis.) 26 N. W. Rep. 110. Alleged newly-discovered evidence of a fact known at the trial, as to a matter about which one of the witnesses testified, is no ground for a new trial. *People v. Lyle*, (Cal.) 4 Pac. Rep. 977.

As a general rule, newly-discovered evidence, the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. *State v. Smith*, (Kan.) 11 Pac. Rep. 908; *Barrow v. State*, (Ga.) 5 S. E. Rep. 64; nor does newly-discovered evidence which is merely cumulative, *State v. Gleason*, (Iowa,) 27 N. W. Rep. 785; *People v. Fong Ah Sing*, (Cal.) 11 Pac. Rep. 323; *Marcum v. Com.*, (Ky.) 1 S. W. Rep. 727; *Neill v. State*, (Ga.) 4 S. E. Rep. 871; *Spurlock v. West*, Id. 891. But evidence of distinct and independent facts of a different character, though it may tend to establish the same ground of defense, is not cumulative within the rule. *Casey v. State*, (Neb.) 29 N. W. Rep. 264.

Applications for new trial on the ground of newly-discovered evidence are addressed to the discretion of the court, and its action will not be disturbed except for an abuse of discretion; the presumption being that the discretion was properly exercised. *People v. Sutton*, (Cal.) 15 Pac. Rep. 86.

See, also, on the general subject of the granting of a new trial on the ground of newly-discovered evidence, *Boot v. Brewster*, (Iowa,) 36 N. W. Rep. 649, and note.

STATE v. RUSH.

(Supreme Court of Missouri. May 7, 1888.)

1. ROBBERY—INDICTMENT—DESCRIPTION OF PROPERTY.

Under Rev. St. Mo. 1879, § 1817, providing, that when, in an indictment, an averment is necessary "as to any money or any note purporting to be made or issued by any bank incorporated by law, or made or issued by virtue of any law of the United States, it shall be sufficient to describe such money or note simply as money," the offense, in an indictment for robbery, is well charged by a description of "one piece of current gold coin of American coinage, of the value of ten dollars; and three pieces of current gold coin of American coinage, of the value of five dollars each; and four genuine United States legal tender notes, commonly called 'Greenbacks,' of the value of twenty dollars each."

2. **CRIMINAL LAW—EVIDENCE—ADMISSIONS.**

Defendant, arrested for robbery, made criminating admissions upon being told by the officer having him in custody that his co-defendant had implicated him, but it did not appear that such admissions were induced by promises, threats, or intimidation. *Held*, that they were voluntary, and admissible in evidence.¹

3. **SAME—EVIDENCE TO EXCLUDE ADMISSIONS—WHEN OFFERED.**

A defendant's testimony to show that certain criminating admissions should not be admitted in evidence against him, by reason of the circumstances under which they were made, must be offered to the court while that issue is pending. If given while testifying in his own behalf before the jury, it affords no ground for excluding the admissions.¹

4. **SAME—EVIDENCE—DISAPPEARANCE OF DEFENDANT—PRESUMPTION.**

Evidence that defendant was present in a crowd at the scene of and immediately after the robbery for which he was indicted, and there heard it discussed, and was not again seen in the city until brought back after his arrest, which occurred a year subsequently; a writ having been issued, a reward offered, and diligent search made for him in the mean time; and that, both when arrested and when testifying as a witness, he gave no account of his absence,—is sufficient to warrant an instruction to the jury on the presumption arising from flight.

5. **SAME—CUSTODY AND CONDUCT OF JURY—DUTY OF SHERIFF.**

Where the only communication shown to have been had between the jury and the sheriff, or any one else, is that the sheriff furnished the jury with cigars at their request, and another person, at the sheriff's direction, threw soap and towels into the hall-way, which was open to the jury-room, and the only separation allowed was brief and proper, there is no misconduct by the sheriff.

6. **SAME—NEW TRIAL—MISCONDUCT OF JURY—TESTIMONY OF JUROR.**

On motion for a new trial for misconduct of the jury, a juror's testimony denying that he denounced defendant in the jury-room, or there said that he ought to go to the penitentiary on general principles, as testified by an eavesdropper, is admissible, as disclosing nothing in regard to the jury's deliberations, and a new trial was properly refused on the unsupported evidence of the affiant whom the juror contradicted.²

7. **SAME—NEW TRIAL—TESTIMONY OF JUROR TO IMPEACH VERDICT.**

On a motion for a new trial for misconduct of the jury, after a juror has testified denying the allegations of an eavesdropper that he improperly denounced defendant in the jury-room, defendant's application to examine other members of the jury on that question was properly refused.³

8. **SAME.**

On a motion for a new trial for misconduct of the jury, evidence that a juror, after the trial, in reply to witness' remark that he "didn't believe the man had ever been robbed," said, "Don't make any difference; R. [defendant] ought to have been sent up on general principles,"—is inadmissible, since it would effect an indirect impeachment of the verdict by one of the jurors.⁴

9. **SAME—NEW TRIAL—PREJUDICE OF SHERIFF.**

A new trial will not be granted on the ground of the prejudice of the sheriff against defendant, unless it appears that such prejudice was so manifested by word or act as to influence the jury or affect their verdict.

10. **WITNESS—COMPETENCY—PROMISE OF REWARD UPON CONVICTION.**

The fact that a witness is to receive a reward in the event of conviction may affect his credibility in the minds of the jury, but does not disqualify him as a witness.

Appeal from circuit court, Jasper county; M. G. MCGREGOR, Judge.

George Rush was indicted for the robbery of James Pyrtle. There was a conviction, and defendant appeals.

T. B. Houghawout, for appellant. *B. G. Boons*, Atty. Gen., for respondent.

BRACE, J. The defendant was jointly indicted, in the circuit court of Jasper county, with one Seth Beard, for the crime of robbery in the first degree, and on his motion was granted a separate trial. His motion to quash the in-

¹For a general discussion as to when confessions are and when not admissible in evidence, see *Mitchell v. State*, (Ga.) 5 S. E. Rep. 130, and note; *Hoover v. State*, (Ala.) 1 South. Rep. 574, and note; *U. S. v. Long*, 30 Fed. Rep. 678; *Rice v. State*, (Tex.) 3 S. W. Rep. 791; *U. S. v. Bassett*, (Utah,) 13 Pac. Rep. 237.

²As to the admissibility of a juror's affidavit, see *Com. v. White*, (Mass.) 14 N. E. Rep. 611, and note.

dictment having been overruled, he was tried, found guilty, and his punishment assessed at imprisonment in the penitentiary for a term of 10 years, and he was sentenced accordingly. His motion for new trial and in arrest of judgment having been overruled, he appealed, and assigns for error that the court overruled his motion to quash the indictment, admitted incompetent evidence, refused proper and gave improper instructions, failed to declare all the law of the case, and refused to grant a new trial for the improper conduct of the sheriff and the jury.

1. The motion to quash was properly overruled. The offense was well charged. The money charged to have been taken was described as "one piece of current gold coin of American coinage, of the value of ten dollars; and three pieces of current gold coin of American coinage, of the value of five dollars each; and four genuine United States legal tender notes, commonly called 'Greenbacks,' of the value of twenty dollars each." A description in terms much more general would have been sufficient under the statute. Rev. St. 1879, § 1817; *State v. Burnett*, 81 Mo. 119.

2. Sheriff Bailey, sworn as a witness on behalf of the state, was permitted, over the objections of the defendant, to testify to a conversation he had with the defendant, in which he made certain criminating admissions, after answering as follows to preliminary questions: "Question. Did you have the defendant in your custody at that time? Answer. Yes. Was that confession about getting the money from Pyrtle made after you had told Rush that Seth Beard had given him away? A. Yes." E. S. Pike, who arrested the defendant in Kansas, and brought him back to Jasper county, was present at the same conversation, and testified in regard to it. He was also permitted to testify, over the objections of the defendant, to the following conversation had with defendant on the way back: "I told him I was satisfied that he was connected with the case, and he said he was not guilty himself, but knew who was." These admissions of the defendant were made to an officer having him in custody; but it appearing that they were not induced by "any promise of benefit or favor, or threat of disfavor, or intimidation connected with the subject of the charge, made or held out by such officer, such admissions were voluntary, and admissible in evidence." *State v. Simon*, 50 Mo. 370. It does not appear whether the statement made by the sheriff, "that Seth Beard had given him away," was true or false; but even if it was false, and the defendant made the admissions under the mistaken supposition that the co-defendant had divulged facts in relation to the crime, this would not have rendered them inadmissible. *State v. Jones*, 54 Mo. 478; *State v. Phelps*, 74 Mo. 128. The fact that the defendant, when he came to testify in his own behalf before the jury, gave a different version of the conversation; testifying that Bailey, the sheriff, told him "that he had just as well give up about the case; that Seth Beard had told it all; * * * we don't want to send you over the road, but want to send Seth Beard,"—afforded no grounds for excluding the admissions testified to by Bailey and Pike, as the court was asked to do by defendant's instruction No. 8, the refusal of which is complained of as error. If the defendant desired to have his testimony considered by the court in determining the question whether his admissions, about to be testified to by Bailey and Pike, were voluntary, he should have proffered his evidence when that preliminary question was being tried by the court. Having declined to do so, he could not raise that issue again upon his own evidence on the trial before the jury, and ask the court to pass upon it the second time by way of instruction; and if it was error, as is contended, for the court, after having decided that issue upon the evidence before the court when it was being tried, afterwards to submit it to the jury upon all the evidence in the case, as was done in instruction No. 5, it was an error in favor of the defendant, of which he ought not to be heard to complain.

3. It is urged for reversal that the court failed to instruct the jury on the

whole law of the case; but counsel have not pointed out, nor have we been able to discover, wherein such failure consists. It is also contended that there was no evidence on which to base the instruction in regard to the presumption arising in case of flight, although the defendant was confessedly present when the crowd was standing around Pyrtle, just after the robbery occurred, discussing it, and heard that a man had been robbed; that it was shown he was not again seen in the city until he was brought back from Kansas on requisition a year afterwards; that, during the period intervening, the sheriff had a writ for his arrest in his hands; that a reward was offered, and that he and the police officers were searching for him, but could not find him; that when the sheriff asked him where he had been, and said, "You gave us quite a chase," he made no answer to the question, and gave no account of his absence, nor did he choose to do so when testifying as a witness. The evidence was sufficient to warrant the instruction; its weight was for the jury. The *corpus delicti* was fully proven if the jury believed the testimony of the prosecuting witness, and they were the exclusive judges of his credibility.

4. The improper conduct of the sheriff complained of is that he permitted the jury to separate after they had been placed in his charge to consider of their verdict, and permitted improper communication with them. The only communication shown between the jury and the sheriff, or any one else, is that the sheriff, at their request and cost, furnished them some cigars, and that another, by his direction, got some soap and a towel, and threw them in the hall leading to the jury-room, when some of the jury were in the hall, and some in the room, the door being open between. The only separation shown is that, the jury being in the yard, some of their number went into the privy, while the others remained outside. There is nothing in these complaints.

5. To impeach the conduct of one of the members of the jury, the defendant introduced the affidavits of two witnesses, Kingston and Gray. Kingston deposed that while the jury were deliberating in their room, over the sheriff's office, he stopped on the street below, and listened, and "heard one of the jury-men talking, whose voice sounded like that of Isaiah Driesbach, who seemed to be talking to the balance of said jurors. Heard him say: 'I know the defendant, George Rush. He ought to be sent up on general principles. It has been but a short time since he was arrested for knocking a man down on the railroad east of Carthage. He has a bad reputation in Carthage. His own people has forsaken him, and he ought to be sent to the penitentiary.'" Gray deposed that, in a conversation with Driesbach after the trial, in reply to a remark of Gray's "that he [Gray] didn't believe the man had ever been robbed," Driesbach said: "Don't make any difference. Rush ought to have been sent up on general principles." To rebut these affidavits on the hearing of the motion for a new trial, the state introduced Juror Driesbach, who, being sworn, testified, over the objections of defendant, that he made no such statements as contained in the affidavits of Kingston and Gray. The defendant asked leave to put other members of the jury on the witness stand to prove that such statements were made in the jury-room, to which the state objected, and the objection was sustained. It is settled law in this state that jurors will not be permitted to impeach their own verdict, either directly, by their own affidavit or evidence, or indirectly, by the affidavit of others deposing to declarations made by jurors to them after the verdict was rendered. *State v. Cooper*, 85 Mo. 256; *State v. Dunn*, 80 Mo. 687; *State v. Fox*, 79 Mo. 109. This rule disposes of the affidavit of Gray, and the exception to the refusal of the court to permit jurors to be examined as to statements made in the jury-room in impeachment of their verdict. As to the affidavit of Kingston, tending to prove the juror, Driesbach, made the statements therein contained, the juror on oath positively denied that he made the statements attributed to him by the affiant; and, on general principles, the oath of a juror ought to go

as far as that of an eavesdropper. His testimony disclosed nothing in regard to the deliberation of the jury while in the jury-room, but was confined simply to a contradiction of the statement that he made the declarations attributed to him by an outsider; was admissible, (*State v. Underwood*, 57 Mo. 40; *Woodward v. Leavitt*, 107 Mass. 453;) and we cannot say that the court committed error in refusing to grant a new trial upon the unsupported evidence of the affiant in this case, in the teeth of the juror's denial.

6. The interest of the witness Pike in the result of the trial, by reason of the fact that he was to get a reward in case of conviction, did not disqualify him as a witness; it went to his credit only with the jury. And the prejudice of Bailey, the sheriff, which was not manifested in a word or act calculated to prejudice the defendant with the jury, or affect their verdict, could afford no ground for a new trial. In the absence of anything in the record to the contrary, it is to be presumed that the case was tried before the regular panel, drawn and summoned in the manner provided by law, and not before a special jury selected by the sheriff.

On the whole record, we find no reversible error, and the judgment is affirmed.

All concur.

O'BRYAN *et al.* v. ALLEN *et al.*

(*Supreme Court of Missouri. May 7, 1888.*)

1. DOWER—ACTION FOR—DECREE IN FAVOR OF HEIRS.

In an action for the assignment of dower, plaintiff's children, the heirs of her deceased husband, were made defendants, but did not appear. The other defendants appeared and answered. *Held*, that a decree investing title in the heirs of plaintiff's deceased husband, as against their co-defendants, was erroneous, they not having claimed such relief.

2. WITNESS—CONTRACT WITH DECEDENT—COMPETENCY OF WIDOW TO TESTIFY.

Plaintiff, with her present husband, brought an action for dower, and for specific performance of an alleged oral gift of land to her former husband from his father. Both the father and son were dead. *Held* that, the widow being the real party in interest in the suit, and not a party to the original contract, was a competent witness, under Rev. St. Mo. § 4010, providing that, in an action where one of the original parties to the contract is dead, the other party shall not testify in his own favor.

3. SAME—COMPETENCY—PARTY TO SUIT.

In an action for dower and specific performance of an alleged oral gift of land to plaintiff's husband from his father, where the heirs of the deceased father and son are defendants, the husband of plaintiff's daughter, an heir to an undivided interest in the land either under her father or grandfather, is a competent witness for plaintiff, being an interested party to the suit, under Rev. St. Mo. § 4012, providing that a party may compel an adverse party to testify in his behalf.

4. SAME—COMPETENCY—FAILURE TO WITHDRAW FROM COURT-ROOM.

Evidence will not be excluded because a witness remained in the court-room after an order of court directing all witnesses to withdraw until called, where it appears that such an act of the witness was not the fault of the party calling him.

Appeal from circuit court, Cooper county; E. I. EDWARDS, Judge.

Action by Harriet G. O'Bryan and her present husband for an assignment of dower and specific performance of an alleged oral gift of land to her former husband by his father. Rev. St. Mo. § 4010, provides that, in an action where one of the original parties to the contract in issue is dead, the other party shall not testify in his own favor. Rev. St. Mo. § 4012, provides that any party to an action may compel the adverse party, or any person, for whose adverse benefit such action is instituted or defended, to testify as a witness in his behalf, subject to cross-examination by the opposite party.

John R. Walker and *Douglas & Scudder*, for appellants. *Cosgrove & Johnston*, for respondents.

BLACK, J. This was a suit by Harriet G. O'Bryan and her present husband to have dower assigned in 200 acres of land. The claim is that Henry v.8s.w.no.3—15

Bell made a verbal gift of the land to his son Noah D. Bell, the former husband of the plaintiff Harriet. The three children of Noah D. Bell and the said Harriet are made defendants, but they do not make answer. The other defendants are the other heirs of Henry Bell, he being also dead when this suit was commenced. The court made a decree divesting the defendants, other than the three children of Noah D. Bell, of all title, and invested the same in these three children, and then caused dower to be assigned.

1. So far as the decree invests the title in these three children, it is erroneous. They ask and claim no such relief. Indeed, the evidence offered, but excluded, shows that they are entitled to no such relief. This portion of the prayer of the petition should be disregarded. If the plaintiff should be entitled to dower, it is not essential that title should be decreed in the heirs of Noah D. Bell. She can have her dower assigned without any such a decree, and let the defendants settle the title between themselves, as they see fit, as they seem to be doing by an amicable partition suit.

2. The objection made by the defendant that the plaintiff Mrs. O'Bryan was incompetent to testify in her own behalf was properly overruled. She was not one of the original parties to the contract or cause of action on trial. The original parties to that contract were Henry Bell and his son Noah D. Bell, both of whom are dead. Though she is a married woman, and her husband is a party to this suit, still she is the real party in interest, and may testify. *Owen v. Brockschmidt*, 54 Mo. 288. It is not claimed that she can testify as to conversations of her former husband made to herself or third parties. Such conversations and admissions are to be excluded, if offered.

3. Objection was also made, by the defendants who filed answer, to the evidence of Henry M. Thomson, one of the defendants, when called as a witness by the plaintiffs, on the ground that he was the husband of his co-defendant Clara. Mrs. Clara Thomson is a daughter of Noah D. Bell; and, if this property belonged to her father, she inherited one-third, and, if not, then she inherited one-ninth, interest in this and other property from her grandfather; so that, in any event, she has an undivided interest in the land. If her husband has a substantial interest in the contest, then he, too, is a competent witness. He has no interest in her real estate which he can convey by his individual deed; but he has the right to possess and enjoy the property, and this marital right will be defeated to the extent that the land is set off to the plaintiff for her life. We think he is therefore not merely a nominal, but a substantial, party to the suit, within the meaning of the following authorities: *Fugate v. Pierce*, 49 Mo. 441; *Cooper v. Ord*, 60 Mo. 428; *Steffen v. Bauer*, 70 Mo. 404.

4. At the request of counsel for some of the defendants, and before any evidence was heard, the witnesses then present were sworn, and were by the court directed to withdraw from the court-room, and not return until called. Mr. Stephens, one of the witnesses thus sworn for defendants, when called to the stand, stated that he had been in the court-room off and on, 15 minutes, and that he had not understood the rule excluding witnesses from the room. The court refused to hear his evidence, and defendants excepted. Other witnesses, not present when the rule was made, and not sworn until called, were also excluded; one because he had been in the room less than five minutes, and another though he heard none of the evidence, and no witness was on the stand while he was present. The judge may, according to the weight of the authority, in his discretion, order an examination of the witnesses out of the hearing of each other, and some of the authorities hold that it is discretionary with him whether a witness shall be examined at all who has disobeyed the order; but it is believed that to refuse to hear the evidence of a witness who had disobeyed the order, without fault on the part of the party calling him, would be reversible error,—an unsound exercise of that discretion. The following extracts from the text-books will show the current of modern rulings:

"A witness' testimony, it is true, will not be necessarily ruled out because he remains in court, even willfully, after being ordered to withdraw; but he exposes himself, by his disobedience, to an attachment for contempt. But, where the party calling the witness is to blame for the disobedience, then the witness may be excluded." 1 Whart. Ev. § 491. "If a witness who has been ordered to withdraw, continue in court, it was formerly considered to be in the judge's discretion whether or not the witness should be examined; but it may now be considered as settled that the circumstance of a witness having remained in court, in disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." 2 Phil. Ev. 887. "A witness who disobeys such an order is guilty of contempt, but the judge cannot refuse to hear his evidence, although the circumstance is matter of remark to the jury." 2 Best, Ev. § 636. Any other rule would put it in the power of a hostile witness to deprive a party of his evidence; and we conclude that the better rule is that it is reversible error to exclude a witness who has disobeyed the order, unless the party or his attorney, calling the witness, has been party or privy to the violation of the order; and this conclusion, we believe, has the support of the following authorities: *Keith v. Wilson*, 6 Mo. 435; *Hubbard v. Hubbard*, 7 Or. 42; *Hey v. Com.*, 32 Grat. 946; *Davenport v. Ogg*, 15 Kan. 363; *Bell v. State*, 44 Ala. 393. It is clearly shown that these witnesses were not in the court room by the connivance, knowledge, or consent of the defendants or their attorneys, and it was error to exclude the witness Stephens. The two other witnesses had no notice of the rule, and cannot be said to have disobeyed it. Still it was error to exclude them, for it was stated and understood, when the rule was made, that there were other witnesses for the defense, not then present, who would be called. Other witnesses were also excluded, but we need not notice the rulings in respect of them. The real merits of this case cannot be considered until all the evidence is in the record. The judgment is reversed, and the cause remanded for trial anew.

RAY, J., absent. The other judges concur.

STATE v. HRONEK.

(Supreme Court of Missouri. May 7, 1889.)

EXCEPTIONS, BILL OF—REFUSAL TO SIGN—AFFIDAVITS AS TO CORRECTNESS OF BILL—SUFFICIENCY.

On appeal from a conviction for murder the trial judge refused to sign the bill of exceptions on the ground that it was not true, and gave defendant's counsel time to prepare a proper bill. Defendant's counsel, however, had the rejected bill signed by three by-standers, and filed with the clerk four affidavits as to its correctness, as provided by Rev. St. Mo. §§ 3633-3641. One of the affiants stated that he did not hear all the evidence, but that his own testimony was correctly reported. The other three affiants were on the panel of jurors. One of them stated that the proceedings were in the main correctly stated in the bill, and the other two stated that the bill was true according to their best recollection at the time. The state, as authorized by section 3640, also filed the affidavits of four lawyers, residents of the county, to the effect that they were present during the trial, that they heard all the evidence, objections, and rulings of the court; that they had carefully examined the bill prepared by defendant's counsel, and that it was not true. Held that, under such preponderance of evidence against the correctness of the bill, it could not be considered.

Error to Buchanan criminal court.

Peter Hronek was indicted and convicted of murder in the first degree, and sued out a writ of error to the trial court.

F. S. Winn and *Wm. B. Sanford*, for plaintiff in error. *D. G. Boone*, Atty. Gen., for the State.

NORTON, C. J. At the March term, 1887, of the Buchanan county criminal court, the defendant was indicted for murder in the first degree for killing his wife by shooting her with a pistol. He was put upon his trial at the June term, 1887, of said court, and was found guilty as charged, and sentenced to be hanged. From the judgment of the court he has prosecuted a writ of error to this court.

The first question presented by the record is as to whether there is any bill of exceptions in the case. The bill of exceptions is not signed by the trial judge, and when presented to him for his signature, on the 8th of July, 1887, he refused to sign it, as shown by his certificate attached to the transcript, for the following reasons: "Because it does not correctly state the evidence as given before the court of a single witness who testified upon the trial; that said bill of exceptions is not full, and does not enable the reader of it to form any correct idea of the case as presented by the evidence. Because the official stenographer of this court took down all the evidence in short-hand that was given during the trial, and has been ready to furnish a copy of the same to defendant's counsel when demanded, and is still ready to do so, as he informed the court, and the court requires of the defendant's counsel a correct statement of the evidence and rulings of the court during the trial, or the substance of it, before the court will sign a bill of exceptions in this case; and now gives the defendant's counsel until the 15th inst. to prepare a proper and correct bill of exceptions, and has adjourned till that time to enable them to do so." The defendant's counsel did not pursue the course indicated, but prepared the bill now on file and had the same signed by three by-standers, and on the 19th of July presented the same to the judge for his signature, and he refused to sign it, as certified to by him, because it was not true. On the 22d and 23d July defendant filed with the clerk four affidavits in support of the correctness of the bill as signed by the by-standers. The first of them is signed by one Dr. Porter, who states that he was not present during the greater portion of the trial and did not hear the evidence, but that his evidence is correctly reported. The other three affidavits are made by persons who were on the trial panel of jurors. One of them states that, according to his best knowledge and recollection, the evidence and rulings of the court and other proceedings are in the main correctly stated as he then remembers them. The other two stated the bill was true and correct according to their best recollection at that time. As is authorized by section 3640 Rev. St., the state thereupon filed an affidavit of four lawyers, residents of Buchanan county, with the clerk, to the effect that they were present during the trial of the cause; that they heard all the evidence, objections, and rulings of the court, and all other matters and things that took place during the progress of the trial, and that they have carefully examined the bill of exceptions presented by the defendant to the court for its signature, and which signature was refused because said bill was untrue, and that said bill was then signed by certain by-standers; that said bill is not true: "(1) Because it fails to set out all the evidence or the substance of the evidence as given at the trial. (2) That the evidence set out is false, garbled, misleading, and disconnected. (3) That not more than one-half of the evidence given at the trial is set out. (4) That each and all of the objections made to evidence, as appears in said bill of exceptions, is false and untrue, except the state's objections to evidence as to drunkenness, which the court overruled and permitted all evidence on that point to go to the jury as offered by defendant. (5) That the hypothetical questions purporting to have been asked experts are not stated as they were asked. (6) That the bill as filed is false in presenting evidence that never was offered at the trial. (7) That so numerous are the errors in the bill on file that they can only be fully set forth by comparing it with the stenographer's report. (8) That the defendant seemed to understand English sufficiently to answer all questions propounded to him intelligently. (9) That the bill as filed does not fairly present the circumstances under which the court in-

interrupted counsel for defense in his opening statement. (10) That the criminal court in which this case was tried has an official stenographer, who was present during this trial and seemed to be taking notes of the proceedings throughout. (11) That they know no reason why defendant cannot procure said stenographer's notes and present the full proceedings before the supreme court as it was presented before the trial court and jury. (12) That the bill as filed presents a different theory of the case from that on which it was tried. (13) That not more than half of the evidence adduced at the trial is preserved in the bill of exceptions, and the portion preserved is garbled, incorrect, and does not present the case as it went to the jury. (14) That the testimony of all the witnesses was that the defendant was sane, except Dr. Porter, who said, in reply to the hypothetical question that defendant was either drunk or insane, he did not know which. (15) That the defense interposed was insanity. (16) That the bill filed does not correctly present the cross-examination of witnesses, or show any cross-examination. (17) That the opening statement made by defendant's counsel is not fairly and correctly set forth in the bill filed. (18) That defendant stated on the witness stand that he killed his wife while mad and drunk. (19) That the question purporting to have been asked a Dr. Busey is not true. (20) The court permitted evidence of defendant's jealousy and drinking to excess to be introduced, and did not make remarks attributed to it by the bill of exceptions."

The statutory provisions relating to the question under consideration are as follows: "Sec. 3637. If the judge refuse to sign a bill on the ground that it is untrue, he shall certify under his hand the cause of such refusal. Sec. 3638. If the judge refuse to sign any bill of exceptions, such bill may be signed by three by-standers who are respectable inhabitants of the state, and the court shall permit every such bill if the same be true to be filed in court. Sec. 3640. When the judge shall refuse to permit any bill of exceptions signed by the by-standers to be filed, and shall have certified that it is untrue, either party in the suit may take affidavits, not exceeding five in number, in relation to its truth. Sec. 3641. Such affidavits shall be taken and deposited in the clerk's office within five days after the trial of the cause, and on appeal or writ of error copies of such affidavits shall be annexed to and form a part of the record of the cause. Sec. 3642. Every court to which an appeal or writ of error shall be taken shall admit, as part of the record of the cause, every bill of exceptions taken therein, upon its appearing satisfactorily to such court that the truth of the case is fairly stated in such bill; that the same was taken according to law, and that the court refused to permit such bill to be filed. Sec. 3643. The truth of every such bill shall be tried by the affidavits required by this article to be taken, and filed in the clerk's office." Trying the truth of the bill by the test which the statute provides, there is a clear preponderance against its correctness; of the affidavits in support of the bill one of them states that it is in the main correct,—that is, that it is not wholly, but only partly, correct. Two other affidavits state that the bill is true and correct according to their best recollection at the time made. On the other hand the affidavit of four attorneys, who heard all the evidence, objections, exceptions, and all other proceedings of the trial, state positively and unequivocally that the bill is not true, that it presents a different theory of the case from that on which it was tried, and specifies a large number of distinct grounds wherein the bill is incorrect and untrue. One of the affidavits in support of the bill in effect states it to be correct only in part; two other of the affidavits as to its truth are general, and lacking in positiveness. On the other hand the affidavits of four other persons are positive and unequivocal that the bill is untrue and incorrect, and point out with particularity wherein it is untrue; so that, as the matter presents itself, there are but two affidavits in support of the bill, and five hearing witnesses that it is untrue; and, casting out of view the certificate of the judge who tried the case as to its untruthfulness we

hold that the bill as presented cannot and ought not to be considered, as by considering it we would be passing upon a case which the bill makes different from that passed upon by the criminal court. It seems that the trial court afforded to defendant's counsel every facility in its power to procure from the official stenographic reporter a correct version of the evidence, objections, and exceptions, of which it seems they did not avail themselves.

In this view of the subject there is nothing before us for consideration but the record proper, and, finding no error in it, the judgment is affirmed.

All concur except RAY, J., absent.

BOWEN v. CHICAGO, B. & K. C. RY. CO.

(Supreme Court of Missouri. May 7, 1888.)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE OF MASTER—QUESTION FOR THE JURY.

Plaintiff, an employee, was injured, without negligence on his part, by the falling of a temporary bridge which he was crossing on defendant's train. The bridge was designed for the passage of trains, the operation of a pile-driver, and the construction of a permanent bridge therefrom. The bridge had been in use for several days. All the details of the construction and inspection of the bridge were before the jury. Held, that it was for the jury to say whether defendant used reasonable care in the construction and inspection of the bridge, keeping in view the purpose for which it was to be used.

2. SAME—DEFECTIVE APPLIANCES—NEGLIGENCE OF MASTER—DEGREE OF CARE.

Where defendant furnishes for his employee a temporary bridge for the passage of construction trains, and the construction of a permanent bridge therefrom, the fact that the bridge was built under a competent foreman, and competent inspectors were afterward furnished, does not free defendant from liability to such employees for defects in the construction and repair of the bridge which defendant could, in the exercise of ordinary care, have known of.¹

3. SAME—DEFECTIVE APPLIANCES—EVIDENCE.

In an action against a railroad company for personal injuries from a falling bridge, evidence that the piles, under a part of the bridge that did not give way, leaned down the river, and were braced before the accident, is admissible as tending to show the general character of the structure, the weight to be given the evidence being for the jury.

4. SAME—DEFECTIVE APPLIANCES—NEGLIGENCE OF MASTER—INSTRUCTIONS.

In an action, by an employee, for personal injury, an instruction that plaintiff would be entitled to recover if defendant knew, "or by the use of ordinary care in the inspection of said bridge or otherwise" might have known, that it was unsafe, does not, by the use of the words "or otherwise," call for the highest degree of care possible on defendant's part.²

5. JURY—PROVINCE OF—FINDING THAT THERE IS EVIDENCE AS TO A FACT IN QUESTION.

Where an interrogatory submits to the jury the question whether there is any evidence tending to prove an alleged fact, the answer will be disregarded, the question being one of law for the court.

6. APPEAL—REVIEW—DEMURRER TO EVIDENCE.

Where defendant puts in his evidence, after interposing a demurrer to plaintiff's evidence which was overruled, and the evidence as a whole entitles plaintiff to go to the jury, the demurrer will not be considered on appeal, though it should have been sustained when it was interposed.

SHERWOOD, J., dissenting.

Appeal from circuit court, Carroll county.

¹The master is responsible for the negligence of a servant who stands as his vice-principal and direct representative, invested with his own authority over inferior servants, and the latter, when injured by such negligence, are not barred by the doctrine of fellow-servant. *Farren v. Sellers*, (La.) 3 South. Rep. 363, and note; *Railroad Co. v. Smith*, (Neb.) 36 N. W. Rep. 285.

²A master's liability for injuries to his servant for defective arrangements is not that of an insurer or of a guarantor. The question is one of reasonable care and diligence. *Batterson v. Railway Co.*, (Mich.) 18 N. W. Rep. 508, 18 N. W. Rep. 584; *Richards v. Rough*, (Mich.) 18 N. W. Rep. 785; *Railroad Co. v. Wagner*, (Kan.) 7 Pac. Rep. 204; *Pierce v. Mills Co.*, (Ga.) 4 S. E. Rep. 381; *Manufacturing Co. v. McCormick*, (Pa.) 13 Atl. Rep. 273.

H. H. Trimble, Palmer Trimble, Anderson, Davis & Hageman, Mirtick & Young, and Eads & Graham, for appellants. Waters & Wyne, for respondent.

BLACK, J. Defendant appealed from a judgment in a personal damage suit, and insists that the evidence does not support the verdict. The facts disclosed are these: In the course of the construction of its road the defendant built a temporary bridge, or false work, over Grand river, in Chariton county. This bridge was used for the erection of the permanent structure therefrom, and for the passage of construction trains. It had been so used for 11 days before the accident in question. Plaintiff and others, a gang of track-layers, took the evening construction train for their lodging-place, on the east side of the river, and, as the train was passing over the bridge, about 100 feet of it gave way, the engine and several cars went down, and the plaintiff, to save his life, jumped from the car, landed in the river, and received the injuries of which he complains. It is not claimed that he was guilty of negligence. The charge of negligence is that the bridge was not of sufficient strength to allow the train to pass over it in safety, and that it was insecure and in an unsafe condition at the time it gave way. Four piles were driven in a line with the current of the river, and on the top of these was placed a sill, some 15 feet above the water. On this sill were placed four posts 16 feet high, with a cap on top. These bents were 17 feet apart and extended from shore to shore,—a distance of some 300 feet or more. In that part of the bridge which gave way, a pony bent was constructed on each of the bents before described, consisting of three posts with a cap, to receive the stringers upon which the ties rested. There is evidence that the plan of the bridge was the standard plan for permanent wooden bridges where there is no driftwood, and that the timbers and material used were of the standard size and of good quality. The evidence also shows that the posts of the pony bents were not placed directly over the posts beneath; that the piles under one bent were far out of a perpendicular position; but this bent was next to the shore, had been braced a day or so before the accident, and was not in that part of the bridge which fell; that a pile-driver, built upon trucks and weighing some 30 tons, was operated from the track on the bridge, the use of which caused the bridge to vibrate and throw the track out of line, so that frequent inspection of the bridge was required. One witness says the ties were not spiked to the stringers, but others say every fifth or sixth tie was spiked. The track was constructed in such a way that it could be moved out of line, from time to time, and not interfere with the work on the permanent bridge.

1. As between master and servant, the mere fact that an appliance proves to be defective, and the servant is injured, does not make out a *prima facie* case for the servant of negligence on the part of the master. But that is not this case. Here all the details of the construction of the bridge and its inspection were before the jury, so that the case does not stand alone on the fact that the bridge fell and the plaintiff was injured. The measure of the defendant's duty is reasonable and ordinary care, both in the construction of the bridge and in keeping it in repair. Reasonable and ordinary care must always be determined in the light of the dangers to be reasonably apprehended. It is clear that more care is required in the construction of a temporary bridge, designed for the passage of trains and the operation of such a pile-driver therefrom, than in one simply designed for the passage of trains. While the plaintiff did not call any expert bridge builders to show that the bridge was defective in its construction, still it was competent for the jurors to say, with all of the details before them, whether the defendant had used reasonable and ordinary care and foresight in erecting this structure, keeping in view the purposes for which it was to be used. The same may be said of the inspections. The superintendent says he inspected the bridge three or four times each day,—three times on the day it fell,—and that he saw nothing wrong;

and another witness says he inspected it at least twice a day. Forces of men were at work on both sides of the river, and at different places on the bridge, and some of these inspections were made in going from one place to the other, to give directions; and whether these inspections were made with reasonable care was a question for the jury. It is a well-known principle of applied mechanics that these oscillating motions are highly detrimental to such structures, and a corresponding degree of care should be exercised to guard against their effects. There was no error in sending the case to the jury.

2. Thus far we have considered the evidence as it stood at the close of the case. A demurrer was interposed at the close of the plaintiff's evidence, which was overruled. If, after making such a demurrer, the defendant puts in his evidence, and the evidence as a whole entitles the plaintiff to go to the jury, the demurrer to the plaintiff's evidence will not be considered here. This is true though the demurrer should have been sustained, as the case stood, when it was interposed.

3. We have held again and again that, as between master and servant, the master is not required to furnish absolutely safe appliances. The rule in this respect is that the master must use reasonable and ordinary care and foresight in procuring appliances and keeping them in order and good repair, and this is the extent of his duty to the servant. This rule, it is said, is violated by so much of the plaintiff's second instruction as declares that, if the bridge "was unsafe and insecure, and was insufficient to support and sustain the weight of the train, because of its construction or its then condition; and if defendant knew, or by the use of ordinary care in the inspection of said bridge or otherwise, might have known, that said bridge was insecure, insufficient, or unsafe, * * * then the plaintiff is entitled to recover." We cannot see that the words "or otherwise" make the instruction call for the highest degree of care possible on the part of the defendant. By it the defendant's liability is predicated upon the fact that the bridge was unsafe, and the defendant knew it, or might have known it by the use of ordinary care. This is made the more emphatic by two instructions given at the request of the defendant, which are as follows: "(6) Even if the defects were in the original construction of the bridge, yet defendant would not be liable for such defects if it provided competent inspectors, who went over said bridge very carefully, and inspected all parts of it carefully, and was not able to detect any such defects." "11. Proof that the bridge got out of repair after it was built will not entitle plaintiff to recover. He must follow this evidence by additional evidence showing that defendant knew that the bridge was out of repair, or would have known it by exercising ordinary care. Such knowledge will not be presumed; plaintiff must prove it."

4. The court refused to instruct that, if defendant selected a competent person to plan the bridge, good materials, and competent mechanics, and if the bridge was planned by such foreman and built by such mechanics according to the plan and of said materials, then defendant is not liable for defects in the construction; but the court gave an instruction to the same effect, with this qualification, "unless defendant knew, or could in the exercise of ordinary care have known, of such defect." A servant is not a mere machine, employed to drive a nail here, or a spike there, where directed by the master or some one representing him. Many things involving the exercise of judgment may properly be left to the servant. Hence it has been held, where the master employs competent workmen, and provides suitable material for staging, and intrusts the duty of erecting the staging to the workmen, as a part of the work which they are engaged to perform, that he is not liable to one of the workmen for injuries resulting to one of them from the falling of the staging. The negligence in such cases resolves itself into negligence of a fellow-servant; and the principle has been applied under a variety of circumstances. *Kelley v. Norcross*, 121 Mass. 508; *Killea v. Faxon*, 125 Mass. 485; *Armour v. Hahn*, 111

U. S. 313, 4 Sup. Ct. Rep. 433; *Peschel v. Railway Co.*, 62 Wis. 388, 21 N. W. Rep. 269. It is just as well settled that, if the master undertakes to furnish structures to be used by the servant in the performance of his work, the master must use due care in the erection of the structures, and if there is negligence on his part, or negligence on the part of some one representing him in that respect, he is liable for injuries sustained by the servant. See authorities just cited; *Arkerson v. Dennison*, 117 Mass. 407. Now in this case it was no part of the duty of the plaintiff to build or keep the bridge in repair. Neither he nor his foreman had anything to do with it. It was held out to him as reasonably safe for the passage of construction trains by the very act of taking him back and forth. The bridge was planned and built under the supervision of foremen employed for that purpose. The acts of these foremen were the acts of their principal, and not the acts of a fellow-servant of the plaintiff. There is nothing in this case to take it out of the rule that the master is bound to use reasonable care and foresight in furnishing and keeping in repair structures and appliances to be used by the servant in the prosecution of the work assigned to him. This duty is personal to the master, and, if intrusted to a foreman, the negligence of the foreman is the negligence of the master. It is not enough in such cases to furnish a competent foreman or agent. If the agent is shown to have been negligent, the negligence will be imputed to the master. *Porter v. Railroad Co.*, 71 Mo. 67; *Covey v. Railroad Co.*, 86 Mo. 639. For like reasons the defendant did not perform its whole duty by furnishing a competent bridge inspector. It was its duty to see that the bridge was properly inspected, and that, too, considering not only the fact that it was used for the passage of trains, but that it was used in operating a pile-driver therefrom. It follows that there was no error in giving and refusing instructions upon this branch of the case.

5. The objections made to the eight special findings returned by the jury in answer to interrogatories submitted at the request of the defendant are that the findings are not supported by the evidence. These objections are disposed of by what was said at the outset of this opinion. We may add, as to the eighth interrogatory, that whether there is any evidence tending to prove an alleged fact is a question of law for the court, not of fact for the jury. Such an interrogatory, with its answer, will be disregarded.

6. During the progress of the trial evidence was received to the effect that the piles under the east bent leaned down the river at an angle, one witness says, of 45 degrees. The objection to the evidence is that it was irrelevant and immaterial. We think the evidence has some tendency to show the general character of the structure. It is true this bent did not give way, and other evidence shows that these piles were braced before the accident, but the weight to be given to the evidence was a question for the jury. It is plain that a fair trial of this case involves a full description of the entire structure, and of every part of it. The judgment is affirmed.

RAY, J., absent. SHERWOOD, J., dissents. The other judges concur.

STATE v. WARDEN.

(Supreme Court of Missouri. May 7, 1888.)

1. CRIMINAL LAW—CONTINUANCE—ABSENCE OF MATERIAL WITNESS.

An application for a continuance on the ground of the absence of a material witness set out what the witness was expected to prove. The prosecuting attorney consented that the facts set out in the application as to what defendant expected to prove by the absent witness should be taken as the latter's testimony, and defendant was compelled to go to trial. *Held*, that the continuance was improperly refused. Following *State v. Neider*, 6 S. W. Rep. 708.

2. LARCENY—WHAT CONSTITUTES—INTENT.

On an indictment for larceny, defendant having admitted taking the property, but claiming to have done so innocently, thinking it belonged to a relative, it was

error to charge that where property has been stolen, and is found soon after in the possession of another, such person, in the absence of exonerating evidence, is presumed to be the thief, as the question of defendant's intent, and not who took the property, is the one for consideration by the jury.

Appeal from circuit court, Johnson county; JOHN E. RYLAND, Judge.

John H. Warden was indicted for larceny. The jury found him guilty, and he appeals.

S. P. Sparks, for appellant. *The Attorney General*, for the State.

BRACE, J. At the May term, 1885, of the Johnson circuit court, the defendant was indicted and tried for grand larceny. The jury failing to agree, the case was continued to the December term. At the December term the defendant made application for a continuance on account of the absence of Fred. Shores, a material witness, which being submitted to the court, and the state's attorney admitting that if the witness was present he would testify as stated in the application, the same was thereupon overruled, and the defendant compelled to go to trial, and on the trial he was permitted to read the facts set out in the application as the testimony of such absent witness.

The facts stated in the application were material to appellant's defense. The court, in overruling the application and permitting the statement to be read, must have found that the defendant had exercised due diligence in endeavoring to procure the attendance of the absent witness; and under the decisions of this court in *State v. Berkley*, 92 Mo. 41, 4 S. W. Rep. 24, and *State v. Neider*, 6 S. W. Rep. 708, the court committed error in overruling the application for a continuance.

The only other error in the record prejudicial to the defendant was the giving by the court on behalf of the state of the fourth instruction, which is as follows: "The jury are instructed that where property has been stolen, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person is presumed to be the thief; and if he fails to account for his possession of such property in a manner consistent with his innocence, either by direct evidence, or by the attending circumstances, or by his character and habits of life, or otherwise, this presumption becomes conclusive against him." No fault can be found with the abstract legal proposition laid down in this instruction; but the impropriety of laying down abstract propositions of law for the guidance of juries in determining questions of fact, instead of declaring in concrete form the legal conclusions at which they must arrive in a particular case upon the facts as they may find them, is apparent when application is attempted of the correct abstract legal principle contained in this instruction to the facts in this case; and at the same time the inapplicability of the instruction to those facts is demonstrated. There was no question on the evidence as to who took the horse, bridle, and saddle, the property charged to have been stolen. The defendant admitted that he took the property. His plea was that he took it innocently, by mistake, believing that it was the horse of a friend and relative who had given him permission to ride it to his father's house, for which purpose alone he used it and intended to use it. There was evidence tending to sustain this defense, and the only question for the jury to determine was whether the taking was with a felonious intent,—whether the property was stolen, or taken innocently for the purpose stated, by mistake, as the defendant claimed. If the jury found that the property was stolen, the issue was decided. There was no necessity for any presumption in the case. The presumption is indulged under proper circumstances for the purpose of determining who took the stolen property, but has no place in a case where the only question is, was the property stolen? It bears upon the identity of the thief, and not upon the question whether or not there is a thief in the transaction; upon the question of who took the property, and not upon the question of the intent with which it was taken,—the only one before the jury for their determination in this case. The in-

struction was outside of the case, may have prejudiced the defense, and should not have been given. The judgment is reversed, and cause remanded for new trial.

All concur.

ANDERSON v. SCOTT.

(*Supreme Court of Missouri. May 7, 1888.*)

SPECIFIC PERFORMANCE—WHEN GRANTED—PAROL PROMISE TO CONVEY.

A promise by plaintiff's husband, since deceased, to defendant, his son-in-law, of a gift of certain land, on condition that he would buy an adjoining tract, which he bought, and on which he made improvements, will not be specifically enforced in equity after the promisor's death; it appearing that defendant had the use of the promised land, but made no improvements thereon, and there being no proof that the improvements on the purchased land were made on the faith of the gift.¹

Appeal from circuit court, Pettis county; JOHN P. STROTHER, Judge.

Action of ejectment by Mary J. Anderson against Nicholas H. Scott. Judgment for defendant, and plaintiff appeals.

George P. B. Jackson, for appellant. *G. W. Barnett*, for respondent.

BLACK, J. This was an action of ejectment, commenced in April, 1881, for 100 acres of land in Pettis county. Prior ownership in George Anderson is conceded, who, by his last will, dated 19th December, 1879, and probated in March, 1880, devised the land to his widow, the plaintiff in this suit. Defendant married a daughter of the plaintiff and her deceased husband. By way of an equitable defense, he sets up, in his amended answer, that Anderson requested him to purchase an adjoining 85 acres from the Sedalia Savings Bank; that Anderson promised to give him the 100 acres in suit if he would buy and build upon the 85 acres; that he did buy and build upon the 85 acres; that, at the time he took possession of the 85 acres, Anderson gave him possession of the 100 acres, and promised to make him a deed as soon as he (Anderson) got a conveyance of the land from Mills, in whom the legal title was then vested. Anderson had purchased this and other lands, in all 300 acres, from Mills, but did not get a deed therefor until shortly before his death. The deed bears even date with the will, 19th December, 1879. Defendant, or defendant and Mr. Anderson, purchased the 85 acres from the bank in 1877 or 1878, and the deed therefor was made to the defendant in April, 1879. At the time of the purchase the defendant took possession, built a house, barn, and made some other improvements on the 85 acres purchased of the bank. He, at the same time, took possession of the 100 acres, and continued in the possession thereof to the commencement of this suit, but it does not appear that he made any improvement on that tract. Mr. Scott, the former assessor, testified: "I don't remember that Mr. Anderson ever gave in the land, but instructed me to assess it to Nich. Scott, the defendant, and said either that he had given it to Nich.'s wife, or was going to give it to her, and defendant went into possession the next fall or spring. Anderson instructed me to assess this 100 acres and 20 acres of timber to defendant. I have no recollection of what year it was he said this." Leftwick says he had a conversation, date not given, with Anderson, which he relates as follows: "I met him near the land. I asked him why he didn't build on that 100 acres a tenement house, and rent it. He said he had given it to his daughter Mary; said he had

¹Equity protects a parol gift of land equally with a parol agreement to sell, if accompanied by possession, and the donee, induced by the promise, has made valuable improvements on the property. *Dawson v. McFaddin*, (Neb.) 34 N. W. Rep. 338; *Poullain v. Poullain*, (Ga.) 4 S. E. Rep. 92. The improvements must be substantial and valuable, and exceed the value of the rents. *Wooldridge v. Hancock*, (Tex.) 6 S. W. Rep. 818. A parol gift of land, followed by immediate and continued possession, is good as against all subsequent grants or incumbrances of the donor. *Potter v. Smith*, (Mich.) 35 N. W. Rep. 916. See *Anson v. Townsend*, (Cal.) 15 Pac. Rep. 49.

told Nich. that, if he would buy that 85 acres from the bank, he would give him the 100 acres; that it would make him and Mary a nice little farm; and he said: 'I have done it; I think it will be eight years next spring.' Nich. was not in possession then, but commenced improving that spring." Another witness says Anderson told him he had given the 100 acres to Mary, the defendant's wife; but the date of this conversation is not given. A Mrs. Majors says, a short time after the defendant was married, Anderson told her he had given another daughter money to build a house, and intended to settle defendant and his wife on the 100 acres. She also states: "Afterwards he told me that he told Nich., if he would buy the bank land, he would give him the 100 acres. He said that Nich. had bought the bank land. He said he intended to give the 100 acres, and wanted him to build on it, but Nich. thought it would be too near the corner. Nich. did not build on the 100 acres, but on the bank land." Mr. Thompson, the president of the bank, says he had a conversation with Anderson some six months before the latter's death; that they were then fixing up matters about the sale of the 85 acres. Witness says: "The arrangement was made with Anderson. He said he intended to give Nich. the 100 acres adjoining the 85 acres, and he wanted to buy this 85 acres for Nich. We held the 85 acres at about \$1,600, and my recollection is that Nich. paid this off, and Anderson directed the deed to be made to Nich., and I think it was so made. I sold the 85 acres to Anderson at \$20 per acre. I didn't get any understanding about it. I knew the money had been paid. Never saw anybody make the payment. It was reported paid for, and I made the deed. I was president of the bank. Our cashier received the money." The other evidence shows that, at the date of the purchase of the bank land, defendant lived upon rented land; that Anderson left a widow and eight children, and that he owned seven or eight hundred acres of land. The statement with record is that he devised all of his property, real and personal, to his wife.

These principles of law have been settled by repeated adjudications of this court, namely: An agreement for a gift of land will not be enforced against the donor upon proof alone of the promise to give. This is true, whether the promise be oral or in writing. As long as the obligation rests alone upon the promise of the donor, he may revoke it, and equity will not compel a performance. But where the donee has accepted the promise, entered into possession of the land, made improvements upon the faith of the promise, and thus changed his conditions, the donor will be required to make good the gift. *Dougherty v. Harsel*, 91 Mo. 161, 8 S. W. Rep. 583; *Sitton v. Shipp*, 65 Mo. 297; *Hagar v. Hagar*, 71 Mo. 610; *West v. Bundy*, 78 Mo. 407. Such a state of facts will also take the case out of the statute of frauds. *Anderson v. Shockley*, 82 Mo. 250. As between father and son or son-in-law, possession of the land alone, under the promise of a gift, is not sufficient to entitle donee to specific performance. *Bright v. Bright*, 41 Ill. 97; Pom. Spec. Perf. § 131. Now, in this case, the evidence consists wholly of statements made by the deceased to third persons,—many of them in casual conversation,—a most unsatisfactory character of evidence, especially when considering family disputes. These statements, too, tended more strongly to show an intention to give the land to the daughter than to the defendant. Mrs. Majors says Anderson told her that he wanted defendant to build on this land, but defendant thought the building would be too near the corner, and did not build on it. Leftwick speaks of a gift to both the defendant and his wife. The conversation testified to by Mr. Thompson occurred but three months before the date of the will, and six months before Anderson died, and it is clear that at that time Anderson only contemplated making a gift at some future day. The witness says Anderson told him that he intended to give the 100 acres to defendant, but this statement must be considered in connection with the other evidence. The reason assigned by one witness for giving this land to defend-

ant and his wife was that Anderson had given another daughter money to build a house; but how much does not appear. We are satisfied that the only gift ever contemplated as proposed was one of the land to the defendant's wife, and such a gift is not pleaded.

But suppose we are in error in this conclusion, and that Anderson did propose and offer to give the 100 acres to defendant as soon as he got a deed, if the defendant would buy and build upon the 85 acres. The question then is whether there exists such a state of facts as would render a failure to complete the donations inequitable and unjust. Two witnesses say the defendant used the land since the spring of 1877; but this, we have seen, will not suffice. One witness says Anderson told him to assess the land to the defendant; but it does not appear that it was so assessed, nor does it appear that defendant ever paid one cent of taxes on this 100 acres. He had the use of it, but it does not appear that he put any improvements upon it whatever. The improvements were placed wholly upon the 85 acres, the deed to which was, by the direction of Mr. Anderson, made to defendant; and we may say here that the evidence rather tends to show that Mr. Anderson paid for the 85 acres,—at least, assisted in making the payments. Mr. Thompson says the arrangement for the sale of the land was made with Anderson; that the land was sold to Anderson at \$20 per acre, and Anderson directed the deed to be made to defendant. He says, it is true, defendant paid off the \$1,600; but it seems he did not know by whom the money was furnished. Without the land in suit, the defendant retains all the improvements he has made. His changed condition from a renter of the Wood farm to owner of the 85 acres was no detriment to him, and, it is believed, no inconvenience. He has not only got the compensation for all of his outlays, but we are satisfied those outlays were not made by him in consequence of or in reliance upon a gift of the 100 acres, but that they were made in consequence of the purchase of the 85 acres. Under such circumstances, courts of equity do not give specific performance of a gift. The expenditures, to be of any avail, must have been made on the faith of the gift. Pom. Spec. Perf. § 131. Conceding, therefore, that there was a parol promise to give the land in question to defendant upon the conditions specified in the answer, still the defendant has not made out a case entitling him to any relief at the hands of a court of equity, nor entitling him to withhold the land from the plaintiff. The judgment is therefore reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

STATE v. LANGFORD.

(*Supreme Court of Missouri. May 7, 1883.*)

1. HOMICIDE—MURDER—INSTRUCTIONS—UNSKILLED MEDICAL ATTENTION.

On a trial for murder an instruction that if the jury find from the evidence that defendant committed the crime they must find him guilty of murder in the first degree, notwithstanding that they may also believe and find that unskilled medical treatment aggravated the wound of deceased, and that deceased might have recovered if greater care and skill had been employed in treating her, is proper.

2. SAME—MURDER—INSTRUCTIONS—PREMEDITATION.

On a trial for murder the court instructed the jury that if they found from the evidence that defendant premeditatedly committed the crime they must find him guilty, and that "premeditatedly" meant "thought of beforehand, any time, however short." *Held*, that the definition is correct, and does not materially vary from the usual one, "thought of beforehand, any length of time, however short."

3. SAME—INSTRUCTIONS—OMISSION TO CHARGE—HARMLESS ERROR.

On a trial for murder, where there was no evidence of either a lawful or just provocation, the court instructed the jury that if they found from the evidence that defendant deliberately committed the crime they must find him guilty, and, after defining "deliberately" to mean "done in a cool state of the blood, and not done in a heat of passion engendered by a lawful or just provocation," added, "and the court

instructs you that in this case there is no lawful provocation." *Held*, that the omission of the court to tell the jury that there was no just cause of provocation, if erroneous, could work no prejudice to the defendant.

4. SAME—MURDER—INSTRUCTIONS—INTENT TO KILL.

On a murder trial the court instructed the jury that, in order to convict defendant of murder in the first degree, they must not only believe and find from the evidence that he intended the shooting of deceased, but that he shot intending to kill her; and that if her death ensued from his act of shooting her in a vital part with a deadly weapon they must find that he intended to kill her, unless the evidence shows to the contrary. *Held*, that the instruction was correct.

Appeal from St. Louis criminal court; JAMES C. NORMILE, Judge.

Henry Langford was indicted for the murder of Annie Fisch, in 1885, and convicted. He now appeals.

Simon S. Bass, for appellant. *B. G. Boone*, Atty. Gen., *A. C. Clover* and *C. O. Bishop*, Circuit Attys., for the State.

NORTON, C. J. Defendant was indicted in the St. Louis criminal court at its May term, 1885, for murder in the first degree for killing one Annie Fisch, in the city of St. Louis, in March, 1885. After repeated continuances he was put upon his trial at the March term, 1887, of said court, and was convicted of murder in the first degree. The case is before us on defendant's appeal, and it is insisted that the court erred in giving instructions, and in order to a proper disposition of the objections relied upon, reference to the evidence is necessary. A voluntary statement made by defendant after his arrest was put in evidence, and is as follows: "I got acquainted with that girl in Belleville about nine months ago, and we worked together there, and I got closely and intimately acquainted with her, (hinting at illicit intercourse.) I promised to marry her so soon as I could provide a home for her here in this city. I found employment in a machine shop, and brought her over and put her in a boarding house at Christy avenue. In a few days I learned that she had intercourse with others in that boarding-house; I upbraided her for it, and asked her how it came that she looked so pale and sickly now; she excused herself as being sick,—didn't sleep well; and I was satisfied that she was not true to me; and she even played dirty tricks on me; so I resolved to kill her rather than to carry on the way she did; I had set the 10th inst. as the day of our marriage, and made this evening an appointment with her; we would meet at my brother's," and there, he said, he got in a dispute with her and shot her. This statement was made the night of the shooting, and soon after he was arrested. Joseph Langford, a brother of defendant, testified that during the day on the night of which deceased was shot defendant came to where he was at work, and during the conversation said: "I have made the motion before already to kill the girl;" "I am going to kill her to-night;" having requested his brother to let him bring deceased to his house, and, being refused, "If you don't let me take her to your house, I will take her to an assignation house, and I will kill her there." The following statement, made by deceased in the presence and hearing of defendant, the day after she was shot, was put in evidence: "Annie Fisch is my name; I am twenty-one years of age; this man before me I identify as Henry Langford; he is my lover; he is the man who shot me last night, whether with a revolver or anything else I don't know; I stayed at Mrs. Duffy's, 908 Charles street; a gentleman who stays there gave me a scrap-book, and Henry told me the negro had told him that two gentlemen stopping in the same house were too intimate with me, and Langford wanted to shoot me; this was on Tuesday night, March 3, 1885; yesterday he came again and wanted me to leave the house and move down town; I went with him about 8 o'clock P. M.; took the cars and got off at Arsenal street and walked to the house on Lemp avenue; I did not enter the house where his sister lives; Langford said nothing to me and shot me; that is all I know." After deceased was shot she was removed to the hospital, where it was ascer-

tained that the bullet had entered the skull just above the eye, but, in consequence of the soreness of the wound, excitement, and resistance of deceased to the surgeon's efforts to locate the bullet, its location could not be determined. Afterwards, on the 12th of March, she was placed under the influence of an anæsthetic, and an operation was performed and an effort made to locate the bullet by probing. After that deceased began to sink, and died on the 15th of March, 10 days after she was shot. A *post-mortem* examination was held, which resulted in showing that the bullet had lodged between the skull and brain; that under it a clot of blood and water had formed, which produced compression of the brain, from which she died. There was some evidence tending to show that the wound was not necessarily mortal, and that death might have resulted from the operation performed in probing for the bullet. Among others, the defendant assigns for error the action of the court in giving the following instruction: "If you believe and find from the evidence that defendant feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought shot Annie Fisch, and inflicted on her a dangerous wound on some vital part, as charged in the indictment, and that such shooting and wounding caused the death of said Annie Fisch, you should find the defendant guilty of murder in the first degree, notwithstanding you may also believe and find that unskilled medical treatment aggravated such wound, and that deceased might have recovered if greater care and skill had been employed in treating her."

It is argued that this instruction denies to defendant the benefit of the defense; that the death of deceased was produced or occasioned by other causes than the wound. We are unable to perceive wherein the instruction does this. On the contrary, it requires the jury to find, before they can convict defendant, that the wound was a dangerous one, inflicted on some vital part of the body, and that it caused the death of deceased. The direction of the instruction that, if they so found, it mattered not that they might also believe and find that unskilled medical treatment aggravated such wound, and that deceased might have recovered if greater care and skill had been employed in treating her, finds abundant support in the authorities. In section 139, 8 Greenl. Ev. it is said: "If death ensues from a wound given in malice, but not in its nature mortal, but, which being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it; but he will be guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or his own misconduct, and not the wound itself, was the sole cause of his death, for if the wound had not been given the party would not have died." So in 2 Bish. Crim. Law it is said, in section 638, that the doctrine is established that if the blow caused the death, it is sufficient, though the individual might have recovered had he used proper care himself, or submitted to a surgical operation to which he refused submission, or had the surgeon treated him differently; and in section 639 it is said: "In law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death, and the wound need not even be a concurrent cause; much less need it be the next proximate, for, if it is the cause of the cause, no more is required." In the well-considered case of *Com. v. Hackett*, 2 Allen, 141, after a review of the authorities bearing upon the question, it is said: "The well-established rule of the common law would seem to be that, if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter, and that the person who inflicted it is responsible, though it appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that improper or unskillful treatment aggravated the wound or contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. The

principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and be responsible for the natural consequence of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes co-operated in producing the fatal result. Indeed it may be said that neglect of the wound, or its unskillful and improper treatment, which were of themselves consequences of the criminal act which might follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law as stated in the authorities cited has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and to take away from human life an essential and salutary safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment."

The court instructed the jury that "premeditatedly" meant "thought of beforehand, any time, however short." This definition is claimed to be erroneous, as the word has heretofore been defined to mean "thought of beforehand, any length of time, however short." The omission of the word "length" from the instruction did not change the meaning of the word as heretofore usually defined, and the instruction as given was as favorable to defendant with the omitted word left out as if it had been inserted, and was in no way calculated to mislead the jury or prejudice the defendant.

The court defined "deliberately" to mean "done in a cool state of the blood, and not done in a heat of passion engendered by a lawful or just provocation, and the court instructs you that in this case there is no lawful provocation." The record does not disclose any evidence either of a lawful or just provocation. It shows that the design to kill deceased was deliberately formed and meditated upon, and that the deceased was shot in pursuance of and in the execution of this design, and the omission of the court to tell the jury that there was no just cause of provocation, if erroneous, could work no prejudice to defendant.

The following instruction is also objected to, viz.: "In order to convict the defendant of murder in the first degree, you must believe and find from the evidence that defendant not only shot deceased, Annie Fisch, intentionally, but that he shot her intending to kill her. In this connection, however, you are instructed that in the absence of qualifying facts and circumstances a person is presumed to have intended the natural, ordinary, and probable result of his acts. Wherefore, if you believe from the evidence that defendant intentionally shot Annie Fisch in a vital part with a deadly weapon, to-wit, a loaded pistol, from which death ensued, you will find that he intended to kill, unless the facts and circumstances given in evidence show to the contrary." No such inconsistency as is alleged to exist between this and the other instructions given is perceived, and that it contains a correct declaration of law has been held in the case of *State v. Gee*, 85 Mo. 648.

The cause was fairly and impartially tried, and the evidence fully sustains the verdict of the jury, and we find nothing in the record calling for an interference with the judgment, and it is hereby affirmed.

All concur except RAY, J., absent.

INTERNATIONAL BANK OF ST. LOUIS v. FIFE *et ux.*

(Supreme Court of Missouri. May 21, 1888.)

1. SPECIFIC PERFORMANCE—ENFORCEMENT OF PAROL GIFT—INTENTION OF DONOR.

Defendants in ejectment testified that the disputed property had been given to them in fee, and that the donor had agreed to make a deed to them. Other witnesses testified that the donor had admitted making the gift. It also appeared that he was under obligations to defendants for support furnished him during minority. The donor alone testified that the gift was conditional. *Held*, that the evidence shows an intention in the donor to convey an absolute estate to defendants.

2. LIMITATION OF ACTIONS—POSSESSION UNDER PAROL GIFT—EXECUTION OF MORTGAGE BY DONOR.

Defendants in ejectment, having been in adverse possession of the property for the full statutory period, under a parol gift, will not have their claim defeated by proof that the donor had, within the statutory period, without defendants' consent, executed a mortgage and trust deed thereon, paid taxes, demanded rents of defendants, etc., as these acts, not being by defendants, do not show that they have elected to abandon their claim of title under the gift.¹

3. SAME—RUNNING OF STATUTE—POSSESSION UNDER PAROL GIFT.

Where a person takes possession of property under a parol gift, which gave her a right to a deed thereto immediately, the statute of limitations commences at once, and this defense in an action of ejectment will not be waived by setting up in the answer an equitable claim of title to the property.¹

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

Ejectment by the International Bank of St. Louis against William G. Fife and Sarah J. Fife. Judgment for defendants, and plaintiff appeals.

I. Gottschalk, for appellant. *Thomas A. Russell*, for respondents.

DAY, J. This is an action of ejectment, the petition being in the ordinary form, to recover from defendants the possession of a house and lot situated in North St. Louis, Mo. The answer sets up the statute of limitations; and also an equitable defense, in substance, that one Hymers, who is the common source of title, was left an orphan without means; "that he was supported by defendants without compensation; that he afterwards became prosperous, and in 1871 was indebted to defendant Wm. G. Fife, in the sum of about \$1,600; that, when said claim was presented, said Hymers admitted its correctness, and proposed that in consideration of the great services rendered him by defendant in providing for him when a child, and also the release of said claim, to convey to defendant Sarah J., by deed in fee, the property in dispute; that said proposition was accepted, and said claim released; and that on or about July 8, 1872, possession of said property was delivered to defendant Sarah by Hymers; and that said Sarah has been in peaceable possession ever since, and has made improvements thereon, but that said Hymers has never made a deed, notwithstanding several requests, to which said Hymers always made some excuses, but always recognized the ownership of said defendant Sarah; and that he, on July 15, 1880, without knowledge of defendant, undertook to convey said property by deed, together with other property, in trust, to secure the payment of a debt due by him to plaintiff; that, in default of the payment of said debt, the right and title of said Hymers to said property was sold, and by trustee's deed conveyed to plaintiff, and that this constitutes the title of plaintiff. Also that, at the time of the making of said deed of trust, defendant had been in possession for about eight years, and that plaintiff knew, or might by proper diligence have known, the fact that defendant claimed said property; and that, when plaintiff purchased the same, it had notice of all

¹ In an action to quiet title to real estate, the evidence showed that plaintiff's title had been acquired by a parol gift from her father, followed by immediate and continued possession. *Held*, that her title was good as against all subsequent grants or incumbrances of the donor, except such as had been recognized and acquiesced in by her while the title stood in the name of the donor. *Potter v. Smith*, (Mich.) 35 N. W. Rep. 916.

these facts, and of defendant's equitable title." Plaintiff read in evidence at the trial the record title, which was formal and regular, and consisted of a deed of trust from Hymers to Lange & Leise for the benefit of plaintiff, dated and recorded in July, 1880, on the property in question, with other property, to secure a certain note for \$23,000; publication of notice of sale; and deed of said trustees to plaintiff, dated in March, 1884, conveying the property in dispute. Said Hymers had given a former deed of trust to one Mills on the property, which was dated, acknowledged and recorded in November, 1872, which was discharged out of the funds borrowed from plaintiff, and released at the date of the trust deed in favor of plaintiffs. Said first trust deed, in favor of Mills, was also read in evidence by plaintiff. The defendants went into possession of the premises, under claim of title from said Hymers, in July, 1872,—more than 10 years prior to the institution of this suit,—and have ever since maintained their possession. The origin and nature of their equitable claim, of title is sufficiently indicated by the abstract of the answer already given, which, together with the statute of limitations, as indicated, constitute the defense to the action. The evidence in this behalf will be noticed hereafter. The case was tried by the court without the aid of a jury, and the following action had upon declarations of law. At the instance of plaintiff, the court gave those numbered 1 and 4, as follows: "(1) If the court believes from the evidence that Hymers gave the property in question to defendant, or one of them, to have and enjoy the same during life, and that plaintiff had no notice of such gift prior to its purchase, then such gift is no defense to plaintiff's claim." "(4) If defendants knew that Hymers, on the strength of his record title to the lot in question, and which was claimed by defendants as their own, under a parol gift from Hymers, contracted a loan from another party, who knew nothing of defendant's claim, to secure said loan, executed a deed of trust on said lot, without objecting thereto, or without taking any means to remove the cloud on their title caused by the existence of the record title, and, if plaintiff purchased said lot at a sale under such deed of trust of Hymers, then said defendants are equitably estopped from asserting any claim against said plaintiff for said lot." The court also gave, at the instance of defendants, the following: "If the court believes from the evidence that Hymers gave the property in question to Mrs. Sarah J. Fife, and delivered the possession of the premises described in the petition to the defendant Sarah J. Fife, and at the time promised to convey the same to her, and that defendants went into possession, claiming title according to such gift, and that such possession continued for a period of over ten years before the filing of the petition in this cause, and that such possession was notorious, visible, and actual for that period, then the court declares that said possession is adverse, and the court should find for defendants." Of its own motion, the court also gave the following: "(5) If the court finds that the deed of trust referred to in instruction No. 4 was made and executed by Hymers without the knowledge or assent of the defendants, then the fact that the defendants took no action to contest the validity of said deed of trust, or to remove the cloud upon her title, after she discovered the execution of said deed of trust, will not prejudice her defense under the statute of limitations." The court refused to give instructions numbered 2 and 3, asked by plaintiff, and as follows: "(2) If the court believe from the evidence that Hymers had, in 1872, the record title to the lot in question, and in that year gave the same by parol to Mrs. Fife, and that, in pursuance thereof, he delivered possession thereof to her, yet if, a few months thereafter, said Hymers, for a valuable consideration, executed the deed of trust read in evidence, by which said property was conveyed to secure the payment of a certain loan, and that said deed of trust as duly recorded, and defendants knew of this shortly after such execution, took no step to contest the validity of the same; and if plaintiff afterwards, on the strength of such record title, and without notice of defendants'

claim, advanced to said Hymers a large amount of money, which was partially used in taking up said deed of trust, and took from said Hymers his other deed of trust on this and other property to secure the payment of its loans so made; and if all other property has been sold under said deed of trust, and did not bring sufficient to pay said loans; and if the lot in question was also sold, after all other property was exhausted, under the terms of said deed of trust, and plaintiff became the purchaser at such sale,—then plaintiff is entitled to recover, although defendants may have been in adverse and uninterrupted possession for ten years prior to the commencement of this action. (3) The court instructs that the statute of limitations constitutes no defense to this action as against plaintiffs." The trial court found upon the various issues as follows: *First*, that defendant Mrs. Fife held the property in question as absolute donee of the fee from said Hymers; *second*, that Mrs. Fife's merely equitable claim could not, however, prevail against the plaintiff, for the reason that plaintiff is not shown to have had notice of defendants' equitable title, but bought in good faith, for value, and without notice from Hymers, who had the record title; *third*, that defendant has acquired title under the statute of limitations; *fourth*, that the equitable defense set up in the answer does not operate as a waiver of the statute of limitations, also set up in the answer.

The finding of the court upon the issue whether the said gift was absolute and in fee, or conditional and for life only, was, we think, well warranted by the evidence. Hymers admits that he gave the defendant Mrs. Fife the house to live in for her life, if she would take care of the old people. He testifies that he made his said declaration one night at the house of the Fifes; that he don't know certainly who was there; and that he cannot say the declaration was not made at the wedding anniversary. Said Hymers is the only witness testifying in his behalf in this connection. On the other hand, both defendants testify that on the 20th of October, 1871, which was the twenty-fifth anniversary of their marriage, he made Mrs. Fife a present of the house and lot in North St. Louis. The daughter, Emma Richards, also so testifies. Both defendants say he promised to make a deed to Mrs. Fife. The witnesses Stone, Earley, and Dr. Hughes testify to statements made to them on various occasions by Hymers to the effect that he had given the house to Mrs. Fife. Hymers admits that the house was altered, in some particulars at the suggestion and request of Mrs. Fife; that he put her in possession of the property, which defendants held without rent being demanded of them until 1881. It appears that said Hymers was under obligations to the Fifes, which obligations he recognized in statements to several of the witnesses, and, to some extent, in his own testimony. In 1849, he was taken when a child, from an orphan asylum by the parents of defendants, who were also then living with their said parents, and said Hymers continued to reside with said family until 1853, when the defendants moved to a different house, taking said Hymers to live with them, which he continued to do until 1856 or 1858. Between that time and 1871, he had prospered in business, and at the time of the gift was possessed, it seems, of ample means. Said Hymers, it is true, probably did not employ language such as would be used in deeds of conveyance; but he intended at that time, we think, to give Mrs. Fife the absolute estate, as a home, and this we apprehend was the natural purport of his language at the time. There is, we think, a clear preponderance of the evidence in favor of defendants upon this issue.

2. On the issue whether the plaintiff is chargeable with actual notice of defendants' claim of title under the facts of the case, the court found for plaintiff, and that question may, we think, be waived, as the case was disposed of in the trial court upon the theory that the defendants had acquired the legal title under the statute of limitations; and, as we think this ruling of the trial court must be sustained, under the facts of the case, we do not deem

it necessary to pass on the question of actual notice, and therefore waive the same.

3. The defendants had been in the actual, open, and notorious possession of the property for some 12 years prior to the filing of this suit; and the whole question on this branch of the case is whether, under the facts of the case, their said possession was adverse, within the meaning of the law. Where an absolute and unqualified donee in fee takes possession of lands under a parol gift, his possession is thenceforth adverse to the donor. Authorities are numerous to that effect, and, among others, the case of *Rannels v. Rannels*, 52 Mo. 109, where it is said that the donee is to be regarded as holding adversely to the donor "from the very inception of her entry under the parol gift." In the case at bar, it is claimed, however, that defendants are to be regarded as holding permissively, and in subordination to Hymers, and not adversely, for the reason that Hymers paid the taxes up to 1881, executed the mortgage to Mills in November, 1872, demanded rents of defendant in 1881, before the 10 years had expired, and, again, in 1880 executed the trust deed under which plaintiffs claim, and for the further reason that defendants took no affirmative action to obtain a deed for the property. These acts, however, were the acts of Hymers, and not of defendant. There is no evidence that Mrs. Fife, or her said husband, had any knowledge of Hymer's intention to execute said instruments. There is no evidence that either of said deeds were given with the consent of Mrs. Fife or her said husband. When Mr. Fife heard of the first mortgage to Mills, he went to see Hymers about it, who explained the matter; that he was building considerable, had to raise considerable money; and that he would discharge the mortgage, so far as this property was concerned, in a short time. The execution of these deeds, which were the act of Hymers, of which defendants had no knowledge before they were executed, and to which they gave no consent at any time, can afford no ground for the claim of plaintiffs that defendants had elected to abandon their claim of title, according to the gift: that is, adversely to Hymers. No one claiming under the Mills deed of trust made any effort to disturb defendants' possession, and, under the facts in evidence, Mrs. Fife could not have taken any steps, at law or in equity, which would have availed her anything as against the mortgage already executed, acknowledged, and recorded. So, too, with reference to the deed of trust under which plaintiff claims. At the date thereof, the defendant had not acquired the legal title under the statute of limitations, for the 10 years had not run in 1880 or in 1881; and her equitable claim of title under the parol gift and possession would not have prevailed against the plaintiff, holding under the trust deed, if, as the court found, the plaintiff was not chargeable with actual notice of defendants' equitable claim. Defendant was not, we think, bound to take such affirmative action to obtain a deed; and, while no effort was made to disturb her possession, she might continue to hold and claim the same, under said gift, openly, notoriously, and adversely, which the evidence shows she did, and permit her possession and claim of title to ripen, under the statute, into the legal title. From July, 1872, when Hymers put defendants in possession, until 1881, he never demanded any rent; and when he did so demand rent, in said year, and began his suit threatening her possession, she successfully defended the action under her said possession and claim of title. At all times, when questioned on the subject, or when called upon to defend her possession, she has, so far as the evidence discloses, set up her claim of title under said gift, with possession, which she has maintained openly, adversely, and notoriously for more than 10 years prior to the institution of this action; and this, we think, under the authorities, gives her the legal title under the statute of limitations.

4. A further claim in plaintiff's behalf, in substance is that the defense of the statute of limitations was waived by the equitable claim of title set up in the answer, remains to be noticed briefly. The case of *Adair v. Adair*, 78

Mo. 630, cited in support of this position, is, we think, not applicable. In that case the vendee's possession, when taken, was not adverse to the vendor, the contract of purchase being executory. The legal title was reserved by the vendor until the payment of the purchase money, and until such payment by the vendee his possession was not adverse. In the case before us the possession of Mrs. Fife was adverse from the beginning. After taking possession, there was nothing more to be done on her part. Her right to the deed immediately arose, and the statute of limitations began at once to run in her favor.

There are some other questions presented, but none that would change the result, and they are therefore not discussed. This leads to an affirmance of the judgment of the trial court; and it is accordingly so ordered, with the concurrence of the other judges.

STATE v. LEEDY.

(*Supreme Court of Missouri. May 7, 1883.*)

LARCENY—FROM A DWELLING-HOUSE—WHAT CONSTITUTES—REV. ST. MO. § 1300.

On an indictment for larceny, it appeared that defendant stole certain goods from the office of an hotel kept by one O.; that the hotel was owned by, and the license to keep the same issued to, one D. Held, that such theft was larceny from a dwelling-house, within the meaning of Rev. St. Mo. § 1300.

Appeal from circuit court, Jasper county; M. G. MCGREGOR, Judge.

George Leedy was indicted for larceny in a dwelling-house. The jury found him guilty, and he appeals.

T. B. Houghawant, for appellant. *The Attorney General*, for the State.

BRACE, J. The defendant was indicted and convicted in the circuit court of Jasper county of larceny in a dwelling-house and sentenced to the penitentiary for two years. The indictment charged the defendant with feloniously stealing a pair of shoes at the county aforesaid, the property of one Robert Owens, in the dwelling-house of the said Robert Owens, then and there being. The testimony tended to prove that the defendant stole the shoes; that they were of the value of eight dollars; that they were the property of Robert Owens; that they were taken from a room in a house in which the said Owens resided, with his mother and sister; that the property was owned by one Divers, step-father of the said Owens, who bought it for the said Owens, and placed him in charge of it; that said Owens was in charge of said house, and carrying on a hotel business therein under a city license issued to said Divers; that the room from which the shoes were taken was used as the office of the hotel, in which Owens kept cigars, oranges, pea-nuts, etc., for sale, for which he had a merchant's license. On the trial, exceptions were taken to instructions given, and to the refusal of the court to give instructions asked by the defendant containing propositions of law the converse of those given. The questions raised by the exceptions are embraced between the following two instructions refused by the court: "(1) If the jury believe from the evidence that the room from which the shoes were taken, was used as a store where cigars, oranges, and pea-nuts, and other merchandise were kept for sale, the said room was not a dwelling-house, and the jury cannot convict the defendant of grand larceny. (2) If the jury believe from the evidence that John Divers, the step-father of the witness Robert Owens, was the owner of the hotel known as the "English Kitchen," and that the same was a hotel, and that the said Divers had the license to run said hotel, and the wife of said Divers was residing in said hotel at the time, then the variance as to the ownership of said house is fatal, and the jury cannot convict the defendant of grand larceny."

We find no error in the refusal of the court to give these instructions. The house in which the shoes were stolen, was the house in which Robert Owens

dwelt with his mother and sister. He was the ostensible head of the family, and in possession of the house, as charged in the indictment. It was entirely immaterial to the defense who was the owner of the house, whether it was run as a hotel, or to whom the license was issued for that purpose. The defendant was fully informed of the offense with which he was charged, by the averment in the indictment that the shoes were stolen in "the dwelling-house of Robert Owens, then and there being in his possession," and the proof sustained this averment. Whether he dwelt there as owner, lessee, or by sufferance, it was, to all intents and purposes, his dwelling-house at the time his shoes were stolen. The averment was sufficient, and there was no variance between the averment and the proof. A man's dwelling-house is that in which he and his family, if he have any, eat, sleep, and make their home; and it is none the less his dwelling-house because he may not be the owner of it; that in it he keeps rooms for lodgers, and furnishes meals to others; and that the license for so doing is in the name of another; and, in this case, although the room in Owen's dwelling-house, in which the shoes were stolen, was used by him as an office, in connection with the other uses of the house, and in it he kept for sale the articles mentioned in the instruction, it did not, by reason of these uses, cease to be a room in his dwelling-house; and a larceny committed in that room was a larceny committed in his dwelling, within the meaning of the statute, just the same as if it had been committed in the dining-room, kitchen, or any other room in the house. Rev. St. 1879, § 1309; Bish. St. Cr. §§ 242, 278, 280. The judgment is affirmed.

All concur.

GRANBY MINING & SMELTING CO. v. RICHARDS.

(Supreme Court of Missouri. May 21, 1888.)

1. CORPORATIONS—CORPORATE EXISTENCE—COLLATERAL ATTACK.

Under act Mo. Feb. 20, 1865, providing that, where a special company is created and organized, a certificate in writing shall be filed with the circuit clerk in the county where the business is carried on, and a duplicate filed with the secretary of state, the mere failure to file such certificate with the circuit clerk is not fatal to the existence of the corporation, but is a mere omission which can not be taken advantage of collaterally.

2. SAME—INCORPORATION—POWER TO ISSUE SPECIAL STOCK—DELEGATION OF LEGISLATIVE POWER.

Where the powers of a corporation and the procedure by which it could be brought into existence have been prescribed by the legislature, the mere fact that the legislature in the same act gave such corporation power to dispose of special stock which was to form no part of the general stock of the corporation, and permitted the holders of such special stock to become a distinct company, is not such a delegation of legislative power as to render an organization formed under the special stock clause invalid.

3. SAME—INCORPORATION—LIABILITY TO LEGISLATIVE ALTERATION.

A company organized under act Mo. Feb. 20, 1865, entitled "An act to incorporate the Missouri Petroleum and Mining Company," which expressly exempts charters of companies formed thereunder from legislative alterations, is not subject to provisions of Rev. St. Mo. 1855, c. 34, art. 1, § 7, declaring that the charter of every corporation thereafter granted shall be subject to alteration.

Error to St. Louis circuit court; WILLIAM H. HORNER, Judge.

Action on promissory notes by the Granby Mining and Smelting Company against Eben Richards. Plaintiff claimed that the notes were executed by Richards and others while partners, doing business under the name of the "Missouri Zinc Company." Defendant claimed that the Missouri Zinc Company was a corporation, and that he could not be held liable as a partner. Defendant set out that the provisions of Rev. St. Mo. 1855, c. 34, art. 1, § 7, declaring that the charter of every corporation thereafter granted shall be subject to alteration and repeal, did not affect the Missouri Zinc Company, which was formed under special act Mo. Feb. 20, 1865, expressly exempting charters

of companies formed thereunder from alterations or repeal. Judgment for plaintiff, and defendant brings error.

Walker & Walker, for plaintiff in error. *Noble & Orrick* and *David Goldsmith*, for defendant in error.

BLACK, J. This action is based upon five promissory notes and an open account, and, without the credits, aggregate \$75,000. The notes are dated in 1881 and 1882, and are signed "Missouri Zinc Co."—some of them "By T. T. Richards, Treas.," and others "By Eben Richards, Prest." The open account is for a balance for zinc sold in 1881. The petition alleges that the defendant, Eben Richards, and others not made defendants, were partners doing business under the name of the "Missouri Zinc Company," and as such executed the notes and incurred the indebtedness. There was a judgment against the defendant for \$49,743.33, and he sued out this writ of error. That the plaintiff corporation supposed the Missouri Zinc Company was a corporation, and made all of the transactions in question with it as such, is clearly shown. The Missouri Zinc Company has and has had a board of directors and other officers since 1869; and the defendant supposed that he was but a shareholder and officer in a corporation, and never professed to be doing business as a partner with the other persons. The plaintiff prevailed in the circuit court on the ground that the Missouri Zinc Company was not a legally organized corporation, and defendant was held liable as a partner, with the named persons. The defendant insists (1) that his company was and is a corporation duly organized under the charter of the Missouri Petroleum Mining Company; (2) that if it is not a corporation *de jure*, it is and was a corporation *de facto*; (3) that in either case the members of the company are not chargeable for its debts as partners. The special act of February 20, 1865, (Acts of 1864 1865, p. 268,) makes designated persons, their associates, and successors, a perpetual body corporate by the name of the "Missouri Petroleum Mining Company," with power to mine coal, lead, iron, and other minerals; to bore for oil, etc.; to refine the same for trade; to quarry stone, and to buy, sell and lease real estate. The capital is not to exceed \$2,000,000; the chief office to be at St. Louis; and the corporation not to be subject to the seventh, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth and twentieth sections of the first article of the corporation law of 1855. It is also provided: "And said corporation shall have power to create and dispose of special stock in any one or more of its mining or other operations, which special stock shall be no part of the general stock of the corporation, nor shall its holders be liable for or interested in any other than the special property and business for which said special stock shall be created; the holders of said special stock, when the same shall have been taken, may become a distinct company, under the name and style designating such special enterprise, and may elect its own officers, and exercise all the general powers and enjoy all the privileges of a distinct corporation under the provisions of chapter 34 of the Revised Statutes of 1855, entitled 'An act concerning corporations,' approved November 23, 1855, with exemption from the provisions of the seventh, thirteenth, fourteenth, fifteenth, sixteenth, eighteenth, and twentieth sections of the first article of said act. * * * It is also provided that, when such special company or companies are created and organized, a certificate shall in writing be filed in the office of the circuit clerk of the county in which the business of the company is carried on, and a duplicate thereof in the office of the secretary of state, which certificate shall state the name, object, amount of capital stock of said company, and the number of shares of its stock, and the number and the names of the directors of such company, also stating the names of the towns and county or counties in which the operations of such company are to be carried on; said certificate to be signed by the president of such company with its seal affixed thereto." Defendant became a subscriber for 50 shares.

of special stock at the organization of the Missouri Zinc Company, in 1869. A certificate of its organization was then made out in due form, under the above-quoted provisions, and filed with the secretary of state in March, 1869. By this certificate the main office of the special company is located at St. Louis, and it states that the mining and other operations are to be carried on in St. Louis and Washington counties, and in such other towns and counties in the state as the business of the company may require; but this certificate was never filed in the office of the clerk of the circuit court in either of those counties.

1. The first question is whether the failure to file the certificate with the clerk of the circuit court makes the defendant liable for the debts of the association. In the case of *Hurt v. Salisbury*, 55 Mo. 311, the articles of association were in due form, had been filed in the recorder's office, but not with the secretary of state. The general law by virtue of which the association was attempted to be created made it the duty of the officers to file a copy of the articles of association with the secretary of state, and provided that "the corporate existence of such corporation shall date from the time of filing said copy of such articles." It was held that until the officers took this final step the corporation had no power to issue the note there sued upon, and hence the defendants who were directors were liable. They had signed the note as directors. That, and the subsequent case of *Richardson v. Pitts*, 71 Mo. 128, proceeded upon the ground that conditions precedent to corporate existence had not been performed. But, as said in *Mining Co. v. Woodbury*, 14 Cal. 424, there is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former any material omission will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter. Now, the question in this case is to be determined by the special act before quoted, not by the general law, as in *Hurt v. Salisbury*, *supra*. It is true that some of the sections of chapter 34, Rev. St. 1855, are made a part of the charter; but they have no relation to the organization of the corporation. By the special act incorporating the Missouri Petso Mining Company the disposal of special stock in one of its corporations, and the organization of a special company, are matters to be performed by and under the supervision of the directors of the parent company. All this seems to have been done in the present case, and made matter of record on the books of the parent company. The act says, "When such special company or companies are created and organized, a certificate shall in writing be filed," etc. This language does not indicate, nor is there anything in the general scope of the act to indicate, that the filing of the certificate with the circuit clerk is made a matter of condition precedent to the assumption of corporate powers or the execution of corporate contracts. The failure to file the certificate with the clerk of the circuit court is an omission of which the state alone can complain. This conclusion is not inconsistent with *Kaiser v. Bank*, 56 Iowa, 104, 8 N. W. Rep. 772; *Bigelow v. Gregory*, 73 Ill. 197, or the cases before cited from this court; for the language of the law in these cases was essentially different from that in this case. But the rule of the *Hurt-Salisbury Case* ought not to be extended.

2. That the power to make laws cannot be delegated by legislature is conceded on all hands; and the plaintiff says the act of February 20, 1865, so far as it authorized the organization of the Missouri Zinc Company, was a delegation of legislative power. Morawetz says: "It seems, therefore, that a general power to confer corporate franchises cannot be delegated by the leg-

islature to any other agent. However, where the legislature has enacted that corporations may be formed upon compliance with certain conditions, it is no objection that ministerial duties, such as the issuing of a certificate or charter, must be performed by some officer before the incorporation takes effect." 1 Mor. Priv. Corp. § 15. That corporations may be organized under general laws is no longer a debatable question. The powers of this corporation, the Missouri Zinc Company, and the procedure by which it could be brought into existence, were all fixed and prescribed by statute law, perfect as it left the hands of the legislature. The object seems to have been to enable the parent company to separate from its business some of its mining or other operations. Since corporations may be created under general laws, we do not see how it can be said this law is invalid. We think it is valid as against any objection made to it.

3. We do not see how Gen. St. 1865 can have anything to do with the organization of this corporation. The seventh section, art. 1, c. 34, Rev. St. 1855, does declare that the charter of every corporation thereafter granted shall be subject to alteration and repeal; but that section is, by the special act of February 20, 1865, excluded from any application to the corporations organized thereunder. We conclude that, upon the undisputed facts of this case, the judgment should have been for defendant. Judgment reversed.

All concur.

CITY OF ST. LOUIS v. RANKEN *et al.*

(*Supreme Court of Missouri.* May 21, 1888.)

MUNICIPAL CORPORATIONS—ACTION FOR ASSESSMENTS—EXPERT TESTIMONY.

In an action by the city to recover of a property holder the amount which his property has been benefited by the widening of a street, a charge for plaintiff that, in determining the amount, the testimony of experts, if deemed unreasonable, may be disregarded, is not error.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Action by the city of St. Louis against Thomas Ranken, Jr., and others, to recover the amount which defendants have been benefited by the widening a street. Judgment for plaintiff, and defendants appeal.

G. M. Stewart, for appellants. L. Bell and Theo. H. Culver, for respondent.

RAY, J. This action is brought by the city of St. Louis on a special tax-bill to recover the amount which it is claimed the property of defendants has been benefited by the widening of Eighteenth street in said city. No point is made on the pleadings. "At the trial the plaintiff introduced evidence to show the steps taken by the city to secure the widening of Eighteenth street, for which this tax-bill was issued, including the ordinances providing therefor, and condemnation proceedings entitled '*City v. Wall*,' report of the commissioners, and also the testimony of expert witnesses to show that the property of the defendants had been benefited to the full extent of the sum named in the tax-bill, and rested its case. On the part of the defendants, the testimony of a number of expert witnesses was introduced, tending to show that defendants' property had not been benefited to any extent by the widening of the street, and should not have been assessed. These witnesses were all experienced real-estate agents and dealers." For the plaintiff, the court gave the following instruction: "The court instructs the jury that in determining the amount, if any, that defendants' property is benefited by the widening of Eighteenth street, as shown on this trial, the testimony of the expert witnesses who testified before them, if deemed unreasonable by the jury, may be disregarded by them." And for the defendants, the following: "(1) The jury are instructed that, while the city of St. Louis may condemn private property for the purpose of opening and widening its streets, they are also instructed

that it is primarily liable to pay for the property so taken; and that no other property in the city is liable to be taxed or assessed to pay for the property so taken by the city except such property as has been specially benefited by such widening or opening, in some respect other than the other real estate in the city of St. Louis generally has been benefited by such widening or opening. (2) The jury are instructed that the question which they have to determine in this case is the benefit, if any, which has accrued to the property of Thomas Ranken, Jr., and others, the defendants in this case; and before they can find a verdict for the plaintiff for any amount they must be satisfied from the evidence that the defendants' property, which has been assessed, has been benefited by the widening of Eighteenth street at and near its junction with Clark avenue, as shown on this trial; and unless the jury find and believe from the evidence in this case that the property of defendants, situated on the east side of Eighteenth street, has been benefited by said widening of Eighteenth street, then they should find for the defendants. (3) The jury are instructed that, in making up their verdict in this case, they should disregard so much of the finding of the commissioners in the case of the *City of St. Louis v. Wall and others* which may have accrued to the property of Thomas Ranken, Jr., and others, and described in the petition, by the widening of Eighteenth street at the north-west corner of Clark avenue, as shown on this trial. (4) If the jury should find for the plaintiff, they should assess its damages for such amount as they may find and believe from the evidence the property of defendants may have sustained by the widening of Eighteenth street at its junction with Clark avenue, as shown on this trial." Under the above instructions, the jury found for plaintiff in the amount claimed, and, judgment being had therefor, defendants have appealed; assigning here as sole ground of error the action of the court in giving said instruction in plaintiff's behalf above set out.

We see no error in the court's action in this behalf. The jury are the judges of the value, weight, and credibility of the evidence; and, if they regarded the testimony of the expert witnesses on either side of the case as unreasonable, we do not see what else they could do except to disregard the same,—that is, attach to it no value, no weight, or credit; and this is all the jury is authorized to do by the said instructions. The instruction in *City of Kansas v. Hill*, 80 Mo. 534, to which we have been referred, told the jury, among other things, that they were not bound to find according to the evidence, but might wholly disregard the same, and make their finding from their own observation alone, and was condemned by this court for that reason. It is there said, among other things, that "it would seem a farce to introduce evidence if it may be wholly disregarded. * * * We do not say or intimate what weight or importance the jury may or ought to give the proof so submitted; but, when submitted, we think it is their duty to consider and not wholly disregard it." The instruction in this case is obviously different. The jury are not told that they may disregard the evidence of the experts, but are, in effect told to consider the evidence, and are left at liberty to disregard such as upon consideration they believe to be unreasonable. Defendants' counsel seem, to claim that the jury are bound by the testimony of the experts; that they are not competent to judge of the reasonableness of such evidence, because they have not the same knowledge of the subject-matter which the experts possess. In *City of Kansas v. Butterfield*, 89 Mo. 648, 1 S. W. Rep. 831, this court approved an instruction in which the jury are told that they are not bound by the testimony of the expert witnesses, but may apply their own judgment and knowledge as to values and damages, in connection with the testimony offered in the case. See, also, *Head v. Hargrave*, 105 U. S. 49; *Railway Co. v. Thul*, 32 Kan. 255, 4 Pac. Rep. 352. In the case at bar, some of the experts estimate the benefits to the property, as a result of widening said street, as high as \$1,000, while others, for defendants, said the

property derived no benefit therefrom; and we see no reason why, after considering the evidence of all, the jury might not exercise their judgment, and disregard—or, in other words, give no weight, value, or credit to—the testimony of the expert witnesses on either side which they believed, upon consideration, to be unreasonable. In so doing, the jury would not necessarily be relying wholly upon their own experience or judgment. They may have been so impressed with the candor, capacity for observation, experience, and knowledge of some of these experts themselves, as to the effect on the property following a widening of the streets, as to induce the belief on their part that the opinions of others were unreasonable, and not entitled to credit. We may add that said instruction is to be read with the other instructions given in the cause; and, taken together, there is manifestly nothing in this behalf prejudicial to defendants. The cases cited by appellants do not, we think, militate against the views here expressed.

This leads to an affirmation of the judgment of the trial court; and it is accordingly so ordered.

The other judges concur.

DOBYNS v. MEYER *et al.*

(*Supreme Court of Missouri. May 21, 1888.*)

CHattel Mortgages—Validity—Agreement that Mortgagor may Sell.

Where a deed of trust was given on certain planing-mill stock, by a manufacturing company, to secure a debt to a bank, under a parol agreement between the bank and the manufacturing company that the latter might sell the stock in trade, in the usual course of business, for its own benefit, and afterwards the company made an assignment for the benefit of all its creditors, and, with the consent of the assignee, the trustee took possession of the property under the trust deed, *held*, that the deed of trust is valid as against creditors attaching the property after the trustee has taken such possession of it.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge. Transferred from St. Louis court of appeals.

Action by Joseph S. Dobyns, trustee in a deed of trust from the Falter Manufacturing Company to secure a debt of the Fifth National Bank, against George F. Meyer and others, attaching creditors of such company, for damages for carrying away, under attachments, certain of the property conveyed in the trust deed. Judgment for plaintiff, and defendants appeal.

Kehr & Tittman, for appellants. *Jos. S. Dobyns*, for respondent.

BLACK, J. This is a suit for damages for carrying away doors and other manufactured building material. The judgment, which was for the plaintiff, was affirmed by the St. Louis court of appeals, but the case was then certified to this court because one of the judges deemed the opinion contrary to a previous decision of this court. The facts are these: On the 20th September, 1883, the Falter Manufacturing Company made to plaintiff, as trustee, a deed of trust upon certain real and personal property, including a stock of planing-mill material, to secure a large indebtedness to the Fifth National Bank. On the 9th of the following December, the manufacturing company made an assignment of all its property for the benefit of all its creditors. The property in question was then turned over to the assignee. The assignee then gave the trustee in the deed of trust possession of all the property therein described, real and personal, including the property in question. After this, the defendants, creditors of the manufacturing company, levied a writ of attachment upon the property now in dispute, sold the same, and applied the proceeds to the payment of their debt. The deed of trust was duly recorded before the assignment. There was evidence tending to show that, at the date of the deed of trust, there was an understanding between the bank and the manufacturing company that the latter might sell the stock in trade in the usual

course of business for its own benefit. But, notwithstanding this agreement, the court instructed that if the plaintiff, prior to the levy of the attachment, took possession of the property under the deed of trust and the agreement of the assignee, then the finding should be for the plaintiff; and in this it is claimed the court erred. It is not claimed that the agreement between the assignee and the trustee could or did amount to a new pledge. Indeed, it seems to be conceded that the trustee took possession by virtue of the deed of trust, and not otherwise. The agreement between the bank and the manufacturing company, that the latter might sell the stock in trade in the usual course of business, rendered the deed of trust fraudulent in law, as to creditors of the manufacturing company, as to the stock in trade; not, however, because there was any actual fraudulent intent, but because the conveyance was one to the use of the grantor. Section 2496, Rev. St. 1879. The sole question, then, is whether the fact that the trustee took possession of the property in good faith, for the purposes specified in the deed of trust, with the consent of the assignee, made the deed of trust valid as against creditors attaching after possession by the trustee. Cases are cited to show that possession by a mortgagee does not purge the mortgage of its fraudulent character; and, among them, our attention is called to *Armstrong v. Tuttle*, 34 Mo. 432. In that case the mortgage was fraudulent on its face, because of a stipulation allowing the mortgagor to sell, etc. Some of the expressions of the court favor the contention that possession by the mortgagee would not make the mortgage valid; but the subsequent case of *Greeley v. Reading*, 74 Mo. 309, is not unlike the present one. Reading had executed a mortgage to McCune upon a stock of groceries. The mortgage contained a stipulation rendering it void as to creditors, because it was held the stipulation made the mortgage one for the use of the grantor. Before the levy of the attachment, McCune, under an agreement with Reading, took possession of the stock in good faith, and because he did this it was held that it was wholly immaterial that the mortgage was improperly recorded, or that it contained the stipulation that rendered it void except as between the parties thereto. There, as in this case, the possession was taken by virtue of the mortgage. The case cites with approval *Nash v. Norment*, 5 Mo. App. 545, and 1 Jones, Mortg. § 178, where the same doctrine is asserted. The principle of that case had been previously intimated, if not expressed, in *Hewson v. Tootle*, 72 Mo. 632, and has been again asserted and approved in *Petring v. Chisler*, 90 Mo. 650, 3 S. W. Rep. 405. To the same effect is *Cameron v. Marvin*, 26 Kan. 612. Notwithstanding the agreement that the manufacturing company might sell the stock in trade in the usual course of business, the deed of trust was valid as between the parties thereto. No actual fraud was intended by the parties; and it would seem that, if the objectionable parol agreement was abrogated before the rights of creditors attached, the deed of trust ought to be held valid from that time on. Even as to creditors, an entire new pledge, freed from such agreement, would have been valid. The effect of taking possession under the deed of trust, for the purposes therein specified, with the consent of the assignee, was to abrogate the previous objectionable parol agreement. At all events, the question in this case is settled by the cases last cited; and they will not be disturbed. The judgment is therefore affirmed.

All concur.

STATE v. HICKAM et al.

(Supreme Court of Missouri. May 21, 1888.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—FORCE NECESSARY TO REPEL ASSAULTS.

A person assaulted cannot stop to estimate just how much force is necessary to repel the assailant. Hence it is error to charge, in a trial for assault with intent to

kill, that if the defendant believed, and had good cause to believe, that the complaining witness was about to do him some great bodily harm, that would not justify him in using greater force than was necessary to repel such assault.¹

2. SAME—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

In a trial for assault with intent to kill, it is error to charge that if the jury find that defendant made the assault with a pistol, in the manner charged in the indictment, it devolves on him to show some grounds for making such assault, and, if he has not done so, they must find him guilty, as such charge throws on defendant the burden of proving his innocence, and submits to the jury a question of law as to what facts would justify the assault.

3. SAME—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—FAILURE TO COVER WHOLE CASE.

In a trial for assault with intent to kill, which was claimed to have been done in self-defense, a charge, purporting to cover the whole case, which does not instruct the jury that they must be satisfied beyond a reasonable doubt that it was not done in self-defense before they can convict, is defective.

4. SAME—ASSAULT WITH INTENT TO KILL—DEFENSE OF NEAR RELATIONS.

Where a person, finding his mother and sister engaged in an altercation with other persons, goes to their assistance, and, during the affray, shoots one of such others, his guilt depends on the motive prompting the act, and the circumstances under which it was done, and not on the fact that he voluntarily engaged in the difficulty.

5. SAME—ASSAULT WITH INTENT TO KILL—ACCESSORIES.

Where persons are indicted as accessories to an assault with intent to kill, they cannot be convicted, unless there was a common purpose in the minds of the principal and the defendants to kill, and the assault was done in the attempt to accomplish such common purpose, or that the assault was made by the principal with an intent in his mind to kill, of which the defendants had knowledge, and they did some act in furtherance of the attempted accomplishment of such purpose.

6. TRIAL—INSTRUCTIONS—VERACITY OF WITNESS.

Where there is a direct conflict of testimony, it is not error to instruct a jury that, if they believe from the evidence that a witness has knowingly testified to a falsehood, they are at liberty to disregard his entire testimony.

Appeal from circuit court, Moniteau county; E. I. EDWARDS, Judge.

Draffen & Williams, for appellants.

The fifth instruction given by the court was error, because it declared that he must prove his innocence to the satisfaction of the jury, when it was for the state to prove it beyond a reasonable doubt. *Chaffee v. U. S.*, 18 Wall. 516-545; *State v. Fowler*, 52 Iowa, 103, 2 N. W. Rep. 983; *People v. Coughlin*, 32 N. W. Rep. 905; *Nichols v. Winfrey*, 79 Mo. 544; *Jones v. State*, 13 Tex. App. 1; *State v. Wingo*, 66 Mo. 181; *Dubose v. State*, 10 Tex. App. 230; *Stokes v. People*, 53 N. Y. 164; *Com. v. McKie*, 1 Gray, 61; *State v. Porter*, 34 Iowa, 139. In addition to the error as to the burden of proof, this instruction told the jury that defendant Samuel Hickam must "show some satisfactory ground" for making the assault, leaving it to the jury to determine what constituted a "satisfactory ground." What facts would constitute a defense—would amount to a "satisfactory ground"—was a question of law for the court; the existence thereof, a question of fact for the jury. It was error to leave it to the jury to decide whether there were "satisfactory grounds" for the assault, without telling them what facts would in law constitute such grounds. *Rains v. Railway Co.*, 71 Mo. 164-169; *Anderson v. McPike*, 86 Mo. 293-299; *State v. Ellis*, 74 Mo. 207-219; *Morgan v. Durfee*, 69 Mo. 469. "An instruction in itself erroneous cannot be cured by another." If this instruction is vicious, in that it erroneously puts the burden of proof upon the defendant, and also submits a question of law to the jury, it cannot avail the

¹On the subject of justifiable homicide, see *People v. Robertson*, (Cal.) 8 Pac. Rep. 600, and note; *State v. Donnelly*, (Iowa,) 27 N. W. Rep. 369, and note; *Darbey v. State*, (Ga.) 3 S. E. Rep. 663; *Lynch v. State*, (Tex.) 6 S. W. Rep. 190; *Stanley v. Com.*, (Ky.) 1d. 155; *Duncan v. State*, (Ark.) 1d. 164; *Fallin v. State*, (Ala.) 8 South. Rep. 525; *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758; *Thumm v. State*, (Tex.) 7 S. W. Rep. 286; *Alexander v. State*, 1d. 867; *Humphries v. State*, 1d. 663; *Bonnard v. State*, 1d. 862; *Gilmore v. People*, (Ill.) 15 N. E. Rep. 738.

state that other instructions, which were correct, were given. It cannot be known by which the jury were governed. *Goets v. Railroad Co.*, 50 Mo. 472; *State v. Simms*, 68 Mo. 305; *Manufacturing Co. v. Hudson*, 4 Mo. App. 145; *State v. Foley*, 12 Mo. App. 431; *State v. McNally*, 87 Mo. 644. The court committed error in giving the fourth instruction asked by the state. It improperly told the jury, in the first paragraph, that defendant Samuel Hickam was not justified in using any greater amount of force than was necessary to repel the attack made upon him. *Nichols v. Winfrey*, 79 Mo. 544, (see that part of opinion on page 546, point 2;) *State v. Palmer*, 88 Mo. 568; *State v. Sloan*, 47 Mo. 604; *Runyan v. State*, 57 Ind. 80. The eighth instruction given for the state was erroneous. It purported to cover the whole case; and if it authorized the jury to convict the defendant, without requiring them to find the existence of all the constituent elements of the offense, it was error, even though other correct instructions were given. *State v. Mitchell*, 64 Mo. 191; *State v. Dearing*, 65 Mo. 530. This instruction told the jury that they might find the defendant Samuel Hickam guilty of the offense defined in section 1262, without requiring them to find that the assault was committed with malice aforethought. The jury might have believed all that this instruction required them to find, and yet said defendant Samuel Hickam would not have been guilty of the offense specified in section 1262. The instruction left out the feature distinguishing assaults provided for by section 1262 from those included in section 1263, and yet authorized the jury to find said defendant guilty under section 1262, and to administer the punishment for the offense provided for in said section. The defendant could not have been guilty of the offense mentioned in section 1262 unless the assault was made with malice aforethought; *i. e.*, with malice and premeditation. The instruction omitted an important element. *State v. Curtis*, 70 Mo. 594, 598; *State v. Seward*, 42 Mo. 206; *State v. Sands*, 77 Mo. 118; *State v. McNally*, 87 Mo. 644. Again, it left the jury to grope in the dark as to what would constitute "sufficient reason, cause, or extenuation." *State v. Ellis*, 74 Mo. 207-219; *Morgan v. Durfee*, 69 Mo. 469; *Rains v. Railway Co.*, 71 Mo. 164, 169. The instruction was so worded as to mislead the jury. In a similar case, this court, through NAPTON, J., said, in regard to a similar instruction: "But the instruction in reference to the intent of the defendant was calculated to mislead. The intent of the defendant in making the assault was a question of fact for the jury. The law raises no presumption about it, and it was error to tell the jury that 'the law presumes that every man intends the natural, necessary, and probable consequences of his acts.'" *State v. Stewart*, 29 Mo. 419. The ninth instruction was in conflict with the third instruction given for defendants. See, also, *State v. Partlow*, 90 Mo. 608, 4 S. W. Rep. 14. The tenth instruction for the state ought not to have been given. It was directed against the defendant Samuel Hickam, and prejudiced the jury against him. Such an instruction should not be given in ordinary jury trials simply because of a conflict in the testimony. *White v. Maxcy*, 64 Mo. 559; *Bank v. Murdock*, 62 Mo. 70; *State v. Palmer*, 88 Mo. 568.

B. G. Boone, Atty. Gen., for respondent.

The eighth instruction is as to the legal presumptions arising from the use of a deadly weapon. *State v. Wisdom*, 84 Mo. 188; *State v. Dickson*, 78 Mo. 440; *State v. Thomas*, Id. 337; *State v. Curtis*, 70 Mo. 594. The tenth tells the jury that, if any witness has knowingly testified falsely, they will disregard such witness' testimony. This instruction was proper, and there was sufficient basis for it being given. *State v. Palmer*, 88 Mo. 572, and cases cited.

BRACE, J. The defendants were jointly indicted under section 1263, Rev. St. 1879, for assaulting and shooting one Harrison Davenport, "on purpose

and with malice aforethought," with the intent him, the said Davenport, to kill; the defendant Samuel Hickam as principal, and the other defendants as present, aiding, helping, abetting, etc., the said Samuel in the felony and assault as aforesaid. They were all found guilty under section 1263, *supra*; the punishment of Samuel Hickam assessed at five years' imprisonment in the penitentiary; of the other defendants, at fines in different amounts. The defendant Susan is the mother, and defendant Nancy Lamm is the sister, of said Samuel, and defendant Edi Bell was a colored servant of the said Susan. As ground for reversal of the judgment in this case, it is urged that the trial court committed error in giving for the state instructions 4, 5, 8, 9, and 10, which are as follows: "No. 4. The court instructs the jury that, even though the defendant Samuel Hickam may have had good reason to believe, and did believe, that the witness Harrison Davenport was about to do him some great bodily harm, yet that would not justify him in using any greater amount of force than was necessary to repel such attack as said Hickam apprehended was about to be made upon him; and if the jury shall find that the defendant Samuel Hickam did shoot said Davenport, and wound and disable him in such a manner that said Davenport could not make any further attack or resistance, and that the said defendant Samuel Hickam, knowing him to be so wounded and disabled, did continue to assault him, then such assault, made after said Davenport was so wounded and disabled, was not made in necessary self-defense. 'No. 5. If the jury shall believe from the evidence that Samuel Hickam made an assault upon the witness Harrison Davenport with a pistol, in the manner and form as charged in the indictment, it devolves upon the defendant to show, to the satisfaction of the jury, some satisfactory grounds for making such assault, and, unless he has so done, the jury should find him guilty.'" "No. 8. The court instructs the jury that he who willfully, that is, intentionally, uses upon another, at some vital part, a deadly weapon, such as a revolver, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death; and, knowing this, must be presumed to intend death, which is the probable consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a base heart. If, therefore, you believe from the evidence that the defendant Samuel Hickam did, on the 25th day of July, 1884, in the county of Cooper and state of Missouri, shoot Harrison Davenport with a pistol, with the manifest design to use such a pistol upon him without sufficient reason, cause, or extenuation, then the jury will find said defendant Samuel Hickam guilty, and assess his punishment at imprisonment in the penitentiary not exceeding ten years. No. 9. The court instructs the jury that the law of self-defense is emphatically a law of necessity, and no person can avail himself of the right of self-defense where he freely and voluntarily enters into and engages in a difficulty; and if the jury shall believe from the evidence that Samuel Hickam sought a difficulty with the witness Davenport, and that he voluntarily entered into such difficulty, and that he shot the said Davenport on purpose and of his malice aforethought, then there is no self-defense in this case. No. 10. The jury are instructed that, if they shall believe from the evidence that any witness has knowingly testified falsely to any material fact, then the jury may disregard the whole of the testimony of such witness." And in refusing to give the following instruction in behalf of defendants: "The mere fact that Nancy Lamm, Susan Hickam, and Edi Bell engaged or took part in the fight or difficulty in which Davenport was shot, is insufficient to convict them. Under the indictment in this case, it must further be shown by the evidence, to the satisfaction of the jury beyond a reasonable doubt, that they, with knowledge of the intention of said Samuel Hickam to do said shooting, aided, abetted, counseled, advised, or commanded him to shoot said Davenport, and, unless this proof has been made, they must find said defendants Susan Hickam, Nancy

Lamm, and Edi Bell not guilty, although they may have been present, and may have been engaged in the difficulty when the shooting took place."

1. The proposition contained in the first paragraph of the fourth instruction is incorrect. If the defendant Samuel Hickam had good reason to believe and did believe that Davenport was about to do him some great bodily harm, and "acted in a moment of apparently impending peril, it was not for him to nicely gauge the proper quantum of force necessary to repel the assault." *State v. Palmer*, 88 Mo. 568. On the plea of self-defense, the question to be determined by the jury was not whether the shooting was actually necessary to repel the attack, or whether some other or lesser force might not have been adequate to the defendant's emergency, but whether, when he did shoot, under all the circumstances, he had reasonable cause to believe and did believe that such shooting was necessary to protect himself from impending danger of great bodily harm. *Nichols v. Winfrey*, 79 Mo. 544, and cases cited. This incorrect proposition was so connected with the correct one, declared in the second paragraph of the instruction, as to indicate that the latter was the corollary or equivalent of the former, and, as a whole, the instruction had a tendency to confuse or mislead the minds of the jurors.

2. The fifth instruction, purporting to cover the whole case, is either obnoxious to a like criticism, or asserts incorrect legal propositions. If the jury, as therein instructed, found from the evidence that the defendant made the assault in manner and form as charged in the indictment, then there was and could be no defense in the case. If, however, the court meant to tell the jury that, if they found from the evidence that the defendant made an assault upon the witness with a pistol, then it devolved upon him to show that the assault was made under such circumstances as would justify it, it is faulty for three reasons: (1) It devolved upon the defendant the burden of proof; (2) it required a higher degree of proof that the law demands; and (3) it submitted a question of law to the jury, *i. e.*, what facts would justify the assault. The defendant could not be lawfully convicted on the indictment, either under section 1262 or 1263, unless the shooting was done in malice, with the intent to kill. If it was done under such circumstances as to be justifiable on the ground of self-defense it was without malice. The defendant, through the whole of the trial, is clothed with the presumption of innocence of the offense with which he is charged. The state failed to make out its case if, upon the whole evidence, it failed to prove, not to the satisfaction of the jury, for that might be done by a preponderance of the evidence, but beyond a reasonable doubt, that the shooting was done by the defendant with the intent to kill, in malice; *i. e.*, under such circumstances as not to be justifiable on the ground of self-defense. *Nichols v. Winfrey*, *supra*; *State v. Wingo*, 66 Mo. 181; *Chaffee v. U. S.*, 18 Wall. 517. Malice and an intent to kill being essential elements of the offense with which the defendant was charged, it devolved upon the state to prove them, the same as any other fact in the case necessary to establish guilt. From their nature they are not susceptible of proof by direct and positive evidence, but can and may be inferred from other facts. Malice may be inferred from the intentional use of a deadly weapon upon a human being; an intent to kill, from its intentional use on or at a vital part; and the jury may well be told that these inferences may be made. They are deductions of fact, however, to be made by the jury in the light of all the facts and circumstances in evidence in the case. They are not conclusions to be reached at any stage of the case, if the attendant facts and circumstances militate against such conclusions to an extent sufficient to raise in the minds of the jurors a reasonable doubt of their correctness, and of defendant's guilt. The satisfactory grounds that would constitute a defense to the assault charged, are such grounds as would satisfy the law, and not the jury. By the instructions the jury were told to find the defendant guilty unless he showed some satisfactory grounds for making the assault, leaving to them to determine what facts would satisfy

the law, and constitute a good defense,—a question of law that they were not competent to determine, and which should not have been submitted to them. *State v. Forsythe*, 89 Mo. 667, 1 S. W. Rep. 834.

3. The eighth instruction also purports to cover the whole case; and while, in the first paragraph, some correct principles are laid down in the abstract, yet, when application of them is attempted to the case in hand in the second paragraph, so much is left out that practically the instruction is but a repetition, in a slightly changed form, of the fifth, and what is said in regard to that instruction is equally applicable to this. It must be conceded that these instructions, standing alone, are erroneous in the particulars pointed out. If, as in the case of *State v. Alexander*, 66 Mo. 158, the direction to find the defendant guilty upon the facts hypothecated had been qualified by the words "unless justification appears from the evidence offered by the state," and an instruction had been given directing the jury to acquit if, upon the whole case, they had a reasonable doubt of defendant's guilt, it might be contended that the two first vices mentioned were cured; but no such qualification was contained in either instruction, and the jury was simply instructed that, if they had a reasonable doubt of defendant's guilt, they should give him the benefit of the doubt; but in what way and to what extent they were not told. They might have supposed that the requirement of the instruction was satisfied if they applied the principle in the determination of the *prima facie* case the state was required to make out, and, being satisfied beyond a reasonable doubt that the defendant did assault and shoot the witness with a pistol, they may have found the defendant guilty because he did not make out some undefined defense satisfactorily to them, and thus reconciled the instruction. On the whole case, they may have had a reasonable doubt of defendant's guilt, and felt that they were giving him the benefit of the doubt by assessing a milder punishment than they otherwise would have assessed; so that these instructions, whether read alone or in connection with the one on reasonable doubt, are erroneous, and were calculated to mislead the jury.

4. If the defendant Samuel Hickam, on purpose, and of his malice aforethought, shot Davenport, then there is no self-defense in the case, is the legal truism declared in the last sentence of the ninth instruction; and this would be true just the same whether he sought the difficulty, or voluntarily entered into it or not. What was said on that subject was entirely superfluous to the conclusion drawn, was unnecessary, not applicable to the case, and its only tendency was to confuse the minds of the jury. The uncontroverted evidence was that when Samuel Hickam appeared upon the scene, in front of his father's house, the difficulty was on, between the prosecuting witness, Davenport, and his nephew on one side, and Hickam's mother and sister on the other. Whoever brought it on, he did not. In that difficulty he had a right to interfere in behalf of his mother. Whether any act he did afterwards could be justified on the ground of necessary defense of himself or of his mother would depend on the motive prompting the act, and the circumstances under which it was done, and not upon the fact that he voluntarily entered into the difficulty.

5. Instruction No. 10 should not be given as a matter of course in any case; but when it should be given and when not is a question difficult to determine upon a record, and the propriety of giving it in any particular case must be left largely to the judgment and discretion of the trial court. *White v. Mawzy*, 64 Mo. 552. We cannot see that this was a case in which it was not proper to give it.

6. We cannot say that the court erred in refusing defendant's instruction in the form asked. The mere fact that Nancy Lamm, Susan Hickam, and Edl Bell took part in the fight or difficulty, of course, was not sufficient to convict them; but they might have been convicted under the indictment, although they had no knowledge that Samuel Hickam intended to shoot Davenport, and

although they neither aided, advised, nor commanded him to shoot Davenport. Neither of these defendants, however, could properly be convicted of the offense charged in the indictment, unless the jury found either that there was a common purpose in the minds of Samuel Hickam and such defendants to kill Davenport, and the shooting was done in the attempted accomplishment of such common purpose, or that such shooting was done by Samuel Hickam in the attempted accomplishment of a purpose in his mind to kill Davenport, of which said defendants had knowledge, and that they did some act in furtherance of the attempted accomplishment of such purpose; and a proper instruction on this branch of the case ought to have been given. The judgment is reversed, and the cause remanded for new trial.

All concur, NORTON, C. J., in the result.

ORR v. WILMARTH.

(*Supreme Court of Missouri. May 21, 1888.*)

1. LIMITATION OF ACTIONS—ACCRUAL OF ACTION—ABSENT DEFENDANT—REV. ST. MO. ART. 2, § 3286.

A defendant who is a non-resident at the time the cause of action accrues, though he returns after the accrual of such action, temporarily, to the state on business, is not within Rev. St. Mo. 1879, art. 2, § 3286, providing that if at any time when a cause of action accrues against a resident of this state, and he is absent therefrom, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such accrual, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

2. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

An objection to evidence not made on the trial, or on the motion for a new trial, will not be regarded in the appellate court.

Appeal from circuit court, Clinton county; GEORGE W. DUNN, Judge.

S. H. Corn and T. J. Porter, for appellant. *Ramey & Brown, Roland Hughes, H. C. McDougal, and Frank B. Miller*, for respondent.

BLACK, J. Joseph T. Zimmerman owed D. C. Wilmarth \$1,600 for borrowed money. He also owed the amount of two notes; one, payable to House & Brown for \$272, and the other to Rogers for \$200. These three debts, which were secured by a lien on two parcels of land, were assigned to the plaintiff, William Orr, in July, 1871; and he prosecuted a suit thereon in his own name against the Hannibal & St. Joseph Railroad Company, the administrator of Zimmerman, and three other persons, which suit resulted in a finding that there was due to Orr \$2,628, and a decree that the land be sold, subject to any balance due to the railroad company, and, after the payment of \$1,250 on a prior lien, the residue of the proceeds be applied to the payment of costs and debt found to be due to William Orr. This decree was obtained on the 18th August, 1874. The petition goes upon the theory that Orr was the real owner of the judgment or decree. It in substance alleges that Wilmarth desired to buy the land, and that he and plaintiff made an agreement whereby Wilmarth was to have the use and benefit of the judgment, at a sale thereunder; and if Wilmarth became the purchaser of the land, then he was to pay off all prior liens, and all of the costs of the suit and sale, and as soon thereafter as he sold the land and collected the proceeds he would pay to plaintiff the full amount of the judgment and interest; that the land was sold under the agreement on the 14th August, 1876, and Wilmarth became the purchaser, through an agent; that he paid off the prior liens, and then sold the lands for \$5,500. The further allegations are that Wilmarth took in payment for the land, when sold by him, various notes and mortgages, besides \$1,000 in cash; that at the time of the sale of the lands by Wilmarth he resided in the state of New York, where he continued to reside until his death,

in May, 1877; that his wife, the defendant, is his sole legatee; that she as such legatee collected the notes received by her husband for the sale of the lands, the last collection having been made in July, 1884; that no part of the plaintiff's judgment has been paid; and that no letters of administration have been granted upon the estate of Wilmarth in this state. The prayer is for a personal judgment against the defendant; and such a judgment was recovered by the plaintiff for over \$4,000, and defendant appealed.

1. A contention was made, by way of an objection to the introduction of any evidence, that the petition is insufficient in this: that it does not show that Wilmarth actually used the judgment in the purchase of the land at the sheriff's sale. The allegation is clear and explicit that he did purchase the land under the alleged agreement, and that is sufficient. No other objections are made to the sufficiency of the petition, and we do not stop to inquire whether this suit can be maintained against the defendant as legatee under the circumstances alleged.

2. Wilmarth employed the attorneys who prosecuted the lien suit, paid their fees, and the expenses in enforcing the lien against the land; and there are many other circumstances which go to show that plaintiff had no interest in the judgment; that it really belonged to Wilmarth, and especially that portion represented by the \$1,600 debt. On the other hand there is evidence tending to show that Orr held the part of the judgment represented by the two small debts in trust for persons other than Wilmarth; and that he held one-half of the part represented by the \$1,600 debt for Harwood, the attorney who prosecuted the lien suit. The other half Orr claims himself, but for what consideration does not very satisfactorily appear. But all these were questions for the jury, and the court seems to have given all the instructions asked by defendant in respect of them.

3. It was shown that the plaintiff testified in another suit that the agreement with Wilmarth was that he (Orr) was to have the half of the judgment when the property was sold on the execution; that his right to half did not depend upon a resale of the property. If this be true,—and it was for the jury to say whether it was or not,—then plaintiff's cause of action accrued 14th August, 1876, more than five years before the commencement of this suit; it was commenced April 19, 1884. It is conceded that prior to August 14, 1876, and ever after, Wilmarth resided in the state of New York. If the case, on the theory this evidence of the plaintiff is true, is taken out of the statute of limitations, it is because of the first clause of section 8236, Rev. St. 1879. It is well settled that this clause applies only to cases where defendant resided in this state at the time the cause of action accrued. *Thomas v. Black*, 22 Mo. 331; *Scroggs v. Daugherty*, 53 Mo. 497; *Fike v. Clark*, 55 Mo. 105. The defendant's third instruction, therefore, should have been given. But if the cause of action accrued first against the defendant, as legatee, then the plaintiff's second instruction is wrong in telling the jury that in computing the time of five years they should not count the time while defendant resided in New York after her return to this state in 1878. She has at all times resided in the state of New York since the death of her husband. She came to this state temporarily and on business in 1878, in 1879, in 1882, and in 1884, remaining two or three weeks each time. The exception relied upon by the plaintiff to support such a declaration of law can only be the second clause of section 8236, Rev. St. That clause, like the preceding one, has no application to cases where the defendant was a non-resident when the cause of action accrued. A different construction was given to it in *Whittelsey v. Robert*, 51 Mo. 120; but in the recent case of *Zoll v. Carnahan*, 83 Mo. 42, this court said that, to bring a case within this exception, the proof should show two facts: *First*, that at the time the cause of action accrued the debtor was a resident of this state; and, *second*, that thereafter he departed from and resided out of the state. This is clearly the meaning of the clause in question;

for the whole section proceeds upon the hypothesis that the debtor was a resident of this state when the cause of action accrued.

4. Objection is made to much of the evidence of Mr. Harwood, who was the attorney for Mr. Wilmarth, because it consisted of communications made by client to attorney; but no such objection was made on the trial or in the motion for a new trial, and the objection cannot, therefore, be noticed in this court. The judgment is reversed and the cause remanded.

All concur.

HUHLIEN v. HUHLIEN *et al.*

(Court of Appeals of Kentucky. May 8, 1898.)

1. WILLS—CONSTRUCTION—DEVISE IN LIEU OF DOWER.

Gen. St. Ky. c. 81, § 12, relating to dower, provides that, "nothing herein shall preclude the widow from receiving her dowerable and distributable share, in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will, or necessarily inferable therefrom." But when a testator provided that "my wife remains in possession and enjoyment of all my immovable property until my youngest child, B., shall have attained his twenty-first year;" and that, "when the time for the division of my immovable property shall come, my wife shall keep in possession, and use as long as she shall live, the house and lot on Twelfth street,"—*held*, that it was clearly the intention of the testator that the devise was to be in lieu of dower.

2. SAME—CONSTRUCTION—NATURE OF ESTATE.

A testator gave his wife the use of all his real estate until the youngest child should arrive at the age of 21 years, when he directed that it should be divided among his children, with the exception of a portion reserved for the wife exclusively. The will directed that the wife should support the unmarried children while she held the entire estate, and that she should undertake the especial care of her imbecile step-daughter, H., and in the event of the wife's death one of the children should support such daughter and be reimbursed from the income of the daughter's share in the estate. When the youngest child came of age, and partition was made of the realty, the widow asked that she should be allowed for the support of H. out of her portion of the estate. *Held*, that she was not entitled to such allowance, the support of H. during the minority of the youngest child being an executory charge upon the devise to the wife.

3. SAME—CONSTRUCTION—RIGHTS OF LEGATEES.

Nor was the widow, in such case, entitled to compensation for the support of said step-daughter after the youngest child became of age, as such continued support was not mandatory upon her under the will.

4. SAME.

But the widow was not chargeable with interest upon the sums collected by her from the personal estate of the testator belonging to said step-daughter.

5. SAME—RIGHTS OF DEVISEES AND LEGATEES—ACCEPTANCE OF DEVISE BY WIDOW—WAIVER.

Where a testator makes a devise of real estate to his wife, and bequeaths to others the proceeds of a policy of insurance which was payable to her, and she accepts the devise, she thereby relinquishes her rights under the policy.¹

6. COSTS—FEES OF GUARDIAN AD LITEM—LIABILITY FOR.

One of the children of a testator brought a bill against the other children and the widow for partition and sale of the realty in accordance with the will. The widow filed a cross petition against one of her co-defendants, an imbecile step-daughter, for support, etc. A guardian *ad litem* was appointed for such child, and upon trial of the cross-petition, the guardian filed a counter-claim and recovered. Code Pr. Ky. § 38, provides that "the court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff, and taxed in the costs." *Held* that, while it was proper to order the payment of the guardian's fees by the widow, she being plaintiff in the cross-petition, yet as the guardian became the real plaintiff under the counter-claim, the widow should have been allowed credit for such payment in her account with the imbecile daughter.

Appeal from Louisville law and equity court.

This is an appeal by Katherine Huhlien, widow of Ehrhard Huhlien, deceased, from a decree in a suit brought by Ehrhard Huhlein, one of their

¹ Where a widow elects to take under the will, in lieu of dower, she must take subject to all charges and limitations of the will, just as any other devisee. Appeal of Kline, (Pa.) 11 Atl. Rep. 866.

children, for a sale of the realty devised by said deceased; said decree denying appellant's claim to dower in certain land, and an allowance demanded for support of a minor child.

Dodd & Grubbs, for appellant. *Chas. A. Wilson* and *W. W. Watts*, for appellees.

HOLT, J. Ehrhard Huhlien died intestate in 1876, the owner of three pieces of real estate in the city of Louisville. He had been twice married. He left surviving him his last wife as his widow, and eight children,—an equal number of them being by each wife. His will, which is in the form of a letter, provides: "My wife, Katherine, remains in possession and enjoyment of all my immovable property until my youngest child, Benjamin, shall have attained his twenty-first year. My unmarried children will, of course, have until that time their home with their mother in their mother's house. She will educate my minor children; will take care of them; and also undertakes the especial care of my invalid daughter, Henrietta. She will at the same time be her guardian and administrator her share of the property, because she, my daughter, is unable to do so herself. My wife will have to pay the taxes, and have the necessary repairs made, so as to keep the property in good condition. Should my wife, however, marry again, she shall from that day lose possession and enjoyment of the property, except of that part to which by right of law she is entitled. (2) When the time for the division of my immovable property, as above, shall come, my wife shall keep in possession and use, as long as she shall live and remain unmarried, the house and lot on Twelfth street between Main and Market, with everything therein contained in the shape of furniture, excepting the piano. She shall never be charged anything for the wear and tear of the furniture. At her death the said house will go back to my children. * * * (3) I am in possession of a life insurance policy for three thousand dollars, of which my wife is to get, when the policy is paid, one thousand dollars, and my daughter, Henrietta, four hundred dollars, and the remaining \$1,000 are to be divided equally, share and share, amongst my eight children. The balance of my cash property is also to be equally divided according to law amongst my wife and children, deducting first the expenses for doctor, undertaker, etc. It is necessary to have an administrator and guardian appointed for my minor children. I herewith appoint my wife administrator and guardian without requiring her to give security. * * * Should my wife die, I beg that one of my children will take care of my daughter, Henrietta, and treat her christian-like and lovingly. The said child shall have the right to draw the income of Henrietta's share of the property, but only so long as Henrietta shall remain with him or her, and is treated well. It is my wish that all you children will live in peace with your mother, who has raised you. * * * The son, Benjamin, became of age in May, 1886, and on October 14, 1886, Ehrhard Huhlien, another son, brought this action against the widow and the other seven children, for a sale of the real estate of the testator, save the Twelfth-street property specifically devised to the widow for life. She claims dower in the other two pieces of property. The lower court correctly refused it.

By the common law a devise to the wife is not construed as in lieu of dower, unless such an intention is expressed, or plainly inferable from the will. She is entitled to it also, unless the will requires a different interpretation. *Timberlake v. Parish's Ex'r*, 5 Dana, 346. Our statute has however changed this rule. It provides: "Nothing herein shall preclude the widow from receiving her dowerable and distributable share, in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will, or necessarily inferable therefrom." Gen. St. c. 31, § 12. It is yet a question of intention upon the part of the testator; but she is not entitled to dower in addition to the devise, unless it affirmatively appears

from the will that he so intended. In this instance, such a purpose is not "plainly expressed," nor does the will contain any expression from which it is "necessarily inferable." The testator gave to the widow, provided she remained such, the use of all his real estate for a term of years, and then of a portion of it for life. She enjoyed it all for a period of 10 years, and yet retains the portion devised to her for life. Our statute provides that the widow may relinquish what is given to her by the husband's will, and take her dower; but "such relinquishment must be made within twelve months after the probate." Here she failed to exercise this privilege. True, she was not required to do so to entitle her to dower, if the will, either by positive expression or plain inference, gave it to her in addition to the devise; but it not only does not do so, but, upon the other hand, plainly shows that the testator did not so intend. The acceptance by her under the will operated by way of jointure as to any claim for dower.

She has had the care of the imbecile step-daughter, Henrietta, since the death of her father. She asks that she be allowed for her support at the rate of \$100 a year out of her portion of the proceeds of any sale of the real estate. This claim she has asserted by cross-petition against the daughter, and admits the receipt of about \$300 from the personal estate of the father belonging to Henrietta. Upon the widow's motion a guardian *ad litem* was appointed to defend for the daughter. He not only resisted the mother's claim for pay for support, which is admitted in argument to be reasonable as to amount, but the answer asserts a claim against her for the \$400 insurance money named in the will, and asks, in substance, for all other proper relief. By the terms of the will Henrietta was to have a home with the mother until the youngest child became of age. She was to have the especial care of her, and the charge of her portion of the property. When the widow accepted the devise to herself, she did so subject to the conditions connected with it. Among them were the care of Henrietta, the charge of her estate, and the furnishing of a home to her. These conditions were an executory charge upon the devise to the wife. It was at least a precatory one; and, choosing as she did, to take under it, she must comply with the requests or directions attached to it. The burden accompanied the benefit. It is urged, however, that in any event she is entitled to compensation from the time the youngest child became of age, in May, 1886, until her cross-petition was dismissed in June, 1887. It is fair to presume, however, that during this period she continued in the use of all the real estate. Nothing appears in the record to the contrary. It was improved property, and an income doubtless was being derived from it. Moreover, she was not, under the will, bound to care for Henrietta after the youngest child became of age. In our opinion the claim for support was properly rejected.

We have now reached the consideration of Henrietta's claims. The policy of insurance named in the will was payable to the widow and her children, and not to her and all of the testator's children. She collected it, and denies Henrietta's right to any portion of the \$2,821.54 received upon it. She alone appeals. Is the bequest of it by the will valid? The children are all of age; and none of them, save Henrietta, ask any relief as to it. The testator devised land to the widow, and the same will bequeathed insurance money belonging to her. A devisee cannot take both under and against a will. Her own children were also devisees under the will. They have taken under it; but in any event they are not now complaining. The will does not show that the testator believed that the policy was a part of his estate. The language employed is: "I am in possession of a life insurance policy." He had taken it out, and presumably knew to whom it was payable, and yet he unquestionably disposes of it. One taking under a will must abide by all of its provisions. If a testator leaves a portion of his estate to A., and at the same time disposes of property belonging to A., and the latter accepts the

bounty under the will, he must abide by the disposition of his own property made by the testator. He has his election; but, if he chooses to take under the will, he is thereby estopped from claiming against it. Citation of authority is needless upon a point so well settled. Here the testator bequeathed to Henrietta a part of the property of his wife and her children, but at the same time devised other property of his own to them. An acceptance of the bounty requires an assent to the entire devise. As the widow converted Henrietta's portion of the insurance money, she must account for it. It is said, however, that relief not asked by the guardian *ad litem* was afforded. It is true that the lower court, after deducting the \$1,000 and the \$400 of the insurance money specifically devised to the widow and Henrietta, respectively, allowed the latter one-eighth of the balance that had been received upon the policy. It also allowed her what had been collected by the widow from the personal estate of the testator as Henrietta's portion. Judgment was not specifically asked for these sums. So far as the insurance money is concerned, however, the reply of Katharine Huhlien to Henrietta's claim denies that she is entitled to the \$400, or "any other amount whatever." The pleading of the widow also avers that Henrietta's portion of the personal estate had been exhausted; and this is denied. The answer of Henrietta asks for all proper relief. Aside, however, from all this, she is an imbecile. As such she is the ward of the court. It was especially the duty of the chancellor to guard her interest, and see that her estate was protected. Humanity so dictates, and public policy requires this to prevent such persons from becoming a public charge. It was not error, therefore, to afford her this additional relief, although the guardian *ad litem* had not asked it in express terms. We do not think it was equitable, however, to charge the appellant interest upon the sums allowed Henrietta as her portion of the insurance money, and of the personal estate of the testator. It amounts to several hundred dollars. This was not, in our opinion, intended by the testator. The daughter was an imbecile. It is true, she was to live with her mother, and she was to care for her, and have charge of her estate; but medical services or other extra expenses might be needful, and it is unreasonable to suppose that the testator expected or intended the wife should account for interest upon the small amount of personal estate that would belong to the daughter. The spirit of the will does not authorize it.

The judgment allows the guardian *ad litem* "two hundred dollars for services rendered in this cause, to be taxed as costs on the cross-petition of Katharine Huhlien, the defendant." If, as is probable, and as counsel appear to concede, the court intended by this that the appellant, Katharine Huhlien, should pay this, and get no credit therefor upon the amount adjudged against her in favor of Henrietta, it is error. The guardian *ad litem* must be a practicing attorney. The Code of Practice provides that he must attend properly to the preparation of the case. In an ordinary action he may cause as many witnesses to be summoned as he may consider proper, subject to the control of the court; and in an equitable one he may take depositions, not, however, exceeding three, without leave of the court. Section 38 further provides: "The court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff, and taxed in the costs." The statute evidently aims to secure the guardian in his compensation. The infant may have no estate. It therefore provides that the plaintiff shall pay it without regard to the result of the suit. This, however, surely does not mean that, in a case like this one, where the infant, by a counter-claim, or set-off, becomes in fact a plaintiff, and recovers, while the nominal plaintiff is defeated, that, as between them, the latter shall pay the fee of the guardian *ad litem*. Suppose the action against the infant were defended by his statutory guardian; certainly no allowance could be made to him for his services. The language of the Code is that it is "to be paid by the plaintiff, and taxed in the costs." It is not to be taxed as costs. Suppose A. sues B., an infant. A heavy lit-

gation ensues. A. recovers nothing, but B., by his guardian *ad litem*, recovers upon a counter-claim, \$50,000. The attorney who has acted as guardian *ad litem* is reasonably entitled to \$5,000 for his services. Is A. in such a case to pay it, and not be credited by it as against B. It was not intended by this provision of the Code that the infant should not, in such a case, be liable for it. Such a construction would be unreasonable; and while, in conformity to the statute, it was proper to order its payment by the plaintiff in the cross-petition, Katharine Huhlien, yet the judgment in this instance should further have provided that upon payment of it by her she should be allowed or have credit therefor against Henrietta Huhlien. For this error, and that as to interest, the judgment is reversed, but in no other respect; and cause remanded, with directions to render a judgment in conformity to this opinion.

DOWNING v. MASON COUNTY.

(Court of Appeals of Kentucky. May 5, 1888.)

COUNTIES—OBSTRUCTION OF WATER-COURSE—LIABILITY FOR.

A county is not liable to a citizen for the flooding of his premises, caused by obstructing the course of a stream by the county officers in the proper discharge of their duties.¹

Appeal from circuit court, Mason county.

This was an action by Charles Downing against the county of Mason to recover damages which plaintiff had suffered by reason of the alteration and obstruction of a sewer or drain by said county. Demurrer to petition was sustained, and plaintiff appeals.

Cochran & Son and *T. C. Campbell*, for appellant. *L. W. Robertson* and *E. Whitaker*, for appellee.

HOLT, J. The appellant avers that the appellee "unlawfully, carelessly, and negligently" so changed and obstructed the course of a stream as to flood his premises. A county can necessarily act only through its agents. If liable at all for a tort, it can only be when committed by its agents, engaged in the course of its business. It is inferable from the petition that the act complained of was done by them in the erection of a county jail. Assuming this to be so, or that it was done, at least, in the course of the county's employment, and within the scope of its business proper, we reach the question involved, to-wit, is a county responsible for a tort? Formerly it was held, as to corporations proper, that, as they were not created to commit wrongs, therefore it was *ultra vires*, and they could not do so. This has long since ceased to be the rule, however. In *Railroad Co. v. Quigley*, 21 How. 202, the supreme court of the United States decided, as to corporations proper, that they were liable for acts done by their agents, whether *in contractu* or *in delicto*, in the course of their business and employment. To the same effect is the case of *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. Rep. 1055; and this is now the well-settled rule. Counties, however, are subordinate political divisions. They do not possess corporate powers under special charters, but exist by virtue of the general laws of the state, apportioning its territory into political divisions for the conveniences of government. They are a part of the machinery of the government. They are created for public purposes. Public duties are imposed upon those residing within their limits without request from them; and, in order that they may properly perform them, they are clothed with certain corporate powers. They are therefore often called *quasi* corporations. A difference should manifestly be drawn between them,

¹See *Eastman v. Clackamas Co.*, 33 Fed. Rep. 24, and note; *Manuel v. Cumberland Co.*, (N. C.) 3 S. E. Rep. 829, and note; *Abbett v. Johnson Co.*, (Ind.) 16 N. E. Rep. 127; *Watkins v. County of Preston*, (W. Va.) 5 S. E. Rep. 654.

invested, as they are, with powers and duties without their consent, and corporations proper, that obtain special privileges for the peculiar benefit of their corporators. The state may compel the citizen to the performance of his county corporate duties by means of penalties, but he does not stand in the light of a person who has for a consideration voluntarily assumed obligations so as to owe a duty, and be answerable to every one interested in its performance. In the case of municipal and ordinary corporations, it is otherwise, because they accept special charters, and presumably valuable privileges. Their creation is due to local advantage and convenience or individual benefit; while the leading object in establishing a county is to effectuate the political and civil organization of the state as to its general purposes and policy. It is an arm of the state, giving local effect to them. It looks largely to the administration of justice, the maintenance of the highways and bridges, the support of education, and kindred governmental objects. It is created at the will of the sovereign, without special regard to the consent or will of those residing in it. It is a necessary instrumentality in carrying out the policy of the state and in governing its people. It is governmental in its purpose and nature. It is not, in the strict legal sense, a municipal corporation, like a city. As a *quasi* corporation, it is distinguishable both from a private corporation and a municipal corporation proper. A city is liable to an individual, in certain cases, for a failure to discharge its corporate duties, upon the ground that its powers have been granted at the special solicitation and for the benefit of its citizens, and not so much to aid in the administration of the state government as for local advantage and convenience. Further illustration by way of distinction is unnecessary. A county being but an arm or branch of the state government, it is no more liable to be sued for the neglect or tort of its officers than the state is for that of those in authority in it. The common law gives no such right, and it, therefore, can only exist by statute. There is none in this state. Judge Cooley says: "It is settled that these [*quasi*] corporations are not liable to a private action at the suit of a party injured by a neglect of its officers to perform a corporate duty, unless such action is given by statute. The doctrine has been frequently applied where suits have been brought against towns, or the highway officers of towns, to recover for damages sustained in consequence of defects in the public ways. The common law gives no such action, and it is therefore not sustainable at all unless given by the statute." Cooley, Const. Lim. 247. In the case of *Brabham v. Supervisors*, 54 Miss. 363, it was held that a county is not liable for an injury arising from its neglect to repair a county bridge. In *Kincaid v. Hardin Co.*, 53 Iowa, 430, 5 N. W. Rep. 589, it was decided that a county is not responsible for an injury sustained by reason of the defective construction and imperfect lighting of a court-house. In *Doddall v. County of Olmsted*, 30 Minn. 96, 14 N. W. Rep. 553, it was declared that one cannot sue a county for an injury due to the negligence of its officers in failing to repair a sidewalk appurtenant to the court-house. In *Wehn v. Commissioners*, 5 Neb. 494, it is said that a county is not liable to a citizen for the erection of a jail in the immediate vicinity of his residence, nor for suffering it, through filth and disorder, to become a nuisance. Many cases could be cited to the same effect. Among them are *Commissioners v. Mighels*, 7 Ohio St. 109; *Bigelow v. Randolph*, 14 Gray, 541; and *Eastman v. Meredith*, 36 N. H. 284. The same reason exists for denying the citizen the right to sue a county for a wrong, whether it arises from its action or mere non-action, whether from mere neglect or a positive act. If permissible in one instance, it would be in the other; and, even if in either, it would lead to innumerable suits, and a wide avenue for trouble and obstruction to the state government. This is illustrated by the cases above cited. The denial of the right may sometimes, and no doubt often does, result in individual hardship; but public policy demands it. It must be kept in view that the paramount object of the existence

of a county is governmental; that it is, indeed, a part of the sovereignty itself. In view of this, and for its proper conduct, it has become a settled judicial rule that no liability exists upon its part unless it be authorized expressly, or by necessary implication, by statute. Its general purpose forbids that it should otherwise be open to suit, or answerable for the manner in which it either exercises or fails to exercise its corporate powers. Judgment affirmed.

LOCKARD v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 1, 1888.)

1. FORGERY—UTTERING FORGED WRITING—INDICTMENT—SUFFICIENCY.

An indictment for uttering a forged writing, which charges the accused with having the writing, knowing it to be false, presenting it to the party defrauded, and representing it as genuine, and thereby obtaining property of value, is sufficient; the falsity of the writing being sufficiently stated in the charge, that the accused knew it to be false, and it being immaterial when, where, how, or by whom it was forged.

2. CRIMINAL LAW—IMPEACHMENT OF DEFENDANT AS A WITNESS—MORAL CHARACTER.

Where the defendant in a criminal action becomes a witness in his own behalf, under act Ky. May 1, 1886, providing that such "defendant on trial, at his own request, shall be allowed to testify in his own behalf," etc., his credibility may be impeached by testimony assailing his general moral character.¹

Appeal from circuit court, Daviess county.

Thomas Lockard was convicted under an indictment for uttering a forged writing, and appeals.

R. W. Slack and Owen & Ellis, for appellant.

HOLT, J. An indictment for uttering a forged writing must state the acts constituting the uttering, and not the forging, of it. It is immaterial who committed the forgery, or how it was done. The falsity of the paper is merely a fact necessary to the existence of the offense. If it be forged, and one so knowing utters it as genuine, he is guilty. The acts constituting the uttering are the *gravamen* of the offense. In this case the indictment charges, in substance, that the appellant had the writing; knew it to be false; presented it to the party defrauded, representing it as genuine; and thereby obtained property of value. The statement that the appellant knew it to be false embraces the charge that it was so in fact. It is charged in the fore part of the indictment when and where the paper was forged. This was unnecessary; but in this instance it aids as to the sufficiency of the charge of uttering the paper, because, in thereafter stating it, the words, "then and there" are used, thus fixing the venue of the offense. The indictment is sufficient.

We now reach the vexed question in the case, and one which has not been heretofore considered by this court. The act of May 1, 1886, provides: "In all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this commonwealth, the defendant on trial, on his own request, shall be allowed to testify in his own behalf; but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her." Gen. St. 548. The appellant testified for himself, but offered no evidence as to his character in any respect. The commonwealth then introduced several witnesses, who were, over the appellant's objection, permitted to testify that, while they knew nothing of his character for truthfulness, yet his general moral character was bad. The law invests every person

¹ When the accused offers himself as a witness, he may be impeached like any other witness, *McDonald v. Com.*, (Ky.) 4 S. W. Rep. 687; *State v. Buella*, (Mo.) 1 S. W. Rep. 764; and, in impeaching his credibility as a witness, the inquiry is not restricted to his general reputation for veracity, but involves his whole moral character, *Peck v. State*, (Tenn.) 6 S. W. Rep. 389. As to the latitude of cross-examination, see *id.*, and note.

charged with crime with a presumption of good character. If the accused chooses to rest upon it, and not put his general character in issue by offering evidence as to it, then the state can offer none to impeach it. It is only when the defendant casts aside this shield of presumption, and attempts to show his general good character by affirmative evidence, that the door is opened for evidence of his bad character upon the part of the prosecution. This has long been a familiar rule. He may now, however, be both a defendant and a witness. The weight of common-law authority is that an inquiry into the general character of a witness must be confined to truth; and, where this rule obtains, there is no difficulty in holding that evidence as to the general moral character of a defendant is inadmissible, unless he has first offered testimony as to it, although he may have testified for himself. The inquiry must be confined to his general character for truth and veracity. Thus, in the case of *Fletcher v. State*, 49 Ind. 124, it was held that, as the accused had not put his general character in issue, evidence of his general bad moral character was inadmissible to assail him as a witness. In that state, a witness, whether he be a defendant or not, cannot be thus attacked in a criminal case. This is not so, however, in this state. Here evidence of the general moral character of a witness is admissible, upon the ground, as was said in the case of *Tackett v. May*, 3 Dana, 80, that "a witness whose moral character is bad is not as credible as one whose moral character is good." This is the settled rule with us. It is no longer open to first impression. The real question, therefore, now presented, is whether, while the testimony of witnesses generally may be assailed by reason of their general moral character, that of defendants in criminal cases shall only be open to attack upon the score of truth or veracity. If this restriction of the general rule existing with us is to be applied, it must be because otherwise the general moral character of a defendant would, without his consent, by his becoming a witness, be, in effect thrown into the scale, and he might sometimes be convicted more upon his bad character than upon the facts of the transaction under investigation. It is, therefore, now urged—and the argument is not without weight—that an impeachment of his testimony upon the score of character should be confined to his general reputation for truth and veracity. If so, this qualification of the general rule must be attributed to the existence of that other rule which, in a criminal case, gives to the defendant alone the right to put his general character in issue. The law making him a competent witness is silent upon this point. Its language merely places him upon the plane of any other witness if he choose to testify. Undoubtedly, the rule that the defendant only can put his general character in issue is founded in sound policy. If the state could do so *ad libitum*, convictions would be likely to result often from bad character, rather than from guilt of the offense charged. When, however, the defendant becomes a witness, he voluntarily assumes another character. Public policy and individual safety forbid that his reputation for veracity should then be beyond inquiry. Probably no case to the contrary can be found. A different rule would serve but a shield for crime. Why, also, if the testimony of other witnesses may be impaired or destroyed by evidence of general bad moral character, should not his be open to like attack? If there be good reason for it in the one case, does it not exist at least equally in the other? If it be said that in his case it may affect him as a defendant, and not merely as a witness; that it, instead of the evidence as to the act in question, may produce a conviction,—why may it not also be said that testimony showing he is unworthy of belief is likely to have the same effect? If, by his becoming a witness, the state is enabled, in effect, to avoid the rule that one criminally charged can alone put his general moral character in issue, yet he voluntarily affords the opportunity. If he chooses to exercise the privilege, should it not be with any burden that is necessary to the safety of the public? Its rights, as well as his, must be regarded. Reason dictates that he, as a witness, should not be

afforded an advantage not enjoyed by other witnesses. If it is important to the administration of justice that their general character for morality should be open to inquiry, why is this not also true of the defendant when he voluntarily becomes a witness? If the testimony of others, who are disinterested, may be thus discredited, ought that of the party interested, however bad may be his character, to be beyond inquiry? Surely, a shield should not be furnished to him that is denied to the disinterested and the impartial. It would be strange, indeed, if the character of a disinterested witness could be attacked by the adverse party and shown to be infamous, while that of the party interested, and who voluntarily becomes a witness, could not be questioned. If so, then the legal presumption that a witness is of good character could be overthrown as to the one altogether disinterested, but must remain indisputable when the party himself becomes a witness. The mere statement of such a position furnishes its own refutation. These considerations must prevail over the suggestion that if the general moral character of the accused, when he becomes a witness, can be assailed, it is, in effect, a violation of the rule that in a criminal case the defendant alone can put it in issue. His credit, like that of any other witness, is for the jury. The end desired is to arrive at the truth or falsity of the statement. If the general moral character of the one renders him unworthy of credit, it should operate likewise as to the other. The statute permitting the accused to testify, does not exempt him from cross-examination or impeachment. If he avails himself of the privilege, he subjects himself to the tests applicable to other witnesses. *Com. v. Bonner*, 97 Mass. 587. It would not only be dangerous, but difficult, to make an exception in his favor. Both reason and authority so dictate.

Statutes essentially like ours have been adopted in Nevada, New York, California, New Hampshire, Missouri, and other states. In the case of *State v. Cohn*, 9 Nev. 179, it was held that one accused of crime, offering himself as a witness in his own behalf, is to be regarded and treated as any other witness. In *Brandon v. People*, 42 N. Y. 265, it was said that, when he elected to become a witness, he left his position as defendant, and subjected himself to the same rules and tests as any other witness. The later case of *Connors v. People*, 50 N. Y. 240, decides that, by availing himself of the privilege of testifying, he assumes all the burdens incident to the position; and in *McGarrey v. People*, 2 Lans. 227, it was said: "He could not have been compelled to give evidence at all; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor, and subjected himself to the peril of being examined as to any and every matter pertinent to the issue." The case of the *People v. McGungill*, 41 Cal. 429, and *Town of Norfolk v. Gaylord*, 28 Conn. 309, are to the same effect. In *State v. Ober*, 52 N. H. 459, this language was used: "If he consents to become a witness in the case voluntarily, and without any compulsion, it would seem to follow that he occupies, for the time being, the position of a witness, with all its rights and privileges, and subject to all its duties and obligations." The case of *State v. Clinton*, 67 Mo. 380, however, seems to have been one in all respects similar to that now before us. In that state, as in this, the general moral character of a witness merely may be shown, without inquiring as to his general reputation for truth. The defendant voluntarily testified for himself. The state was permitted to inquire of other witnesses not only as to his general character for veracity, but as to morality; and the supreme court of that state, in passing upon the question, said: "In the light both of authority and reason, our opinion is that a defendant who at his own option becomes a witness under the act of 1877 occupies the position of any other witness,—is liable to be cross-examined as to any matter pertinent to the issue, may be contradicted and impeached as any other witness, and is to be subjected to the same tests." We concur in this view. In our opinion, it is the safe one. It is not unfair to the defendant. It subjects

him to no liability or test, when he voluntarily assumes the character of a witness, that may not be incurred by or applied to witnesses in general. The judgment is therefore affirmed.

MINNIARD *et al.* v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* May 8, 1888.)

1. HOMICIDE — MURDER — INSTRUCTIONS — KILLING ONE OF CONSTABLE'S POSSE WHILE RESISTING ARREST.

On a trial for murder by killing one of the constable's *posse* while resisting arrest, an instruction that, if defendants believed the arrest a mere pretext by deceased and the others to disarm them, and inflict bodily harm, they had the right to resist by any means in their power, was defective, in not saying that if the jury found the deceased was present in good faith, under a lawful summons to assist in the arrest, but defendants had reason to believe the constable and some others of the *posse* were making the arrest with such intent, and that deceased, with such others present as were lawfully disposed, would fail to protect them, then defendants had the right to resist, and, if necessary, kill the constable or other unlawful assailants, and that if, in using such right with reasonable precaution, they accidentally killed deceased, they should be acquitted.

2. SAME.

An instruction that if, at the time of the killing, the deceased was summoned by a constable having a warrant for the defendants' arrest for a public offense, and was present in good faith aiding in the arrest, it was defendants' duty to submit; and that if defendants, in resisting, willfully and intentionally killed deceased, knowing or having notice that he was summoned by the constable having a warrant for defendants' arrest, etc., they were guilty of murder; and that, if they killed deceased without such knowledge or notice, they were guilty of manslaughter,—is error.

Appeal from circuit court, Leslie county.

Israel Minniard and others were indicted for murder, and found guilty of manslaughter, and appeal. Instruction No. 7 of the trial court in this case was as follows: "If, at the time of the killing, the deceased was summoned by a constable of Leslie county, who had a warrant in his hands for the arrest of the defendants, or any of them, charged with a public offense, and the deceased was there at the time in good faith to aid said officer in making the arrest, having been summoned by said officer, and was at the time engaged in endeavoring to arrest the defendants, under said warrant, for a public offense which the defendants had committed, then it was the duty of the defendants to submit to said arrest, and he or they had no right to make resistance thereto; and if, in resisting such arrest, or to prevent its execution, the defendants willfully and intentionally shot and killed said Solomon Buckheart, then the defendants are guilty of murder, if, at the time, they knew or had notice that the deceased was with a constable, summoned by him in good faith, with a warrant for the arrest of the defendants for a public offense; guilty of manslaughter if they did not have knowledge or notice of said facts."

D. K. Rawlings and *John L. Scott*, for appellants. *P. W. Hardin*, for the Commonwealth.

BENNETT, J. The appellants were indicted in the Leslie circuit court for the murder of Solomon Buckheart. They were found guilty of the crime of manslaughter, and their punishment fixed at confinement in the penitentiary for two years each. They have appealed to this court. It appears from the record that Isaac M. Day, a constable, together with a large *posse*, went to the house of Israel Napier, one of the defendants, with a warrant for the ostensible purpose of arresting the defendants for a supposed offense. The defendants resisted the arrest, and, in the resistance, Solomon Buckheart, one of the *posse* summoned by Day to assist in making the arrest, was shot and killed. The appellants relied on self-defense, upon the ground that Day and his *posse* were the deadly enemies of the appellants, and that their coming to make the arrest under the guise of a warrant was a mere pretext to disarm the

appellants, and get them in their power, for the purpose of doing them great bodily harm, and that the appellants, being apprised of said purpose, had the right to resist the arrest. As the case is to be sent back for a new trial, we refrain from making any comment on the testimony, except to say that there is proof in the record that tends to show that Day and his *posse*, or the most of them, were unfriendly to the appellants; and that it was the purpose of Day to use the warrant as a pretext to get control of the appellants in order to do them bodily harm, and that the shot that killed Buckheart was really fired at Day, but missed him.

The court instructed the jury, in substance, that if the appellants believed, and had reasonable grounds to believe, that the arrest attempted to be made was a mere pretext to enable Day and the deceased, and those acting with them, to disarm the appellants, and place them in their power, for the purpose of inflicting upon them great bodily harm, then they, or any of them, had the right to resist such arrest by any means within their power, etc. The appellants complain of this instruction, and other similar ones, for the reason that they require the jury to believe that the deceased was a party to the purpose of making the arrest as a pretext to disarm the appellants, and place them in their power, for the purpose of inflicting upon them great bodily harm. We are constrained to the belief that these instructions did not go far enough. An additional instruction ought to have been given, to the effect that, although they might believe from the evidence that the deceased was summoned by Day to assist in the arrest of the appellants, and that he believed that Day was proceeding in good faith to arrest the appellants for a public offense, and he in good faith was present for the purpose of assisting in making the arrest, yet, if the appellants believed, and had reasonable grounds to believe, that Day and the other members of the *posse*, or any of them, were attempting to make the arrest, by virtue of the warrant, as a mere pretext to enable them to disarm the appellants, and place them in their power, for the purpose of killing them, or of doing them great bodily harm, and that the deceased, and those of the *posse* acting from motives similar to his own, could not or would not protect the appellants from the unlawful purpose of Day and the other members of the *posse*, then they had the right to resist said arrest; and, if necessary, they had the right to kill Day, or such members of the *posse* as were engaged in such unlawful purpose; and if, in attempting to kill Day, or such members of the *posse*, they used reasonable precaution, under the circumstances, not to kill or injure the deceased, but accidentally killed him while aiming to kill Day, or such of the *posse* as were thus unlawfully engaged, then the jury should acquit them. Instruction No. 7 is conceded to be error.

The judgment of the lower court is reversed, with directions to grant the appellants a new trial, and for further proceedings consistent with this opinion.

ROBERTS v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 8, 1888.)

1. HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.

On trial of defendant, who was indicted in 1884, escaped, and was tried in 1887, where the evidence shows that, upon the evening of the murder, deceased said to defendant, who had stolen money from him, "Dave, give me back my money;" that shortly afterwards deceased rode away, defendant followed, returned in half an hour, and, again going away, returned about midnight, and left at sunrise,—two witnesses denying that defendant left the house that evening; and where deceased's body was found concealed by rubbish not far from the house, and defendant was seen, shortly after sunrise, some miles distant, with his clothes wet to his waist, with a knife which was bloody, and with deceased's pocket-book, and money corresponding in amount with that in deceased's possession; and two witnesses testify that defendant confessed the deed,—a conviction of murder is sustained.

2. SAME—MURDER—EVIDENCE.

On trial for murder, evidence that defendant had stolen money from the deceased is admissible as showing a motive for the murder; the deceased having virtually accused defendant of the stealing.

2. SAME—INSTRUCTIONS—REFUSAL TO CHARGE ON SELF-DEFENSE.

Where the evidence establishes conclusively that defendant assassinated the deceased, either to rob him or to conceal a former larceny, a refusal to charge upon the law of self-defense is not error.

Appeal from circuit court, Morgan county.

Trial of David Roberts, indicted for murder. Judgment of conviction, from which defendant appeals.

Wood & Day and *Salyers & Orear*, for appellant. *P. W. Hardin*, for appellee.

BENNETT, J. The appellant, Roberts, at the November term, 1864, of the Morgan circuit court, was indicted for the murder of James L. Kendall; but having made his escape, and remained away for many years, he was not tried until 1887, when he was convicted of said charge, and his punishment fixed at confinement in the penitentiary for life. The facts are that James L. Kendall was murdered on Sunday evening, about sunset, October 2, 1864, near the residence of Miles Caskey, by having his throat cut with a knife. The appellant, just a short time before James L. Kendall was killed, lived with him; and the proof is clear that, while living with Kendall, the appellant stole some money from him. Just before sunset on Sunday evening, Kendall was at the yard-fence of said Caskey. While there, one witness swears that she heard Kendall say to the appellant: "Dave, give me back my money;" that she did not hear the appellant's reply; that shortly afterwards Kendall rode off, and the appellant followed him; that appellant, about 30 minutes afterwards, returned to the house of Caskey, and remained about 15 minutes, and then left the house, and returned about midnight, and left again Monday morning before day-break. The appellant had plenty of time in which to kill Kendall during the 30 minutes that he was gone from the house of Caskey on Sunday evening. Kendall's body was found in a hollow about 60 yards from the road. The body was covered up with chunks and trash. The evident purpose of the appellant, in leaving Caskey's house the second time, was to conceal Kendall's body. Caskey and his wife swear that the appellant was at Caskey's house at the time Kendall left, and did not leave until Monday morning, about one hour and a half by sun. Their evidence directly contradicts that of the woman which is above detailed; and, if their evidence be true, it was impossible for the appellant to be the guilty party. But it is evident that the jury disregarded their testimony, and we think the jury did right in disregarding it; for it is clearly established that, about sunrise on Monday morning, the appellant was seen several miles away from Caskey's residence, with his clothes wet up to his waist. It is a reasonable inference that he had washed the blood from them. The Caskeys say that he left their house on Monday morning after breakfast, about one hour and a half by sun; the woman says that he left about day-break. She is corroborated. It also appears that the appellant was seen on Monday with a knife which appeared to be bloody. It was proved, with reasonable certainty, that Kendall's pocket-book, which he had in his possession on Sunday, was in the possession of the appellant on Monday; also that he had money in his possession corresponding in amount with the amount that Kendall had in his possession on the day that he was killed. Also one witness swears that while the appellant was under arrest in October, 1864, he heard him confess to Col. Phillips that he killed Kendall; that he was sorry for it; that he had killed the best friend he ever had. Also another witness swears that, after the appellant was arrested the second time, he told him that he killed Kendall. Taking the evidence altogether, the guilt of the appellant is clearly established.

The commonwealth introduced evidence to show that the appellant had stolen money from Kendall prior to the day that he was killed. The appellant objected to this evidence; but, in the light of the circumstances of this case, we think the evidence was competent, for the reason, aside from the motive of robbery, the appellant having on Sunday evening been virtually accused by Kendall of taking the money, it tended to show a motive for putting Kendall out of the way.

The lower court declined to give an instruction upon the subject of self-defense. The appellant assigns this as error. The evidence established the fact conclusively that Kendall was assassinated by the appellant, either for the purpose of robbery, or to conceal the crime of larceny,—probably both. Therefore there was not, and in the nature of things could not be, the semblance of self-defense, and the court did right in not instructing the jury on that subject. The instructions were correct in every particular.

Having carefully considered all the errors assigned by the appellant, we find none to his prejudice. The judgment must be affirmed.

COMMONWEALTH, to Use of MORRIS, v. NETHERLAND'S ADM'R.

(Court of Appeals of Kentucky. May 1, 1888.)

1. GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN—LIABILITY OF JUDGE FOR INSUFFICIENT SURETY—REV. ST. KY. CH. 43, ART. 1, §§ 3, 4.

Under Rev. St. Ky. c. 43, art. 1, §§ 3, 4, providing that "no guardian except a testamentary one for nurture and education, can act until he has been appointed by the proper county court and given covenant with good security, approved by the court, to the commonwealth, faithfully to discharge the trust of guardian," and that "if the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency, the judges present and so in default shall be jointly and severally liable to the ward for any damage he may sustain thereby." A judge who allows a guardian to qualify on his signing another's name as surety to his bond, representing that he had verbal authority to sign for him, it appearing that he had no such authority, and that the act was never ratified, is liable for injury resulting to the ward's estate by reason of such guardian having been allowed to qualify without surety.

2. SAME—LIABILITY OF JUDGE FOR INSUFFICIENT SURETY—ACTION AGAINST ADMINISTRATOR.

A ward who brings suit within a year after his arrival at age against an administrator for injury to his estate resulting from decedent, as county judge, having allowed his guardian to qualify without surety, in violation of Rev. St. Ky. c. 43, art. 1, §§ 3, 4, imposing on the judge a liability for such violation, is within the saving of the statute, and may maintain his action.

3. SAME—ACTION BY WARD AGAINST ADMINISTRATOR OF COUNTY JUDGE—AFFIDAVIT OF CLAIM.

A demand, accompanied by an affidavit of the justice of the claim, need not be made by a ward before suit against an administrator for injury to his estate resulting from decedent, as county judge, having allowed his guardian to qualify without surety, in violation of Rev. St. Ky. c. 43, art. 1, §§ 3, 4, imposing a liability on the judge for such violation.

4. SAME—ACTION BY WARD AGAINST ADMINISTRATOR OF COUNTY JUDGE—INJUNCTION TO RESTRAIN.

That an action has been brought by an administrator for settlement of his decedent's estate, and injunction issued therein enjoining all persons from bringing suit against the estate except in said suit, does not prevent a ward bringing a separate action for an injury to his estate resulting from decedent, as county judge, having allowed his guardian to qualify without surety, in violation of Rev. St. Ky. c. 43, art. 1, §§ 3, 4, imposing a liability on the judge for such violation.

Appeal from circuit court, Taylor county.

This was an action by Samuel A. Morris against Netherland's administrator to recover damages suffered by plaintiff by reason of F. A. Netherland's failure, while acting as judge of the Taylor county court, to take sufficient surety of his (Morris') guardian. The administrator pleaded (1) that the action was barred by limitation; (2) that the act complained of was a judicial act for which Netherland could not be held liable; (3) that no demand, ac-

accompanied by affidavit of the justness of this claim, had been presented to him, as administrator, before the filing of the petition herein; (4) that Netherland's administrator had brought suit in circuit court of Taylor county for a settlement of the decedent's estate, and thereupon an injunction had issued enjoining all persons from bringing suit against estate except in said suit for a settlement; and that hence the petition in this case ought to be dismissed. On hearing of the case, plaintiff's petition was dismissed, and he appeals.

Samuel Aoritt, for appellant. *R. S. Montague*, for appellee.

BRUNETT, J. On the 5th day of December, 1870, F. A. Netherland, as the presiding judge of the Taylor county court, permitted D. S. Mitchell, on his own motion, to qualify as the guardian of the appellant, Samuel A. Morris, an infant. D. S. Mitchell signed his own name to the bond that was required by the statute, and F. A. Netherland permitted him to sign the name of R. E. Jeter to said bond as surety upon the statement that he had the verbal authority of Jeter to sign his name to said bond as surety. Afterwards, Mitchell becoming insolvent, he was removed as guardian of the appellant, Morris, and another guardian was appointed in his stead. This guardian instituted an action on Mitchell's bond as guardian, for the purpose of recovering the sum in his hands belonging to the appellant, Morris. To this action R. E. Jeter interposed the plea of *non est factum*, which was sustained by the circuit court, and this court, upon appeal, affirmed the judgment of the circuit court. The appellant, Morris, having arrived at 21 years of age, being unable to make his money out of Mitchell, seeks by this action to make the estate of F. A. Netherland, he having died, responsible for the money that went into the hands of D. S. Mitchell as his guardian. The circuit court having dismissed his petition, he has appealed to this court.

The proof is clear that D. S. Mitchell signed the name of R. E. Jeter to said bond without his authority, and that Jeter did not thereafter ratify the act. As the bond was executed prior to the adoption of the General Statutes, the question of F. A. Netherland's liability must be tested by the Revised Statutes, then in force. Section 3, art. 1, c. 43, of said statutes provided: "No guardian, except a testamentary one for nurture and education, can act until he has been appointed by the proper county court, and given covenant with good security, approved by the court, to the commonwealth, faithfully to discharge the trust of guardian." Section 4 provided: "If the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency, the judges present and so in default shall be jointly and severally liable to the ward for any damage he may sustain thereby." By the third section *supra* it was made the absolute duty of the court to take covenant with good security from the guardian. The fourth section fixed the judge's liability for a failure to take such covenant. By the first clause of said section the judge was made liable for any damage that the ward might sustain by his failure to take a covenant with one or more sureties from the guardian. If he took a covenant without security, he would be liable for the damage resulting therefrom to the ward, because the third section was mandatory that he should take such covenant; and the first clause of the fourth section made him liable for the damage that the ward sustained by reason of the violation of the mandate; whereas, the second clause of said section only required the judge to satisfy himself that the surety was sufficient. To thus satisfy himself it was incumbent on him to use reasonable diligence in ascertaining whether the surety was sufficient, and if, after such diligence, he was satisfied that the surety was sufficient, he would not be liable in damages to the ward for an error of judgment. But the first clause made the judge liable to the ward if he failed to take a covenant with surety from the guardian. The simple failure to take security was made sufficient to hold the judge liable

for any damage that the ward sustained by reason of such failure. Under the second clause he could be heard to excuse himself for taking insufficient sureties upon the ground that he, after exercising reasonable diligence, satisfied himself that the sureties were sufficient; because it would be unreasonable to require him to ascertain the fact as to the sufficiency of the sureties with absolute certainty; hence said clause required him to exercise reasonable diligence only. But requiring him to know the surety to the covenant taken was not unreasonable, for the reason that he could do so with absolute certainty; for he could require the surety to sign the covenant in person and in his presence; or he could require the surety to authorize the signing of his name by a written power of attorney, authenticated in such manner as to leave no doubt of its authenticity. This could be done without any material inconvenience to the guardian, surety, or judge; hence the first clause required that the judge should know that surety was taken, and for a failure to take such surety he was made liable to the ward for any damage that he sustained thereby. Therefore as F. A. Netherland, the county judge, allowed Mitchell to qualify as guardian of the appellant, Morris, without surety, he became liable to the latter for the damage he sustained by reason thereof. Besides, Netherland was guilty of gross negligence in receiving the name of Jeter upon the bond upon the assurance of Mitchell that he had Jeter's verbal authority to sign it; for it was the duty of the judge to satisfy himself that the surety was sufficient to secure the payment of the money that went into the guardian's hands. The joint ability of the guardian and surety was not sufficient; but the ability of the surety was required to be sufficient to secure the faithful performance of the guardian's trust. If Netherland had been acting as agent to loan to Mitchell the money of his principal, with instructions to take such security as was sufficient to secure the payment of the money, leaving out of view the ability of Mitchell, and he had loaned Mitchell the money upon the faith of the name of Jeter, signed to the note by Mitchell upon the latter's assurance that he had Jeter's verbal authority to sign his name to the note, but in fact no such authority was given, would it not be conceded at first blush that Netherland had been grossly negligent? We think so. The two cases are parallel, and it is clear that upon the ground of negligence Netherland's estate is liable. The appellant brought his action within a year after his arrival at age; therefore he is within the saving of the statute. We think the lower court did right in refusing to dismiss the case on the ground of a want of affidavit and demand. The fact that an injunction was issued against creditors in the case pending to settle Netherland's estate did not prevent the appellant from bringing this action to settle his rights.

The judgment of the lower court is reversed, with directions to reinstate the case, and to ascertain the amount of F. A. Netherland's liability, and to render judgment for the same.

WHITE v. GUTHRIE.

(Court of Appeals of Kentucky. May 5, 1888.)

POWERS—TESTAMENTARY—SALE OF LAND.

Testator's will gave his executrix "power to sell and convey any portion of my estate not devised to my four first-named children." *Held*, that the language of the will having no ambiguous meaning, the power to sell was unrestricted, except as to property specifically devised to said children.

Appeal from circuit court, Shelby county.

Suit in equity for specific execution of contract of sale of real estate, brought by Sarah Guthrie, executrix of the last will and testament of J. D. Guthrie, deceased, vendor, against F. P. White, vendee. Judgment for plaintiff. Defendant appeals.

Stimrall & Bodley, for appellant. *J. C. Beckham*, for appellee.

PEYOR, C. J. J. D. Guthrie, of the county of Shelby, left a last will and testament by which he made various devises to his widow and children of property specifically mentioned, and left his widow, by the last clause of the will, his sole executrix, "with power to sell and convey any portion of my estate not devised to my four first-named children." His widow, under this provision of the will, sold the tract of land known as the "Home Farm" to the appellant White for a large sum of money. He refuses to execute the contract, because, as he maintains, the widow had no power to sell this land under the will. The power of sale is expressly given by the will of the testator, and it is not pretended that she has sold or is selling to the appellant any of the estate devised to his first "four named children;" but, on the contrary, it affirmatively appears that such is not the case. The language of the will has no ambiguous meaning, and the power to sell is unrestricted, except the property specifically devised to his first four named children. This being the view of the court below, the judgment is affirmed.

McCONNELL v. STATE.

(Court of Appeals of Texas. April 7, 1888.)

1. ASSAULT AND BATTERY—EVIDENCE TO SUPPORT CONVICTION—PEN. CODE TEX. ART. 485.

Under Pen. Code Tex. art. 485, providing that, in injuries caused by violence, the intent to injure is presumed, and it rests with the accused to show otherwise, if the person injured, being the only witness to show the commission of the offense, testify that the defendant did not intend to injure her, did not hurt her, and that she made the complaint because she was mad at him, the evidence does not support conviction of assault and battery.

2. SAME—WHAT CONSTITUTES—INTENT.

Intent to injure is an absolutely essential element of assault and battery, defined by Pen. Code, Tex. art. 484, to be the use of unlawful violence upon the person of another with intent to injure him.

Appeal from Cooke county court; J. E. HAYWORTH, Judge.

Appellant, Isom McConnell, was convicted of assault and battery. Pen. Code, art. 484, provides: "The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery."

A. M. Thomason, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. An "intent to injure" is an element absolutely essential to constitute the offense of assault and battery. Pen. Code, art. 484. It is true that, when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. Pen. Code, art. 485. In this case the alleged injured party swore positively as a witness that the defendant did not intend to injure her, and did not hurt her; that she made the complaint against him, at the time it was made, because she was mad at him. Her evidence was the only evidence adduced as to the commission of the offense, and, according to that evidence, the prosecution did not make out the case; wherefore, because the judgment is against the evidence, it is reversed, and the cause remanded. *Ware v. State*, 24 Tex. App. 521, 78. W. Rep. 240. Reversed and remanded.

KELLER v. STATE.

(Court of Appeals of Texas. April 7, 1888.)

1. INDICTMENT AND INFORMATION—SUFFICIENCY—ERRORS IN SPELLING.

An information or indictment wherein the word "inhabitants" is spelled "inhabitance" is sufficient.

2. DISORDERLY CONDUCT—DISTURBING INHABITANTS OF PUBLIC STREET—EVIDENCE.

Persons living in residences which abut upon a public street are inhabitants of such street, within the meaning of Pen. Code Tex. art. 314, which establishes a penalty for using loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof;" and, in a prosecution under the statute, evidence that there were houses abutting on such street, and that the houses were inhabited, was admissible.

3. SAME—SWEARING IN PUBLIC STREET—DISTURBING INHABITANTS OF PRIVATE RESIDENCES.

A prosecution for swearing in a public street, under Pen. Code Tex. § 314, which establishes a penalty for using loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof," is not barred by the fact that the defendant may have equally violated the statute by disturbing the inhabitants of private residences.

Appeal from Montague county court; GRIFFIN LORD, Judge.

W. S. Keller was prosecuted for cursing a person upon a public street, and, upon conviction, appeals. The street where the disturbance was committed, was about 30 yards from dwellings abutting thereon, and defendant's language was audible at double that distance. Pen. Code Tex. art. 314, establishes a penalty for using loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof."

Stephens & Herbert, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Bad spelling does not vitiate an indictment or information if the meaning of the allegations are unmistakable. *Irvin v. State*, 7 Tex. App. 109; *Hudson v. State*, 10 Tex. App. 215; *Brumley v. State*, 11 Tex. App. 114. "Inhabitation," as used in the information in this case, was evidently intended to mean "inhabitants;" and, furthermore, the two words are *idem sonans*. We hold the information to be sufficient. Persons residing in residences which abut upon a public street are, in our opinion, "inhabitants" of such street, within the meaning of article 314 of the Penal Code. It was therefore not error to admit evidence proving that there were residences abutting upon the street, and near to where the alleged disturbance occurred, and that said residences were inhabited. No error was committed in refusing to give the special charge requested by defendant with reference to such evidence. That the defendant may have violated the statute by disturbing the inhabitants of private residences, as well as by disturbing the inhabitants of the street by the same act, cannot bar a prosecution and conviction for the latter phase of the offense. Whether or not the conduct of the defendant was calculated to disturb the inhabitants of the street was a question solely for the jury to determine, and that question was fairly and plainly submitted to the jury by the court's charge, and the evidence sustains the finding of the jury thereon.

Believing that there is no error in the conviction, the judgment is affirmed.

ERWIN v. STATE, (two cases.)

(Court of Appeals of Texas. April 11, 1883.)

GAMING—INDICTMENT—KEEPING A GAMING TABLE—SUFFICIENCY OF EVIDENCE TO CONVICT.

A conviction under indictments for keeping and exhibiting a gaming table, will not be sustained where the evidence merely establishes the fact that defendant was frequently seen in the house where the offense was being committed, but failed to show that he took any part therein, or that he owned or controlled the premises, or had any interest in the table, or was concerned in its operations.

Appeals from Tarrant county court; SAMUEL FURMAN, Judge.

B. P. Ayres, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. These convictions are for keeping and exhibiting a gaming bank and table for the purpose of gaming. In both cases the evidence is substantially the same, and is in our opinion insufficient to sustain the convictions. It merely establishes the fact that the defendant was frequently seen in the house where the offense charged was being committed. It is not shown that he took any part in the gaming; that he owned or controlled the premises where it occurred, or any interest therein; or that he owned any interest in the table or bank; or was in any manner concerned in its operations. His mere presence at the place where the offense was being committed, in the absence of other facts showing that he participated or was concerned, or was interested in the commission of the offense, does not warrant the conclusion that he was guilty of the charges contained in these indictments; wherefore the judgments are reversed and the causes remanded.

LEE *et al.* v. STATE.

(Court of Appeals of Texas. April 11, 1888.)

1. BAIL—SURRENDER OF PRINCIPAL AFTER JUDGMENT ON FORFEITED RECOGNIZANCE—RELEASE OF SURETY.

The surrender of the principal in a forfeited recognizance, after the entry of judgment *nisi* thereon, will not release the sureties from the penalty of such recognizance.

2. SAME—APPEARANCE OF PRINCIPAL AFTER JUDGMENT *NISI* ON RECOGNIZANCE—RIGHT OF COURT TO REMIT PENALTY.

Under Code Crim. Proc. Tex. art. 455, providing that if, before final judgment is entered against the bail, the principal in a forfeited bond or recognizance appear or be arrested, and lodged in the jail of the proper county, the court may, in its discretion, remit the whole or part of the sum specified in the bond or recognizance, the court may, when such principal appears after judgment *nisi* thereon, remit a portion of the penalty, and enter judgment for a part thereof.

3. SAME—ACTION ON BAIL-BOND—RELEASE OF SURETY—INSUFFICIENCY OF INDICTMENT.

Sureties on a bail-bond cannot, in an action thereon, defend on the ground that the indictment against their principal was bad.

Appeal from district court, Lamar county; D. H. SCOTT, Judge.

Action on a bail-bond, in which George Lee, who had been indicted for forgery, was principal, and certain others were sureties, and from a judgment against them for the penalty of the bond defendants appeal. Code Crim. Proc. Tex. art. 455, provides that if, before judgment is entered upon a forfeited recognizance or bail-bond, the principal therein surrenders or is arrested, the trial court may in its discretion remit the bond or recognizance.

Hale & Hale, for appellants. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Lee was indicted for forgery, and Schmidt and Parrott were sureties on his recognizance, the amount of which was \$500. Judgment *nisi* was taken on October 22, 1886. On October 25th, Lee surrendered himself to the sheriff, was placed in jail, and in November, 1886, was tried and convicted. Schmidt and Parrott answered the *scire facias*. *First*. The surrender and conviction of their principal. The surrender to the sheriff being after the judgment *nisi* presents no reason why the judgment *nisi* should not be made final. If, before the judgment *nisi*, the principal be arrested on the same indictment, his sureties will be discharged; but, if the arrest be after the judgment *nisi*, the sureties will not be discharged because of such arrest. In *Peacock's Case*, 44 Tex. 11, and in *Lindley's Case*, 17 Tex. App. 120, the arrests were before the judgment *nisi*. It would be a very strange doctrine, indeed, to hold that the issuance of, and arrest under, an *alias capias* would be ground for setting aside the judgment *nisi*. *Second Ground*. That there is no authority for rendering judgment for \$50; that the judgment must be for the \$500, or no amount at all. This proposition is met by article 455 of the Code of Criminal Procedure, and *Barton's Case*, 24 Tex.

251. *Third Ground.* As the indictment against Lee alleged the forgery to have been committed at a date subsequent to the date of the filing of the indictment, it was fatally defective, and the district court had no jurisdiction of the case of forgery; that is, the jurisdiction of the court had not attached to the particular case. This proposition can be conceded, yet it does not follow that the court did not have jurisdiction of the suit upon the recognizance. Let us suppose that Lee had responded as required by his recognizance. The district attorney may have discovered the defect in the indictment, and obtained an order placing him in custody until a sufficient indictment could be presented. Hence one reason of the rule that the parties to the bond or recognizance will not be permitted to urge the insufficiency of the indictment to defeat their liability. But this is now the well-settled rule. *State v. Coz*, 25 Tex. 404; *State v. Ake*, 41 Tex. 166; *Brown v. State*, 6 Tex. App. 188; *Jones v. State*, 15 Tex. App. 82. There being no error in the judgment, it is affirmed.

BEAN v. STATE.

(Court of Appeals of Texas. April 18, 1888.)

1. HOMICIDE—MURDER—INSTRUCTIONS—SELF-DEFENSE.

Where deceased struck defendant with an iron scoop, and defendant retreated a few steps, picked up a stick, and approached deceased who struck at him again, and they continued striking at each other until deceased was knocked down, a charge upon the trial for murder, omitting the instruction that if there was no cessation from the first act of violence until the fatal blow was struck, and if deceased struck the first blow, and defendant struck with the stick in self-defense, he would be guilty of no offense, is ground for reversal.

2. SAME.

In such case a charge omitting to instruct that if defendant was assaulted on his own premises with an instrument calculated to inflict a serious injury, and he retreated, picked up a like instrument, and returned with no intention of renewing the conflict, and deceased again assaulted him, then, in self-defense, he had the right to repel such assault and if he killed deceased, he should still be acquitted, is ground for reversal.

3. SAME—INSTRUCTIONS—RESTRICTING RIGHT TO SELF-DEFENSE AGAINST DECEASED ALONE.

In a trial for murder, where it appears that a friend of deceased was present at the time of the killing, also armed, and assisting him, it is error in the charge to restrict defendant's right to self-defense against deceased alone.

4. SAME—INDICTMENT FOR MANSLAUGHTER—INCLUDES AGGRAVATED ASSAULT.

A conviction of aggravated assault and battery under Pen. Code Tex. art. 488, making it aggravated assault, "when serious bodily injury is inflicted," may be had under an indictment for murder in the second degree, which charges defendant with killing the deceased "by striking, beating, bruising, and wounding him with a stick," independently of art. 714, providing that murder shall include all assaults.

Appeal from district court, Lamar county; D. H. SCOTT, Judge.

Indictment of Guy Bean for murder, and conviction of aggravated assault and battery, from which defendant appeals.

Mazey, Lightfoot & Denton and Hale, Hodges & Park, for appellant.
Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In this case the indictment was for murder of the second degree, the charge being that appellant "did unlawfully, and with his implied malice aforethought, kill and murder Samuel Wooldridge, by then and there striking, beating, bruising, and wounding him, the said Samuel Wooldridge, with a certain stick," etc. At the trial had upon this indictment appellant was convicted of aggravated assault and battery, the penalty assessed being a fine of \$1,000, and 18 months imprisonment in the county jail.

1. It is contended that under the indictment for murder of the second degree in this case a conviction cannot be had for aggravated assault and battery, because the essential elements of the latter offense are not set out nor

embraced in the charge of murder of the second degree. This is not a new question in this state. It came up directly in *Green's Case*, 8 Tex. App. 71, and it was then held that under the provisions of article 714 of the Code of Criminal Procedure such a conviction could be sustained, it being expressly provided that murder includes assault with intent to murder, and that assault with intent to commit any felony, includes all assaults of inferior degree. Independently of this article (714) we are further of opinion that the indictment in this case is sufficient even in setting forth the offense of an aggravated assault and battery, under the seventh subdivision of article 488 of the Penal Code, which makes it an aggravated assault "when serious bodily injury is inflicted upon the person assaulted." Now, the indictment charges that the appellant killed and murdered the deceased "by striking, beating, bruising, and wounding him with a stick." It is clear that he could not have done this without inflicting serious bodily injury upon him. It is true, the exact statutory words which we have quoted are not used in the indictment, but the substituted words are, if not equivalent, certainly of more extensive signification than the statutory words; and this is all that is required. *State v. Wupperman*, 18 Tex. 33; *Kerry v. State*, 17 Tex. App. 180; *Lantzenester v. State*, 19 Tex. App. 320; *Clarke's Crim. Law*, 420, and note.

2. It seems that a short time previous to the homicide the appellant and the deceased had some misunderstanding regarding their business transactions; but it does not appear to have ripened into hostility. At all events defendant's conduct towards deceased just prior to the fatal difficulty indicated a desire upon his part to avoid further trouble with him. There is a conflict in the evidence of the only two witnesses who profess to have seen what actually occurred immediately at the time of the rencontre, the state's witness making the defendant the aggressor, who struck the first blow, and the witness for the defense swearing that when "defendant told the deceased of the rules which his (defendants') father had adopted with regard to his business in connection with the ginning of cotton, and had said: 'You go to the house, and see my father.' Wooldridge (deceased) said: 'God d—n the rules, your father, and you, too!' and made at Mr. Bean, and struck him a glancing lick on the shoulder with a scoop. Mr. Bean (defendant) then turned and picked up a stick and came back towards Wooldridge who was then on the platform of the scales. Defendant stepped towards Wooldridge, and Wooldridge struck again at defendant with the shovel or scoop, who knocked the lick off with his stick. Wooldridge then stepped backwards, striking at defendant with the scoop, and defendant striking with his stick. Several licks were passed before either was struck again, each warding off the other's licks. They backed in this position, Wooldridge backing and striking with the scoop, and defendant striking with his stick, until Wooldridge came under the elevator, when defendant hit Wooldridge with his stick, and Wooldridge fell to the ground. As soon as Wooldridge fell defendant raised his stick and turned to Mr. Vaughan and said: 'If you don't drop your scoop I will knock you down.' Vaughan was standing close to Wooldridge, and had his scoop in a striking position." This witness stated that after defendant was first struck by Wooldridge, defendant turned and went 10 or 12 steps, and picked up the stick and returned to the place of conflict. From first to last it appears that but very few minutes elapsed from the commencement to the end of the difficulty. Upon this state of facts, in its application to the law of self-defense, the court, among other matters, thus instructed the jury in the seventeenth paragraph of the charge: "If Wooldridge attacked defendant in such manner and with such means as reasonably indicated an intention on the part of Wooldridge to take defendant's life, or to do him some serious bodily injury, yet if, before the fatal blow was struck, such appearances of danger to defendant had ceased, and the defendant afterwards renewed the difficulty with the intention of taking Wooldridge's life,

or doing him some serious bodily injury, then defendant, in such subsequent acts, would not have the right of self-defense. But if defendant renewed the difficulty, (if you find he did renew it,) with no intention of killing Wooldridge, or doing him some serious bodily injury, then you will apply the rule of law explained in the fourteenth sub-division of this charge, (which was as to aggravated assault when the homicide was with an instrument not in its nature calculated to produce death, and under circumstances showing no intention to kill, and no self-defense.) If you find that the rencontre, from the first acts of violence, was continuous, and without actual cessation, till the fatal blow was struck, then the rule of law stated in this subdivision of the charge would not apply." In connection with this latter proposition the court should have instructed in substance that if there was no cessation from the time the first blow was struck, and deceased struck the first blow with the iron scoop, and defendant struck with the stick in his own self-defense, then he would be guilty of no offense whatever in law. Again, in connection with this seventeenth paragraph, and as part of the law of the case, the court should have instructed the jury in substance that if defendant was assaulted on his own premises, or at his own place of business with an instrument calculated to inflict upon him serious injury, and he retreated, and picked up the stick, an instrument of like character, with which to defend himself, and having returned to the scales, where he had a right to go, with no intention of himself renewing the conflict, and deceased again assaulted him with the iron scoop, then, and in that event, defendant, in his necessary self-defense, had the right to use the stick in repelling such second assault upon him; and if in doing so he killed deceased, then, under such circumstances, he would be guilty of no offense, and they should acquit him.

3. Another complaint is, as we think, also justly urged to the charge of the court. It is that the court restricted the defendant's right of self-defense to a combat with, and appearances of danger from deceased alone. It is shown by the evidence that the deceased and the state's witness, Vaughan, were together interested in the getting of the cotton seed which was the cause of the difficulty. Vaughan is directly connected with deceased in the matters and circumstances attendant upon the transaction. He is also armed, as was the deceased, with an iron scoop, and according to the testimony of defendant's witness, defendant, during the conflict, is using his stick to "ward off both Wooldridge and Vaughan," and when the former has been felled to the ground, defendant turns upon Vaughan, who has his scoop raised in a striking position, and tells him: "If you do not drop your scoop I will knock you down." The charge of the court was excepted to because it did not set forth clearly the doctrine of self-defense as applied to the two assailants, Wooldridge and Vaughan. We are of opinion that the exception is well taken. *MoLaughlin v. State*, 10 Tex. App. 340; *Cartwright v. State*, 16 Tex. App. 474; *Jones v. State*, 20 Tex. App. 665.

Because the charge of the court did not sufficiently submit to the jury the law of the case in the particulars pointed out, the judgment is reversed, and the cause remanded.

SPOONEMORE v. STATE.

(Court of Appeals of Texas. April 25, 1888.)

1. INDICTMENT AND INFORMATION—DESCRIPTION OF PERSON—IDEM SONANS.

"Hix Nowels" and "Hicks Nowells" being *idem sonans*, the court rightly withhold from the jury, in a trial for theft, the question of whether the name proved is the name in the indictment.

2. LARCENY—WHAT CONSTITUTES OFFENSE—INSTRUCTION.

On trial for theft of cattle, where it is clear that the defendant took the animal with the fraudulent intention of appropriating it to his own use, and did so appropriate it, the offense is theft, as defined by Pen. Code Tex. arts. 724, 747; and a

charge in relation to the offense defined by article 749, of willfully taking possession, driving, or removing live-stock from its accustomed range, is properly refused.

Appeal from district court, Hunt county; W. C. JONES, Special Judge.

Conviction of John Spoonmore of the theft of one head of cattle. The state proved by Nowells the disappearance of a yearling from its range, the fact that defendant knew the yearling, and that it was afterwards traced to the possession of one Milford, who claimed to have bought it from defendant. Witness went to see defendant about the yearling, but did not find him at home. Defendant's father then paid witness for the yearling. Milford testified that he bought the Nowells yearling from defendant, who claimed to have bought it from one Lindley. Lindley testified that he never at any time sold the Nowells or any other yearling to defendant.

B. F. Looney, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. 1. "Hix Nowells" and "Hicks Nowells" are *idem sonans*, and the court did not err in its charge to the jury in disregarding the difference in the orthography of the name, and in omitting to submit to the jury for their determination whether or not the name, as spelled in the indictment, was the same as that proved on the trial. There was no room for doubt upon this question, and the court might well assume that the names were identical. If there had been any doubt as to whether the names were *idem sonans*, it would have been proper, and perhaps essential, to have submitted the question to the jury. *Henry v. State*, 7 Tex. App. 388.

2. It is objected to the charge of the court that it omits to instruct the jury in relation to the offense defined by article 749 of the Penal Code; that is, the offense of willfully taking into possession, driving, using, or removing live-stock from its accustomed range, etc. In our opinion, the evidence did not demand such a charge, and the court very properly declined to give it. It is clear from the evidence that the defendant took the animal with the fraudulent intention of appropriating it to his own use, and that he did so appropriate it. Such being the case, he was guilty of the theft defined by articles 724 and 747 of the Penal Code, and not of the offense defined by said article 749.

3. We think the evidence supports the conviction. As to the identity of the animal lost by Nowells with that sold by defendant to Milford, the evidence is sufficiently certain and conclusive. The motion for rehearing is refused. Motion overruled.

SHORT v. STATE.

(Court of Appeals of Texas. May 2, 1888.)

CARRYING WEAPONS—CONVICTION FOR—SUFFICIENCY OF EVIDENCE.

In Texas, one cannot be convicted of unlawfully carrying a pistol, where it appears that the pistol was found on his person when at his place of business; that he had received anonymous letters threatening an attack upon his person; and that the arrest of the person threatening the attack was at the time impossible.

Appeal from Tarrant county court; SAM FURMAN, Judge.

Byron G. Johnson and N. A. Stedman, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction for unlawfully carrying a pistol. It is shown by the evidence that defendant had the pistol in the White Elephant saloon on December 12th. Defendant proved by his witness Ward—and there was no evidence to contradict the testimony—that on said December 12th the defendant owned an interest in the White Elephant saloon, having paid the witness, who was the principal proprietor, \$1,000 for said interest; that he had a desk in the office of said saloon, where he did his corre-

spondence, and a drawer in the safe in the office, in which he kept his papers and other valuables; and that he spent three-fourths of his time at said saloon. Defendant was a silent partner in the concern. It was also abundantly proved that defendant had, prior to December 12th, received several anonymous letters threatening his life. These letters were fully proved up by witnesses, and were read in evidence; and it was shown that defendant had endeavored to procure, and perhaps did procure, the aid of a detective and deputy-sheriff to assist him in ferreting out the authors of the letters, and without avail.

From the facts as developed in this record, we are of opinion that, at the time the defendant was found with the pistol on his person, he was at his place of business; and, furthermore, that at said time he had reasonable ground for fearing an unlawful attack upon his person, and that the danger was imminent and threatening, and of a character such as did not admit of the arrest, upon legal process, of the party about to make such attack. In *Young's Case*, 42 Tex. 462, it is said: "The statute does not prescribe that the party from whom an attack is feared, must be actually present before preparation is made for self-defense. It is easy to imagine circumstances under which the danger might be most imminent, though the person from whom it was threatened was not immediately present." We are of opinion that the verdict and judgment are against the evidence. The judgment is therefore reversed, and the cause remanded.

BRYAN v. HANRICK.

(*Supreme Court of Texas*. April 20, 1888.)

LANDLORD AND TENANT—DENIAL OF LANDLORD'S TITLE—EXCEPTION TO RULE—FALSE REPRESENTATIONS.

In an action to recover possession of land, defendant answered that a third person, relying on plaintiff's representations that he was the sole heir of the owner, went into possession of the land under a contract of purchase from the plaintiff; that defendant had succeeded to this contract under like representations made by plaintiff to him; that in fact plaintiff was one of several heirs, and only the owner of an undivided one-third interest. *Held*, that defendant was not estopped from denying plaintiff's title, and it was error to strike out the answer.¹

Appeal from district court, Falls county.

Action by E. G. Hanrick against S. B. Bryan to recover possession of land. Defendant answered to the effect that one Sandifer, relying upon plaintiff's representations that he was the sole heir of the owner of the land, took possession under plaintiff, during negotiations for a purchase; that defendant succeeded to Sandifer's contract, under like representations made by plaintiff to him; that in fact plaintiff was only one of several heirs, and owned only an undivided one-third interest. On exceptions to the answer it was stricken out, and defendant appeals.

Brady & Ring, for appellant. *Goodrich & Clarkson*, for appellee.

GAINES, J. This case is very like that of *Hammers v. Hanrick*, 7 S. W. Rep. 345, (decided at the last Tyler term,) in which the opinion delivered by the commissioners of appeals was adopted by this court. The appellee brought this suit to recover of appellant two tracts of land. He alleged he had leased one of the tracts to one Sandifer, and that the lease had expired; that he had put Sandifer in possession of the other during a negotiation for a sale, which was not consummated, and that defendant had purchased Sandi-

¹As to when a tenant is estopped from denying the title of his landlord, see *Udell v. Peak*, (Tex.) 7 S. W. Rep. 786, and note; *Davis v. Canal Co.*, (N. Y.) 15 N. E. Rep. 878, and note; *School-Dist. v. Seminary*, (Pa.) 12 Atl. Rep. 837, and note; *Tilyou v. Reynolds*, (N. Y.) 15 N. E. Rep. 584, and note; *Hammers v. Hanrick*, (Tex.) 7 S. W. Rep. 345.

fer's right, and gone into possession under such purchase, and had refused to yield up his possession to plaintiff upon demand. The answer in this case sets up substantially the same defense as that in the *Hammers Case*, to which this court held that an exception was improperly sustained. In the latter, the defendant's vendors, as the answer alleged, were in possession of the land when E. G. Hanrick contracted to sell it to him. The answer in the present suit contains no such allegation, but we think this makes no substantial difference as to the law applicable to the two cases. Upon the principles laid down in *Hammers v. Hanrick*, *supra*, we hold that the court erred in sustaining the exceptions to appellant's special answer, and that for this error the judgment must be reversed, and the cause remanded.

SIMMONS HARDWARE Co. et al. v. KAUFMAN et al.

(Supreme Court of Texas. April 24, 1888.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION TO SET ASIDE—INTENT OF GRAN-TOR.

In an order to avoid a transfer or preference on the ground that it is made "in contemplation of the assignment," etc., under section 9 of the Texas assignment act, (Sayles, Civil St. art. 65,) the transfer must have been executed, or the preference given, with the intent then formed to make the assignment, and it is not sufficient that the assignor at the time had the assignment under consideration.

2. SAME—PURCHASERS FROM ASSIGNOR—WHO ARE—MORTGAGEES.

The word "purchaser," in section 9 of the Texas assignment act, providing that "if it shall appear * * * that the purchaser of any such property bought the same of the assignor in good faith," etc., includes mortgagees for value.

3. SAME—ACTION BY ASSIGNEE TO SET ASIDE MORTGAGE AS FRAUDULENT—FINDINGS OF THE COURT.

In an action by an assignee for the benefit of creditors to set aside a mortgage made by the assignors shortly before the assignment, the court, on the issue of fraud, found that the notes for which the mortgage was given were for a valid indebtedness; that the value of the land mortgaged was not much in excess of the debt; that it did not appear that the excess, if any, after paying the debt, was to be reserved; and that the mortgagees acted in good faith. *Held*, that the findings upon the issue of fraud were full and sufficient.

4. SAME—ACTION BY ASSIGNEE TO SET ASIDE MORTGAGE—EVIDENCE—VALUE OF MORTGAGED PREMISES.

A witness was permitted to testify, in regard to the value of the lands covered by the mortgages, that one of the tracts was, at the time of their execution, involved in litigation, and had since been lost to the assignors; that this tract was worth \$12,000; and that, when the mortgages were executed, the title was regarded as good. *Held*, that its admission could not prejudice the plaintiffs, as, whether the excess were greater or less, they would be entitled to it.

5. SAME—RIGHTS OF MORTGAGEES OF ASSIGNED PROPERTY—ACCEPTANCE OF DIVIDEND FROM ASSIGNEE.

Where certain creditors of one who had made an assignment for the benefit of creditors had taken a mortgage to secure notes which they held against him, *held*, that the fact that they presented to the assignee a claim for a balance due on an open account, and received a dividend, did not constitute a relinquishment or discharge of their security for the notes.

6. SAME—ACTION BY ASSIGNEE TO SET ASIDE MORTGAGE—PARTIES.

Certain creditors of one who had made an assignment for the benefit of creditors brought an action in the name of the assignee, who had refused to bring it, to set aside certain mortgages executed by the assignor. Subsequently the assignee was removed, and another appointed, who intervened in the suit as a party plaintiff, and adopted the allegations and joined in the prayer of the creditors' petition. Thereupon the court dismissed the creditors from the case, and allowed it to proceed in the name of the substituted assignee. *Held*, that as the assignee was authorised by statute to prosecute the suit, and to represent the interest of the creditors, the court did not err in dismissing as to them.

7. WITNESS—PRIVILEGED COMMUNICATIONS—WHAT ARE—ATTORNEY AND CLIENT.

S., an attorney, testified that, in conducting the negotiations for the mortgages from the assignors to the defendants, the subject of an assignment was never raised between the parties until he told the assignors that they could make an assignment; that this was several days after the mortgages were executed, and after the assignors had failed to come to an agreement with their creditors; that in all the transactions he was acting as counsel for the mortgagees, and did not represent the as-

signors, although he subsequently drew the deed of assignment. *Held*, that the evidence was proper, as there was nothing to show that he was acting as counsel for the assignors at the time.¹

Appeal from district court, Milam county.

E. L. Antony and A. G. Wilcox, for appellants. *Robt. G. Street*, for appellees.

GAINES, J. The Simmons Hardware Company and other creditors accepting under a statutory assignment made by Thomas F. Hudson & Son brought this suit in the name of the assignee, C. E. Wynne, who had refused to bring it, against Kaufman & Runge and others, to set aside certain deeds of trusts alleged to have been executed by the assignors in contemplation of the assignment. The assignee, Wynne, having been removed, and John B. Wolf appointed in his stead, the latter intervened in the suit as a party plaintiff, and adopted the allegations and joined in the prayer of the plaintiff's petition. The court thereupon dismissed the creditors from the case, and allowed it to proceed in the name of the substitute assignee, to which the creditors excepted. Upon the trial the court gave judgment for the defendants, and the assignee and creditors have appealed. The appealing creditors assign as error the action of the court in dismissing them from the case. It seems to have been intended by the statute that suits brought to set aside conveyances and preferences in fraud of its provisions should always be brought in the name of the assignee, and that, in the event he refused, the creditors surely had the right, by indemnifying him against the payment of the costs, to use his name in prosecuting the action without becoming parties themselves. Assignment Act, § 9; Sayles, Civil St. art. 65. But whether its purpose was to preclude the creditors from joining in the action in any case we need not decide. In this case the petition for intervention filed by the second assignee is signed by the same attorneys who represented the creditors, and, by adopting the allegations and prayer of their petition, presented to the court for adjudication precisely the same case. From this it appears that Wolf and the creditors were making common cause, that there was no conflict of interest between them, and that they did not differ either as to the ground of action or the mode of procedure. Certainly, the assignee was authorized by the statute to prosecute the suit, and to represent the interest of the creditors, and a judgment for or against him was equally conclusive as if they had also been before the court. It is not shown that the creditors have been injured, or could have been prejudiced by the action of the court, and hence their dismissal is no ground for the reversal of the judgment. How could these remaining as parties to the record by name have affected the result of the suit?

The cause was submitted to the court without a jury, and a judgment was rendered for the defendants. The judge filed his conclusions of fact and law, and we here copy so much of his findings as we think necessary for the purposes of this opinion. *Conclusions of Fact.* "(1) On the 4th and 10th of January, 1881, Thos. F. Hudson, one of the firm of merchants composed of Thos. F. Hudson and John A. Hudson, executed the two deeds of trust described in plaintiffs' petition, to secure defendants' note of \$25,000.00, executed on the 4th day of January, 1881, by Thos. F. Hudson & Son to Kaufman & Runge; said deeds of trust embracing the lands described in plaintiffs' petition. The \$25,000.00 was a valid debt. (2) On the 22d day of January, 1881, Thos. F. Hudson & Son, as partners and as individuals, made a statutory

¹As to what communications to an attorney are privileged, see *Manufacturing Co. v. Frawley*, (Wis.) 33 N. W. Rep. 768, and note; *Appeal of Goodwin Co.*, (Pa.) 12 Atl. Rep. 736; *Orman v. State*, (Tex.) 6 S. W. Rep. 544; *Brown v. Matthews*, (Ga.) 4 S. E. Rep. 13; *Grant v. Hughes*, (N. C.) 2 S. E. Rep. 339; *Tays v. Carr*, (Kan.) 14 Pac. Rep. 456; *Caldwell v. Davis*, (Colo.) 15 Pac. Rep. 696; *Morris v. Cain*, (La.) 1 South. Rep. 797; *Bruce v. Osgood*, (Ind.) 14 N. E. Rep. 563.

assignment for the benefit of accepting creditors. * * * (6) The value of the lands embraced in the deeds of trust was, at the time of the execution of the deeds of trust, \$34,000,—\$9,000 in excess of the debt secured; but I do not find that the value of the lands was, against all contingencies, more than enough to secure the debt. The valuation put upon the land above is what witnesses state the land to be worth, and I so find. What the land would have sold for at public vendue, if sold in parcels in the counties where it was situated, the evidence does not show. It does not appear that, if there should be an excess, it was to be reserved for Hudson & Son at this time. (7) At the time the deeds of trust were executed, Thos. F. Hudson & Son were in debt to other persons in large amounts, and their liabilities were much greater than their assets. They were in failing circumstances, and Kaufman & Runge had sufficient knowledge of their affairs to put a man of ordinary prudence upon inquiry as to their failing condition. The deeds of trust were executed by Thos. F. Hudson in good faith to secure Kaufman & Runge in their debt for \$25,000.00, and it was his intention to prefer Kaufman & Runge to other creditors by giving them the security. Thos. F. Hudson, at the time of the execution of the trust deeds, expected to be able to settle with creditors by compromise, and he expected Kaufman & Runge to help him to do this; but, upon failure to make settlement with other creditors by compromise, he intended to make an assignment under the assignment law of this state, both as an individual and as a firm. At the time the trust deeds were executed, it was the intention of Thos. F. Hudson to assign upon the contingency stated; that is, upon failure to settle with creditors. It was not until after he failed to settle with creditors, on the 22d day of January, 1881, that Hudson fully determined to assign. The contingency happened, and he assigned, and so did the firm. I do not find that Kaufman & Runge knew of the design of Thos. F. Hudson & Son, or either of them, to assign upon the contingency stated, at the time of the execution of the deeds of trust; and I do not find that they had reason to believe it. Kaufman & Runge were acting in good faith to secure their debt." It is assigned that the court erred in its conclusions of law founded upon its findings of fact, and in giving judgment for the defendant; and it is submitted that the deeds of trust were executed by Hudson & Son in contemplation of the assignment, within the meaning of the assignment law, and that, Kaufman & Runge being mere creditors, the conveyances were inoperative under the act, although they may have had no notice. So much of the statute in question as relates to these questions reads as follows: "Sec. 9, (1.) All property conveyed or transferred by the assignor previous to and in contemplation of the assignment, with the intent or design to defeat, delay, or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer; * * * but if it shall appear, in such action, that the purchaser of any such property bought the same of the assignor in good faith and for a valuable consideration, and without any reason to believe that the debtor was conveying or transferring the same with the intent or design aforesaid, such purchaser shall be held to have acquired, as against the assignee and creditors aforesaid, a good and valid title to such property."

Does this section apply only to conveyances and preferences made after a fixed intention has been formed to make an assignment, or do they apply also to such as are made or given after an intention has been formed to assign in the event of the happening of some contingency? We find no similar provision in the assignment laws of any of the states, and hence have found no decision bearing very directly upon the point. The words "in contemplation of bankruptcy" appear in the bankrupt laws of the United States, and the words "in contemplation of insolvency" are found in the insolvent acts of some of the states. The phrase "in contemplation of bankruptcy" is also used in the statutes of England, and has been the subject of frequent adjudication

in the courts of that country. The older decisions there hold that if a debtor gives a preference, knowing that he is insolvent, he must be held to have contemplated bankruptcy, which is the probable result. *Poland v. Glyn*, 2 Dowl. & R. 310; *Pulling v. Tucker*, 4 Barn. & Ald. 382. But the later decisions in the courts of Westminster Hall have established a more restricted construction, and it is now settled that, to set aside a transfer on the ground that it was made in contemplation of bankruptcy, it must be shown that it was made with intent to defeat the operation of the bankrupt act. *Morgan v. Brundrett*, 5 Barn. & Adol. 289; *Fidgeon v. Sharpe*, 5 Taunt. 545. The doctrine of these later cases has been adopted by courts of the highest authority in this country, and we think the meaning of the words may be deemed settled in accordance with that construction. *Jones v. Howland*, 8 Metc. 377; *Buckingham v. McLean*, 13 How. 150; *In re Craft*, 6 Blatchf. 177. We may therefore conclude that, in order to avoid a transfer or preference on the ground that it is made or given in contravention of the provisions of section 9 of the assignment law, the transfer must have been executed, or the preference given, with the intent, then formed, to make the assignment, and that it will not be sufficient that the assignor, at the time, had the assignment under consideration. But this does not relieve us of our difficulty. Here the intent to assign was formed when the mortgages were executed, but it was contingent upon Hudson & Son's inability to compromise with their creditors. We have found no case like this, and doubt if there be one in the books. Is a mortgage executed by parties who subsequently assign, after they have determined to make an assignment, contingent, however, upon the event of another transaction, a transfer or preference in contemplation of the assignment, within the meaning of the statute? Such is the question, but we do not think it necessary to decide it. Should it be answered in the affirmative, still we think the mortgages in this case protected, under the finding of the court that they had no notice that the deeds of trust were executed in contemplation of the assignment. The language of the last provision in section 9 of the assignment statute is peculiar: "But if it shall appear, in such action, that the purchaser of any such property bought the same of the assignor in good faith," etc. If we are to take the word "purchaser" in its technical sense, and in the sense in which it is used in the statute of registration and statute of frauds, it would clearly comprehend the mortgagees in this case. *Halbert v. McCulloch*, 8 Metc. (Ky.) 466; *Wethrill's Appeal*, 3 Grant, Cas. 281; *Lancaster v. Dolan*, 1 Rawle, 231; *Porter v. Greene*, 4 Iowa, 571; *Seavers v. Delashmutt*, 11 Iowa, 174. But the word "bought" is not a technical term, and has a far more restricted meaning. If the signification of "purchaser" is to be controlled by the latter term, then a mortgagee is not included. One who has taken a mortgage upon property, though he may be a purchaser, cannot be said to have "bought," according to the literal meaning of that word. What, then, is the construction of the language? Did the legislature mean to except only such persons as had bought property of the assignor, paying value and without notice? Or did they use the word "bought" as the equivalent of "purchaser" in its enlarged legal sense? We think the latter the better construction. We take it that the equity of a purchaser who has bought and paid for property absolutely, without notice of an intent to assign, is no higher than that of a mortgagee, without such knowledge, who has parted with his money, taking merely a lien upon the property to secure its repayment. The legislature did not, we think, intend to make a distinction in cases in which the equities are the same. It is not to be presumed that it designed to make a law manifestly inequitable and unjust. We are of opinion, therefore, that the mortgagees, as well as the purchasers of the absolute title, were intended to be protected by the provision under consideration. *Kaufman & Runge*, as a consideration for the deeds of trust, not only extended the debt, but also released a former mortgage. Having surrendered a previous security, they are purchasers for a valuable con-

sideration, and clearly within the equity of the statute. See cases cited in *Steffan v. Bank*, 6 S. W. Rep. 823.

But it is also submitted that the deeds of trust in question were made to hinder, delay, and defraud other creditors, and that this conclusion is inferable from the findings of the court. Such, however, is not our construction of the conclusions of fact. On the contrary, we think they expressly negative such intent.

The appellants further complain, in their second assignment of error, that the court did not distinctly find the issue of fraud. The court specifically finds that the notes secured were for a valid indebtedness; that the value of the lands mortgaged was not more than fully to secure the debt; that the mortgagors executed the deed in trust in good faith to secure Kaufman & Runge, and with the intention merely to prefer them by the security; that it did not appear that the excess, if any, after paying the debts, was to be reserved to Hudson & Son; and that Kaufman & Runge were acting in good faith to secure their debt. We think this statement clearly shows that, in the opinion of the court, no fraud was proved, and that the findings upon the issue of fraud are full and sufficient. The necessary effect of the preference was to hinder and delay other creditors; but it is settled in this court that, so far as the statute of frauds is concerned, this is legitimate, and not fraudulent. The equity of redemption in the mortgaged property being subject to levy and sale at the suit of other creditors, the excess, after paying the secured debts, was not placed beyond their reach.

What we have already said we think sufficient to dispose of so much of the third assignment of error as calls in question the sufficiency of the judge's findings. By that assignment it is also complained that the conclusions of fact are "against the great preponderance of evidence, if, indeed, they be not wholly without evidence to support them." The evidence was directly conflicting as to the question whether Kaufman & Runge had knowledge of Hudson & Son's intention to make an assignment at the time the deeds in trust were executed. Thomas F. Hudson swore positively that he stated in Runge's presence that he intended to assign. This, Runge as positively denied, and denied, also, all knowledge of that intention. Both witnesses were subjected to long and rigid cross-examinations. The issue depended mainly upon which of them was to be believed. The court below, in the light of the whole evidence, having found in favor of appellees, we have found nothing in the record to justify us in disturbing its conclusion. It is entitled to the same weight as the verdict of a jury.

We are of the opinion that the court did not err in admitting the testimony of R. G. Street, Esq., to the effect that, in conducting the negotiations for the deeds of trust from Hudson & Son to secure Kaufman & Runge, the subject of an assignment by Hudson was never mentioned, and that the matter was never raised between the parties until he told Thomas F. Hudson that he could make an assignment. This was after Hudson had failed to come to an agreement with his creditors, and several days after the deeds in trust had been executed. Mr. Street testified that, in all the transactions, he was the counsel for Kaufman & Runge, and did not represent Hudson & Son; and that, although he subsequently drew the assignment, he did it at the instance of Kaufman & Runge. It may be a serious question whether or not, after the witness undertook to prepare the deed of assignment, he should be considered as of counsel for the assignor. But we see nothing in his testimony to establish that relation until after the conversation about which he was permitted to testify.

During the progress of the trial, Judge McIver, a witness for appellees, testified as to the value of the lands included in the mortgage; and it was objected that his testimony was incompetent, and that he was permitted to give his opinion upon facts not stated, and that it was improper for him to show

the result of litigation by parol. The witness stated that one of the tracts of land embraced in the deed of trust was, at the time of their execution, involved in litigation, and had since been lost to Hudson & Son. He valued this tract at \$12,000, and testified that, when the deeds in trust were executed, the title was regarded as good. We do not think that the admission of this evidence has operated to the prejudice of the appellants on the trial. Without it the result should have been the same. If Kaufman & Runge, instead of merely taking security for their debt, had received an absolute title to the property in satisfaction of their claims, then the question of value would have been material. Knowing their debtors were insolvent, they could, in the latter case, have received only property reasonably sufficient in value to cover their indebtedness, unless there had been a distinct agreement which secured the appropriation of the excess to payment of other creditors. *Oppenheimer v. Haiff*, 68 Tex. 409, 4 S. W. Rep. 562; *Elser v. Graber*, 6 S. W. Rep. 560. But, as mortgagees, they occupy a different ground. They had only a lien for the amount of their debt, and this is all they could claim in any event. The excess over a sufficiency for this purpose is still subject to legal process for the satisfaction of the claims of other creditors; and hence, in a legal point of view, it is a matter of no moment to such creditors whether this excess is greater or less. It is not placed beyond their reach, and hence they are not defrauded.

The fifth assignment is that the court erred in sustaining an exception to the fourth paragraph of the petition. The leading allegation in that paragraph is that, in addition to the note for \$25,000, Kaufman & Runge had an open account against Hudson & Son for the sum of \$2,198.19, which they proved up against the assigned estate, and upon which they received a dividend; and it concludes as follows: "And your petitioners aver and charge that, by reason of the premises, the said claim of said defendants, based on said note, with the deeds of trust by which the same was secured, if otherwise valid, was discharged, and became of none effect." The exception of defendants is as follows: "They except to section 5 and paragraph 1 of section 6 of said amended original petition, for that it was competent for defendants to accept the assignment, as to their past-due open account, without said acceptance relating to or affecting their secured and unmatured claim against the assignors." The evident purpose of the averments in paragraph 5 of the petition was to set up that the claim of Kaufman & Runge, based on their note and mortgage, had been discharged by their acceptance of the assignment as to their unsecured debt. It was excepted to on this ground alone, and could have been sustained upon no other. So much of the averments as set up this defense were properly stricken out. *Kauffman v. Hudson*, 65 Tex. 716. There are other vague allegations in the paragraph that the note and account did not represent the actual indebtedness from Hudson & Son to Kaufman & Runge, "but were, for the most part, simulated and fraudulent," etc. That the court did not intend to strike out any portion of the petition that alleged fraud either in the notes or mortgages is apparent; and, if appellant desired to retain and rely upon such allegations, he could have restored them by a trial amendment. Being intermingled with allegations which were wholly irrelevant, and the last averment in the paragraph showing that its object was to set up the acceptance of the account as a discharge of the note, the court did not err in striking it out altogether.

There was no error in the judgment, and it is affirmed.

REED *et al.* v. APPLEBY *et al.*

(Supreme Court of Texas. April 27, 1888.)

TRESPASS TO TRY TITLE—EVIDENCE—HEARSAY—WHAT IS.

Plaintiffs' grantor, A., obtained from defendant's ancestor, B., a land certificate, made the survey, and received the patent in his own name, and, as claimed by plain-

tiffs, subsequently, for a valid consideration, received a deed from B. for half of the land, which deed was afterwards lost. In an action of trespass to try title, a son of B., who was then deceased, was permitted to testify that he had heard his father say that "he had given his certificate to a man to locate, but had never heard from it; that he had heard his father claim it since 1851." Another son testified that he had heard his father say "he had lost his land certificate, and did not know where it was located, and had not received it." *Held*, that the testimony was hearsay, and improperly admitted.

Appeal from district court, Falls county.

Henderson & Henderson and Goodrich & Clarkson, for appellants.

WALKER, J. The plaintiffs below, who are the appellants, sued for a part of the league and labor patented in name of John Rector. They attempted to show title under the grantee by a deed made in 1848 to 1851 to Michael Reed, through whom they show clear title. The defendants, save as noted hereafter, asserted title under the children of Rector, made in July, 1874. The defendants Westcott & Westcott set up claim under patents calling for the north line of the Rector league, and claimed by them to be outside of the limits of the land sued for. Judgment was rendered for the defendants, and plaintiffs appeal. The matters complained of may be classed, (1) as to proceedings affecting the existence of a transfer from Rector to Reed; (2) the charge of the court; and (3) what, if any, effect should be given to the testimony adduced, tending to show a locative interest in Reed of one-half interest in the Rector tract. The plaintiffs showed that in 1835, when Rector was moving to Texas, he met with Michael Reed, and it was agreed between them that Reed was to locate for Rector his claim for lands. Reed then lived in what is now Robertson county. In 1838 Reed visited Rector in Nacogdoches county, and obtained from him his head-right L. & L. certificate for location. In 1840 Reed made application to the proper surveyor, designating the land, asking survey. In 1842 George B. Erath, then a deputy-surveyor of Milam county, made the location and survey. Erath, as witness, details the work of the actual survey. Reed paid the expenses of the survey, and obtained patent. William Reed, a son of Michael Reed, testified that while he was attending court at Cameron some time in 1848 to 1851, his father and a man calling himself John Rector had a business transaction about the John Rector head-right; that in the negotiations Rector recognized Reed's right to a locative interest in the land of one-half, and that Rector then sold the remaining half to Reed for a negro woman named Silvia. Witness saw the deed for the entire tract written; heard it read, and saw it signed; said the deed was written in the county clerk's office, and was, he thought, acknowledged. One Francis J. Buffau was the clerk. That thereafter Reed claimed the Rector head-right, and paid taxes thereon continuously until his death in 1859. That in 1858 Reed made a deed to 320 acres out of the north-west corner to his daughter. Witness was his father's administrator, and received his papers, and with them the deed. That he gave the deed to Judge McFarland, a lawyer of Belton, for the purpose of protecting the land by suit against one Warren. It appeared that suit was brought by Norris McFall and McFarland, but it appeared that Warren was upon that part of the Rector survey in conflict with the Galendo 11-leagues grant, an older title, and the suit had been dismissed. Mrs. Reed, wife of William Reed, testified to having seen the deed often; had kept it, as she did all her husband's papers; had heard it read several times, and that the last she saw of it was giving it to her husband to take to Judge McFarland. It was in evidence by one Cassidy, who was of the firm of Renick & Cassidy, that a deed for the Rector L. & L. had been handed to him by J. M. Norris, a lawyer. That witness had examined it carefully. That it was signed by John Rector, had two witnesses, one Sneed, a methodist preacher; the other he did not remember. He thought the document was duly acknowledged before some officer at Nashville. That it bore date 1849 or 1850, and was a

transfer of the certificate, and authorized Reed to obtain the patent; also containing a bond in double the named consideration that Rector would make additional deed when patent should issue. Cassidy further testified that at request of William Reed he had handed the deed to Judge Sleeper, a lawyer at Waco, since dead. Search was shown among Sleeper's papers for it. It was shown that Sleeper's office and papers had been destroyed by fire. Corroborative of William Reed's testimony, a Mrs. Burney testified that in 1848 to 1851 she lived in Cameron, and kept tavern. That some time during that time her husband had bought a negro woman named Silvia of a stranger for \$350. That the woman had belonged to Michael Reed, and has since died. It was further shown that in 1853 Reed had been upon the land, asserting ownership, and that in 1860 a ranch had been established by the Reeds upon the north-west corner, which was kept up until 1866 or 1867. On part of the defendants Joseph Rector testified that his father lived in the eastern part of Nacogdoches county, Tex., from 1835 until he died, in 1866. That witness was 15 years old in 1848, and lived with his father in 1848, 1849, 1850, and 1851. That his father had made but one trip west to the Bédias in 1844 or 1845. That his father was not absent from home from 1848 to 1851. Witness could not read or write; had heard his father say "he had given his certificate to a man to locate, but had never heard from it." That he had heard his father claim it since 1851. That he had first heard of the land in 1878. In this connection one William Skellerns testified that he had resided near John Rector for many years before his death, and that in 1848 or 1850 John Rector left home, saying he was going west to look after some land matter. George Rector, another son, testified that he had heard his father say "he had lost his land certificate, and did not know where it was located, and had not received it." This witness testified to his father meeting Reed in 1835, and their agreement that Reed was to locate his father's land, and that in 1838 Reed had visited his father, and had obtained the certificate. To the testimony of George Rector to the declarations of his father that "he had lost his land certificate, and did not know where it was located, and had not received it," and to the like testimony by witness Joseph Rector, and that "he had heard John Rector claim it after 1851," the plaintiffs objected; and to the action of the court in admitting the testimony they excepted, as is shown by the record. The locality of the north and west lines was a subject of much controversy. The defendants Westcott & Westcott asserted title under junior locations placed between the locality claimed by plaintiffs for the Rector north line, and that claimed by the Westcotts as its true situation. The Rector patent calls for a hackberry at its S. W. corner 1,900 varas S., 62 W. from forks of Cow bayou; thence N., 28 W., 5,100 varas to N. W. corner, a mound in prairie; thence N., 62 E., through prairie to its N. E. corner in S. W. line of the Galendo 8-league grant; thence with the Galendo line 5,100 varas to S. E. corner of the Rector corner, which is 3,200 varas from the forks of Cow bayou. Surveyor Erath, who made the Rector location and survey, testified that in July, 1842, on a surveying expedition assisted by ——— Green, also a surveyor, and others, he had made a block of surveys, consisting of the Rector, the Bryan, the Prater, and the McKeen tracts; made, as they at the time thought, west of the Galendo and north of the Zarza grants. The Rector was located west of the Galendo, and bounded on south by Zarza, and a line run from forks of Cow bayou 1,900 varas, an extension, as they thought, of the south line of the Zarza. In making the surveys, Erath stated that, beginning at the forks of Cow bayou, Green ran the 1,900 varas, and reported the connection from the hackberry corner as 1,385 varas from the south-east corner of the Prater survey; that on the next day the Bryan survey, south of the Prater, was run, as was the line east of the Prater and McKeen, which was the west line of the Rector survey, and that the north-west corner of the Rector was made in the east line of the McKeen, near a large cottonwood

standing in a dense thicket and 1,027 varas from the north-east corner of the Prater survey. The north line was not run, only called to the "Galendo line," and thence with the Galendo west line as supposed to be at the time. Erath subsequently pointed out the cottonwood tree for the north-west corner, and its locality has been well known. The Miller survey made in 1849, was run north of the Rector survey, taking the cottonwood for its north-west corner, and its locality has been well known. The Miller survey, made in 1849, was run north of the Rector survey, taking the cottonwood for its north-west corner. The east line of the Prater and McKeen surveys are well known. The Rector survey was recognized and fixed on west and north by these surveys and by the cottonwood tree. Reed, in 1858, conveyed 320 acres to his daughter by these boundaries, and the Reed cattle ranch was upon that part of the land. In 1870 to 1874, upon careful surveys, taking the Erath beginning corner, Surveyor Turner ran from Cow bayou 1,900 varas, as called in the Rector patent; found a marked hackberry for south-west corner; then ran the course as called in Rector patent, missing the Prater and McKeen line 400 varas, and at 5,100 varas fell short of the Miller south line by 1,775 varas. In the alleged vacancy between the Rector and the Miller survey is the land claimed by defendants Westcott & Westcott.

From the testimony it is evident that the general verdict for the defendants was upon the question of the deed from Rector to Michael Reed. The only testimony contradicting plaintiffs' case as to the existence of the deed was that given by the witnesses Joseph and George Rector to their father's statements asserting title, inconsistent with his sale to Reed, save only Joseph Rector's testimony that his father never came out west at the time of the alleged making of the deed. These declarations were introduced by the parties in estate of John Rector, and are hearsay. In 2 Whart. Ev. § 1101, the rule is given: "A party's self-serving declarations cannot be put in evidence in his own favor, whether he be living or dead, at the trial. Nor is the result changed by the statutes enabling a party to be called in his own behalf. That which he could prove by his own statements he is not permitted to prove by statements which are unsworn. In any view the extrajudicial self-serving declarations of a party are inadmissible for him, with exceptions hereafter stated, to prove his case." The exceptions given are where they are *res gestæ*, or show or explain the character of the principal fact under investigation; as where one does any act material to be understood, his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention, and are therefore admitted in evidence like any other material facts. 1 Greenl. Ev. § 108. So, also, declarations of a deceased party in possession of land as to the nature of his possession, and the boundaries affected by such possession. *Hurt v. Evans*, 49 Tex. 316; *Stroud v. Springfield*, 28 Tex. 665. We are not advised of any case or authority extending the rule or excepting from its operation declarations in the interest of the party making them, when not part of an act under investigation as *res gestæ*; or when explanatory of some act, as of possession or of boundaries affected by possession. This testimony was to a vital part of the case. It should have been excluded, and its admission was error. The court charged the jury correctly upon the law as to boundary lines, and submitted as a last resort upon their inability to ascertain the boundaries of the Rector league from the testimony otherwise that it, the survey, be constructed by courses and distances as called in the patent upon the basis of the hackberry, called for south-west corner, and the 1,900 varas line to forks of Cow creek. It seems that that part of the west line, in common with the east line of the Prater and McKeen surveys, should not have been ignored as an object to be considered. This part of the boundary of the survey was known in the testimony. The jury were told, upon their ascertaining the north line of the league survey, if they found that the lands

claimed by the Westcotts were outside of the Rector league, to find for the Westcotts. It might have simplified the case as to the other defendants to have submitted to the jury that the only issue was whether Rector had conveyed to Reed. There was no dispute between the plaintiffs and the other defendants as to the boundaries. Touching the locative interest, it seems that no attention was given to it during the trial, and it was first noticed in the motion for a new trial. The greater part of the testimony adduced and relied upon to establish this interest was admissible as circumstantial evidence to establish the deed from Rector to Reed. Certainly it would have been better practice for plaintiffs to have alleged the facts relied on as fixing the locative interest in Reed, with prayer for alternative relief. It does not appear that the judge below was in fault in not submitting this matter to the jury when it was not asked by the plaintiffs, nor claimed in the pleadings. The additional charges as to basis for constructing the survey from the additional known objects, as well as to the locative interest, should have been asked by the plaintiffs. For the error in the admission in evidence of the declarations of John Rector in the interest of the title of the defendants, the judgment below is reversed, and the cause is remanded.

FORE *et al.* v. HITTSON *et al.*

(Supreme Court of Texas. April 27, 1888.)

1. PARTNERSHIP—SIGNING FIRM NAME AS SURETY—PRESUMPTION.

Where a firm name is used as surety for a third person, the presumptions is that such use of the firm name is outside of the firm business, and the burden of proving assent, estoppel, or ratification is upon the person asserting the liability of the partners who have not signed.

2. SAME—ACTION AGAINST, AS SURETY—INSTRUCTIONS—AUTHORITY TO SIGN FIRM NAME.

Where, in an action to enforce the liability of members of a firm on a contract of suretyship, signed by one of the members, and relating to a matter outside of the firm business, there is no evidence tending to show that the defendants ever authorized the signature, or ratified the act in any way, repeated instructions as to the doctrine of estoppel, though correct as abstract propositions of law, are uncalled for, and will be treated as having misled the jury.

Appeal from district court, Tarrant county.

Hunter & Stewart, for appellants. *Wynne & Carter*, for appellees.

WALKER, J. It appears that, early in 1883, Fore, Morphy & Henderson were partners in a contract to deliver cattle to the Stone Cattle & Pasture Company. The cattle purchased for the contract were thrown back upon them, and were sold to the Texas Investment Company in July, 1883. From that time until the date of the bond sued on, May 27, 1884, the parties had transactions together in winding up their old matters. They had debts to settle, and had paper of the Texas Investment Company to use to meet and settle their debts. July, 1884, an organization of the Texas Investment Company, Limited, was made, which assumed the indebtedness of the original company, including a large debt to Fore, Morphy & Henderson on account of the purchase of cattle the year before. In the new company, Fore, Morphy & Henderson took \$20,000 in stock, paid for in their note for \$5,000, signed in the firm name by Morphy, by consent of Fore and Henderson, and by \$15,000 in paper of the company surrendered by said Fore, Morphy & Henderson. In handling the paper of the Texas Investment Company and of the Texas Investment Company, Limited, which Fore, Morphy & Henderson held and used in settling up their debts made in their cattle enterprise of the previous year, the firm name was signed, as it became necessary, by both Morphy and Henderson. It seems that in May, 1884, Morphy used the firm name, Fore, Morphy & Henderson, by signing it as surety to a cattle contract, made by the Texas Investment Company, Limited, with the Independence Cattle Com-

pany of Kansas City, for delivery of 8,000 head of cattle. Of this, Fore and Henderson knew nothing until several months after it was done. Morphy was president of the Texas Investment Company and of its successor. Reed, of Reed & Hittson, was vice-president of the company. May 27, 1884, Morphy, president of the company, made the contract and bond sued on, for the delivery of 1,500 head of cattle to Reed & Hittson, and to the bond made Morphy signed, as security, the firm name, "Fore, Morphy & Henderson." Morphy made no declarations to Reed, who acted in the business for Reed & Hittson, as to having the authority to sign the name of the partnership. It appeared that the partnership had been formed only to fill the contract for cattle with the Stone Cattle & Pasture Company, and its continuance was only in settling up the debts of the concern made in obtaining funds and debts made in that enterprise. Morphy advised and succeeded in making the firm take \$20,000 of stock in the new company; paying for it as before stated. Under this joint holding of this stock it seems that Morphy concluded that he had the right to use, at pleasure, in any way, the names of Fore and Henderson. August 5, 1884, Hittson & Reed brought suit against the Texas Investment Company, Limited, as principal, and against J. P. Smith and Fore, Morphy & Henderson as sureties, upon their bond, to recover money alleged to have been paid by plaintiffs on the contract made with said investment company for the delivery of certain cattle described, and which it was alleged the investment company had failed to deliver. The petition set out details about which there is no question. The defendants Fore and Henderson separated; pleaded *non est factum*; that there was no such partnership as Fore, Morphy & Henderson,—the pleadings being verified by oath of each. In replication, plaintiffs alleged that the defendants Fore and Henderson, by their course of dealing, had misled plaintiffs as to Morphy's authority to act; that the defendants had ratified the act of Morphy; and that the reorganization of the company (limited) was made for the purpose of providing funds and means to pay the debts of the old company; and that the taking of stock by Fore, Morphy & Henderson was in an effort to secure their debts on the company,—setting out details, and charging that Morphy had special authority to make such contracts, and had done so with the knowledge and ratification of the other defendants, Fore and Henderson. There was much testimony adduced; Morphy, Smith, Henderson, Fore, plaintiff Reed, and others having been examined. Both Fore and Henderson testified that they never knew, before suit was brought, that Morphy was using their names as sureties upon the contract sued on, or any other. Each denied Morphy's authority in signing the bond in suit. The court instructed the jury "that a partnership can only exist, as between the parties themselves, in pursuance of an agreement to which the minds of all have assented; but that, when created, each partner has full power and authority to bind all the partners by his acts and contracts in relation to the business of the partnership, and as between the firm and third parties dealing with them in good faith, whether his copartners or not, provided the act is done within the scope of partnership business and professedly for the firm; but the relation of the partnership confers no authority on one party to bind the others except as to transactions within the scope of the partnership business. And if you believe that said Fore, Morphy & Henderson were partners, yet, if you believe that the partnership existing between them was entered into for the sole purpose of buying and selling cattle, then such partnership relation could not authorize either party to sign the firm name as sureties on the bond of a third party; and if you find that the bond sued on was signed by Morphy without the consent of said Fore and Henderson, and without authority from them, then you should find in favor of said Fore and Henderson, unless you should further find that said Fore and Henderson, after being informed that the bond was so signed by Morphy, consented to the same." (2) "You are further instructed that a partnership, as such, may

engage in a transaction outside of its regular business, if all the partners agree thereto; and, if they do so engage in other transactions, the acts of one partner, done in respect to such transaction, will bind the firm; and, if you believe from the evidence that said Fore, Morphy & Henderson were partners, and that the purpose of the partnership was to buy and sell cattle, yet, if you believe from the evidence that said Fore and Henderson authorized said Morphy to sign the firm name to this bond sued on, then each of them so agreeing to the signing of the same would be bound by the acts of said Morphy." (3) "You are further instructed that if you believe from the evidence that, prior and up to the time of the execution of the bond sued on, the said Fore and Henderson had voluntarily and knowingly held said Morphy out to the world as authorized to sign contracts similar to the one in question, and had knowingly so conducted themselves as to reasonably justify the public generally, and those dealing with them, in believing that said Morphy was authorized to sign their firm name to such contracts, and that the plaintiffs accepted said bond, believing that said Morphy had authority to sign the same, then said defendants would be bound by the acts of said Morphy." (4) "To entitle the plaintiffs to recover as against either Fore or Henderson, you must believe from the evidence that they authorized said Morphy to sign their firm name to said bond, or that they knowingly and voluntarily held the said Morphy out to the world as authorized by them to sign said contract, or that after being informed of said Morphy's act of signing the same that they assented thereto. Unless you so believe from the evidence, you should find for said Fore and Henderson." (5) "If you believe that either said Fore or Henderson authorized said Morphy to sign said bond, or that either of them so held said Morphy out to the public as being authorized to make such contracts, or that either of them, after being informed of the fact of their firm name being signed to the bond, assented thereto, and that the other did not so act, then the one so acting, if either did, would be liable on said bond; and in that event you should find for the plaintiff as against the one so authorizing or ratifying the act of said Morphy, and not as to the other." Upon a verdict, judgment was rendered against the investment company for the amount sued for, and against J. P. Smith and Fore, Morphy & Henderson, sureties, for the amount of the bond. The defendants Fore and Henderson appeal. The question raised is their liability upon the bond.

The third, fourth, and fifth paragraphs of the charge are complained of in first assignment of error, because such charge was error in absence of testimony to acts or declarations on part of these defendants operating as an estoppel. The repetition gave it undue prominence, and was calculated to unduly influence the jury. It was, in effect, a charge upon the weight of evidence, in assuming that there was evidence on the subject, and calling attention of the jury to it. Of the charge as a whole we find nothing subject to special criticism had it been applicable to the testimony. Its repeated suggestion of Fore and Henderson holding Morphy out to the public as their partner, and authorized to sign such contracts, probably had "the effect to give to the principles thus enunciated undue prominence and importance in the minds of the jury, and thus mislead them in the application of the law to the evidence." *Powell v. Messer*, 18 Tex. 406. The two instances shown, (the bond in suit and one other,) in which Morphy is shown to have used the firm name as security for third persons, both unknown to his partners, was not a course of business from which any authority could reasonably have been inferred against the partners.

The third and fourth assignments of error call in question the sufficiency of the testimony. Upon a study of the record, we find in it no testimony at all to authority by Fore and Henderson to Morphy to sign their names as sureties to the bond, or to use, as basis of credit for the investment company, the firm name "Fore, Morphy & Henderson." The bond was not made in the

business of the firm, or in settling up its old business. No acts are shown of Henderson and Fore, or either of them, in ratification of Morphy's attempt to bind them. They never knew of it until after suit, and could not ratify it without knowledge of it. No act or course of business on their part appears in the record from which an estoppel can be inferred; and there is no want of knowledge of the want of authority on part of Morphy by the obligees, Reed & Hittson. It is a well-recognized rule that where one member of a firm uses the name outside of the business of the firm, and it is so shown, that it then devolves upon the holder of such obligation to show authority for such use, which may be by direct or circumstantial evidence, or a subsequent ratification will supply authority. *Goode v. McCartney*, 10 Tex. 195; *Powell v. Messer*, 18 Tex. 407; *Young v. Read*, 25 Tex. Supp. 117; *Insurance Co. v. Bennett*, 5 Conn. 574, 13 Amer. Dec. 109; *Andrews v. Bank*, 7 Smedes & M. 192, 45 Amer. Dec. 301; *Sweetser v. French*, 2 Cush. 209, 48 Amer. Dec. 666. It also appears well settled that, where a firm name is used as surety for a third person, the presumption is that such use of the firm name is outside of the firm business and that in such case the burden of proving assent, estoppel, or ratification, lies upon the person asserting the liability of the parties not acting in the signing as security.

We do not believe that justice was reached on the trial. The charge of the court was not applicable to the testimony, and so was misleading. The testimony did not support the verdict. A new trial should have been granted. For the refusal to grant a new trial the judgment below is reversed, and cause remanded.

STUART *et al.* v. ANDERSON *et al.*

(*Supreme Court of Texas. May 1, 1888.*)

COURTS—JURISDICTION—AMENDMENT OF PLEADING AFTER CITATION BY PUBLICATION—VALIDITY OF JUDGMENT.

A. brought an action against B., a non-resident, attached his property, and caused citation to be published, all of which was by statute made requisite to a valid judgment against a non-resident. B. made no appearance, and, after the publication of the citation, A. filed an amended petition, setting up an entirely new cause of action, on which judgment by default was rendered without any further citation being published or service had on B. Held, that the court acquired no jurisdiction, and the judgment was void, and subject to collateral attack.

Appeal from district court, Falls county.

Trespass to try title, brought by J. M. Stuart, L. W. Goodrich, and B. B. Clarkson against P. H. and J. M. Anderson, D. C. Homan, and J. A. Jones. D. F. Wisnell intervened as party defendant. Judgment for defendants, and plaintiffs appeal.

Goodrich & Clarkson, for appellants.

STAYTON, C. J. This is an action of trespass to try title, instituted by appellants. James Humphries is common source of title, and through him the appellants claim by direct conveyances. The appellees claim through a judgment against Humphries, upon the validity of which depends their title. On January 28, 1867, Joseph Harrell brought an action against James Humphries, in the district court for Travis county, on a note for \$160. The petition alleged that Humphries was not a resident of this state, but that he had property in the county of Falls, and also an unlocated balance of a land certificate described, which was alleged to be then on file in the general land-office. The petition prayed that attachment issue to Falls county, to be levied on property there situated, and that another issue to Travis county, to be levied on the balance of the unlocated certificate then on file in the general land-office, and for citation by publication. The necessary steps were taken to authorize the writs for publication and attachment to issue, and they were issued. That issued to Travis county has on it the following return: "Re-

ceived same day issued, (January 29, 1867,) and executed same day by attaching the within-named unlocated balance of land certificate No. 186. GEO. B. ZIMPELMAN, Sheriff." The land in controversy was patented under so much of that certificate as is claimed to have been unlocated at the time the attachment was levied; but there is a controversy whether that part of the certificate had not been applied to the land in controversy at the time the attachment was levied. How the levy was made, is not further shown than appears by the return of the sheriff. The attachment issued to Falls county was levied on other land in part located by virtue of the same land certificate. Writ for citation by publication issued on the day the petition was filed, and the only return indorsed on it is as follows: "Came to hand same day issued, and ordered the foregoing citation to be published in the Southern Intelligencer for four successive weeks prior to return-day hereof. January 28, 1867. G. B. ZIMPELMAN, Sheriff T. C." Accompanying the citation and return, however, was a copy of the citation as published in the paper named in the return, and the printer's receipt, of date January 31, 1867, for \$18.75, printer's fee for publication. On April 15, 1869, another petition, styled "An Amended Petition," was filed, in which plaintiff set up a new cause of action based on a note for \$400, of which Harrell alleged he was the owner. This petition sought a recovery on the note set up in it, and contained no prayer for citation, nor averment of any fact that would have authorized citation by publication, but it contained a prayer as follows: "Petitioner prays that on the trial of this cause he be given a judgment for the full amount of said note, principal and interest, up to the date of the rendition of said judgment. Petitioner further prays that he be allowed all the means and the benefit of all the writs which is prayed for in said original petition, and that one judgment embrace the amounts due on both notes." On the same day the amended petition was filed a judgment was rendered in favor of Harrell for the entire sum then due on both notes, which directed the attached property to be sold in its satisfaction. The recital in the judgment as to service of citation, and as to the non-appearance of Humphries, was as follows: "Now comes the plaintiff in the above-styled cause, by his attorney, and announced ready for trial, and the defendant, although he was duly called, came not; and it appearing to the satisfaction of the court that the said defendant, James Humphries, has been duly cited by publication in the manner prescribed by law," etc. The judgment further stated that it appeared to the satisfaction of the court that the attachments before referred to had been legally levied upon lands which the judgment described, and upon the unlocated balance of the land certificate, which it described generally, without giving the extent to which it was unlocated, and declared that it was then on file in the general land-office of the state of Texas. The appellees claim under the judgment thus rendered. The court's conclusion of law, from the facts above stated, as to the jurisdiction of the district court for Travis county to render the judgment against Humphries, was: "That all questions as to the jurisdiction of the district court of Travis county, in the case of *Harrell v. Humphries*, are concluded by the recital of service of citation by publication and levy of said attachment appearing in said judgment, and recited aforesaid; and now it must be and is conclusively presumed that the jurisdiction of said court in said case had attached, and said court had full power and authority to adjudge against said defendant the sum \$1,030.55, and costs, and to subject said property, described in said writs of attachment, returns, and judgments, to its payment." The court below found as a fact that there never was any personal service on Humphries, nor any other service of citation or attachment than as appears from the statement above made. Joseph Harrell was a resident of Texas. The title of the appellees, being the elder, must prevail if the judgment through which they claim be not void.

There has been much difference of opinion in courts, for whose decisions

we have the highest respect, as to whether the same presumptions will be indulged in favor of jurisdiction where reliance is placed on citation by publication and seizure of property as will be where personal service, made within the territory over which the court has jurisdiction, is relied upon. It seems to us that there can be no substantial reason for holding, in the one case, that it must be affirmatively shown that such process as the law declares sufficient was properly executed, while, in the other, this will be presumed if the record does not show to the contrary. Whether the jurisdiction of a court be general or special cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach, and made subject to its exercise. It seems to us illogical to hold, when the averments of the pleadings show that personal service might have been made within the jurisdiction, that this will be presumed to have been done if the record be silent, or do not show to the contrary, when the court has exercised, or assumed to exercise, the power to make a final judgment, but to hold that the same presumption will not be indulged as to proper citation by publication, or as to the seizure of property, when the pleadings show that these things were necessary to be done, and could have been done, before the court assumed the power to render a final judgment. In either case the presumption that the court did not render a final judgment until it was authorized to do so, arises from the fact that to have done otherwise would have been a breach of duty, which is never presumed from the doing of an act that may have been legal. If "it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal decree or judgment is rendered, was, at the time of the alleged seizure, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." *Galpin v. Page*, 18 Wall. 364. If, however, the record shows that the defendant was a resident of the territory of the state within which such a court sits, its process must be served upon him personally, and it ought to be presumed in such a case, nothing appearing in the record to show to the contrary, that personal service was made before the court entered a final decree or judgment. In the case before us, it appears that James Humphries was not a resident of Texas at the time Harrell instituted the original action against him, and it further appears that proper steps were taken to entitle the latter to have citation by publication. The return on the citation, however, does not show that it was executed as the law requires, but the judgment declares that it appeared to the court that he had been cited by publication in the manner prescribed by law. If the district court, after Harrell filed the amendment setting up a new cause of action, had jurisdiction to have rendered a judgment on the cause of action first asserted, or on the cause of action as it stood after the amendment was filed, then the same presumption, that citation by publication was duly made, ought to be indulged in this case that would be indulged in favor of personal service in a case in which the record showed a defective return on citation requiring personal service, but in which the judgment declared that the service was made as required by law. In like event, although the return on the writ of attachment did not show how it was executed, the court having declared that it "was legally and formally levied" on the land certificate described in the judgment, it ought to be held, in any collateral proceeding, that the writ was so executed as to give legal seizure, and it would be unnecessary now to inquire what steps would be necessary in attaching a land certificate situated as was that claimed to have been seized. It is now unnecessary, however, to enter

into the consideration of the question whether the court, after the pleading filed on the day of the trial of the case of *Harrell v. Humphries*, had jurisdiction, changed as was the cause of action by that pleading, to have rendered a judgment on the cause of action set up by Harrell originally; for if it be conceded that it might have done so, and that the presumptions arising from the facts found in the record would be conclusive of the power of the court to render such a judgment, it ought not and could not influence the decision of this case. The proceeding in the case of *Harrell v. Humphries* was essentially one *in rem* in its inception, and the record in that case negatives the existence of any fact which could have authorized a personal judgment against the latter on the cause of action asserted in the original or amended pleadings, or upon both; and it further negatives the existence of facts which would have empowered the court to render any judgment on the cause of action set up in the pleadings filed in that case on the same day the court assumed to render a judgment on that cause of action, as well as that set up in the original petition. There was neither personal service on nor appearance by Humphries; hence no personal judgment could legally have been rendered against him on either cause of action asserted. To have authorized the court to render a judgment subjecting his property to the payment of the debts asserted by Harrell, it was necessary that the procedure required by the laws of this state should have been had. The law in force at the time the judgment in favor of Harrell was rendered, authorized an attachment when a defendant was a non-resident of the state; but before this could be obtained it was necessary that a plaintiff should file his petition, and therein state a cause of action which entitled him to such process; to make an affidavit that the defendant was justly indebted to him the amount of the demand; and to execute a bond in at least double the amount sworn to be due. The law further provided "that no judgment shall be rendered in suits by attachment unless the citation or summons has been served in the ordinary mode, or by publication in the manner prescribed by law." Pasch. Dig. art. 156. It was necessary that an attachment should have been levied on property within this state, and that the notice required by law to be given by publication should have been given, before the court could acquire jurisdiction to enter a judgment against Humphries, directing property seized to be sold for the payment of the debt due to Harrell; Humphries being a non-resident, and not appearing. This we deem the settled law of the land; and, so far as we know, no case, in this state decided, asserts a different rule, though there are expressions in the case of *Wilson v. Zeigler*, 44 Tex. 657, which would lead to a different rule. These expressions, however, were not called for by the facts of the case. In that case, notice was given to the non-resident defendant by publication; he owned property in the state; offered and made defense; and the question was whether, under these facts, the court had jurisdiction to render judgment against the non-resident defendant without the seizure of property or further citation. The district court held not, and the judgment was reversed by this court. There could be no doubt of the correctness of the decision made; for the facts presented a case in which a resident plaintiff brought an action to recover a sum of money due him by a non-resident defendant owning property here, who appeared and made defense without personal citation or seizure of property. The law of this state, providing that notice by publication shall be given, contemplates that this shall be given of the cause of action on which the judgment is to be rendered; and not that, when notice is thus given that a plaintiff asserts one cause of action, a judgment may be rendered on another, of which no notice is given. The laws of this state do not deem the seizure of property under a writ of attachment notice, for it requires personal service or notice by publication. It is doubtless competent for the legislature, when personal service cannot be made within the state on a defendant, to declare what shall constitute notice to a non-resident debtor having

property within the limits of the state sought to be subjected by a creditor to the payment of his debt. When, however, the manner in which notice shall be given in such cases is thus prescribed, and the legislature has declared "that no judgment shall be rendered in suits by attachment, unless the citation or summons has been served in the ordinary mode, or by publication in the manner prescribed for by law," we cannot hold that the giving of notice is not necessary to clothe a court with power to hear and determine the pending cause, if there be no appearance; and without this no court has the power to render a decree or judgment whereby a debtor's property may be sold, and the proceeds applied to the creditor's demand, even though the property may be in the custody of the law under a seizure made through a valid writ of attachment.

There are cases holding to the contrary, and a distinguished elementary writer, citing such cases, says: "When, therefore, notice to the defendant is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause." Drake, *Attachm.* § 487. This is the substance of the language used in some of the decisions holding that notice is not essential to the jurisdiction of a court in attachment cases, and that, while judgments rendered in such cases without such notice are voidable, they are not void. The word "jurisdiction," when used in an inquiry whether a judgment a court has assumed the power to render is void or voidable, can have but one meaning, and means lawful power to hear and determine the matter in controversy. If, having this power, the court renders an erroneous judgment, it may be avoided by such proceeding as the law provides, but until avoided it is binding on the parties to the action. If the court have not such power, any judgment it may assume to render is necessarily void, and binds no person or thing. Courts have no power other than such as are conferred upon them by law; and the proposition that an exercise of power which the law forbids in the absence of facts made necessary by the law to the exercise and very existence of jurisdiction is only voidable, can have basis on no other theory than that the courts have an inherent power to hear and determine when the law denies or withholds it. The great difficulty in determining whether a judgment be void or only voidable must frequently arise from the presumptions indulged from the fact that a court of general jurisdiction has assumed to exercise the power to hear and determine, whereby inquiry is cut off, except as facts on which to make it are found in the record. If, however, from the record, it appears that a fact necessary to confer on the court power to hear and determine a given cause did not exist, it is universally held that its judgment is void. Every fact which the law declares shall exist before a court can lawfully hear and determine a cause is necessarily a jurisdictional fact,—an element of jurisdiction in the particular case. A denial of the power to render a judgment is necessarily a denial of the power to hear and determine. The exercise or assumption of a power when a fact necessary to its existence is wanting, is usurpation. In an attachment suit the debtor's property is seized, and thus brought into the custody of the law; but, if the debtor be within the reach of the ordinary process of the court, the law declares that he shall be brought into court by service of such process, before a judgment can be rendered against him, or to subject his property to sale, and its proceeds to the payment of his debt. If the record in such a case showed that there was neither service on such a defendant, nor appearance by him, it would not be claimed that the judgment was not void, even though it did nothing more than to subject the attached property to its payment. In such a case it would be admitted that an element of jurisdiction prescribed by a positive law was wanting. What shall be an element of jurisdiction, except as this may be controlled by constitutional safeguards, is to be determined by the legislature. The same law which makes personal service an element of jurisdiction in attachment.

suits, as in all others, when this can be had, and thereby, in effect, denies the sufficiency of the mere seizure and custody of the debtor's property to confer on a court the power to hear and determine a cause, declares, if such service cannot be had, that notice shall be given by publication before the court can hear and determine the cause. The latter is as clearly an element of jurisdiction as is the former.

The cause of action on which the judgment in favor of *Harrell v. Humphries* was rendered, was one essentially different from that asserted when the writ of attachment was levied and when publication was made; and several cases have arisen in which the necessity for further notice of the new cause of action has been considered. In the case of *McRee v. Brown*, 45 Tex. 507, notice was given by publication, and, after this, a new cause of action was set up, on which judgment by default was rendered without further notice. In disposing of the case, it was said: "This is evidently a different cause of action from that set up in the original petition, and, under such circumstances, a judgment by default cannot be taken against the defendant, who has made no appearance, merely by reason of the service of the original petition. *Morrison v. Walker*, 22 Tex. 20; *Erskine v. Wilson*, 27 Tex. 118." In *Morrison v. Walker* it appeared that, after personal service was made on the defendants, a new cause of action was set up by amendment, of which no notice was given by further citation; and, in disposing of the case, it was said: "No decision of this court has gone to the extent of permitting a judgment by default upon a moneyed demand, set up for the first time by an amendment of which the party to be charged had no notice. * * * But, in all cases where a demand for money upon a cause of action other than that set forth in the original petition is made by an amendment, we are of opinion that there must be service of the amendment, or the record must disclose the fact that the party to be affected by the amendment was actually in court, in person or by attorney, and might have had notice of such amendment." The same ruling was made in the following cases: *Weatherford v. Van Alstyne*, 22 Tex. 22; *De Walt v. Snow*, 25 Tex. 821; *Furlow v. Miller*, 30 Tex. 29; *McNeil v. Childress*, 34 Tex. 871; *King v. Goodson*, 42 Tex. 153; *Pendleton v. Colville*, 49 Tex. 526; *Hutchinson v. Owen*, 20 Tex. 287; *Hewitt v. Thomas*, 46 Tex. 234; *Rabb v. Rogers*, 67 Tex. 889, 8 S. W. Rep. 303. In the case of *Rowley v. Berrian*, 12 Ill. 199, it appeared that an action was brought, against a non-resident, to recover a named sum alleged to be due on a note; that a writ of attachment was prayed for, issued, and levied upon land; and that notice was given by publication, which, as is required by the laws of this state, set forth the cause of action. A larger claim was subsequently set up, without any further notice to the defendant, who did not appear; and on this, as well as the claim originally asserted, a judgment was rendered in favor of the plaintiff. In disposing of the case, the court said: "The law requires the plaintiff to file an affidavit setting forth particularly the nature and amount of the indebtedness, and the advertisement to the defendant must apprise him of the amount claimed by the plaintiff. The writ of attachment commands the sheriff to attach so much of the estate of the defendant as will be sufficient to satisfy the claim sworn to, with interest and costs of suit. The judgment can only be satisfied out of the property levied on. It is not, for any other purpose, even *prima facie* evidence of indebtedness. It is evidently the design of the statute that the plaintiff shall be restricted to the particular demand set out in his affidavit. The court, may upon satisfactory proof, enter a judgment for the plaintiff for the amount claimed in the affidavit, and accruing interest, and subject the estate attached to the satisfaction thereof, and the costs of the proceeding. Beyond this the court has no authority to adjudicate upon the rights of the parties. It only has jurisdiction * * * for the purpose of subjecting the property attached to the payment of the particular cause of action specified in the affidavit. This precise question arose in

the case of *Henrie v. Sweasey*, 5 Blackf. 278." The cases above cited were on appeal, but in several of them the failure of citation after amendment was held to be error fundamental in character; and there is good reason for holding that the same ruling should be made when the question arises collaterally, if the only notice was by publication made prior to an amendment setting up a new and independent cause of action. The court not having jurisdiction over the person of Humphries, no judgment, even before the amendment was made, could have been rendered other than one essentially *in rem*. *Pennoyer v. Neff*, 95 U.S. 714. To authorize that, under the statutes of this state, notice by publication, there being no appearance, and the seizure of property in such manner as to bring it within the custody of the law, and enable the court to condemn it to sale, and its proceeds to apply to the debt due Harrell, were necessary. It is very generally held, if an attaching creditor, after setting up one cause of action, and suing out an attachment upon it, so amends his petition as to set up a new and independent cause of action, and thereon takes one judgment, that this dissolves the attachment, at least as to subsequent attaching creditors, purchasers, and bail. *Willis v. Crooker*, 1 Pick. 204; *Fairfield v. Baldwin*, 12 Pick. 388; *Laughton v. Lord*, 9 Fost. (N. H.) 256; *Page v. Jewett*, 46 N. H. 441; *Tilton v. Cofield*, 2 Colo. 392. The last case cited was one in which the amendment made was held by the supreme court of the United States, on appeal, not to set up a new cause of action, and that the subsequent purchaser took subject to the attachment suit; but we do not understand that court to question the correctness of the rule stated in the cases above cited. If that rule be a correct one in cases in which seizure is not an element of jurisdiction, it may have an important bearing in cases in which seizure is an essential element. If a defendant be not brought before the court by process which gives jurisdiction over his person, and do not voluntarily appear, no judgment can be rendered that will bind him personally in an ordinary action for debt, on the mere fact that he has property within the reach of the process of the court. While seizure may lead to notice that a demand is made, this is not the essential purpose that makes it necessary in attachment and like cases. That purpose is to confer upon the court the power to render a judgment whereby the thing seized may be subjected to the payment of the demand asserted, which cannot be done in an action not personal, unless the person asserting a demand for money has in some way obtained the right to have the thing seized subjected to the payment of the sum due him. In attachment cases this right is acquired through the lien given by the levy of a writ of attachment; and, if the lien be lost by the dissolution of the attachment, the power of the court to render a judgment is lost, unless the court has acquired jurisdiction over the person of the defendant. It is unnecessary for us to determine whether the attachment sued out by Harrell was dissolved. The cause of action on which the judgment was rendered in his favor was the cause of action stated in the pleadings on file the day the judgment was rendered; and, to answer that, no notice by publication was given to Humphries, and he did not appear. No attachment was levied to secure and enforce the payment of the claims thus made a cause of action. The judgment rendered is an entirety, and was rendered when the court had no power to render it. If a valid judgment might have been rendered on a part of the cause of action set up, it was not done, nor was the court asked or permitted to do so. We think the judgment null. *McMinn v. Whelan*, 27 Cal. 313; *Janney v. Spedden*, 38 Mo. 401; *Boswell v. Dickerson*, 4 McLean, 262.

The intervenor, Wisnell, claims the Seates survey, which he alleges embraces part of the land described in the plaintiff's petition. This claim is founded on the fact that the patent under which he claims calls for the line of the Houston survey, which is shown to have been an old and abandoned survey, whose lines have not been identified, which, however, is shown to have covered substantially the same ground now covered by the Long survey.

The surveyor who made the survey under which the patent to the Seates survey issued, testified in the cause, and his evidence shows clearly the true location, and that the Houston survey was called for in the field-notes, but never found on the ground. It was at one time thought that from the north-west corner of the Seates to the north-east corner of the Houston (now Long) survey that it was only 2,000 varas. The northern line of the one is on the prolongation of the other. By measurement, however, the real distance between these points was found to be 3,040 varas. The call for the west line of the Houston, a line never found, cannot extend the Seates survey to the point where the Houston west line would be placed by course and distance for its beginning corner, whose true position is not controverted; and especially so when it is shown by the surveyor who surveyed the Seates, when the lines were by him actually fixed on the ground. As thus placed, the intervenor receives all the land called for in the patent under which he claims; while to extend his eastern line to the western line of the Long would give more than twice the area called for in the patent, or that could have been appropriated by virtue of the Seates certificate.

The judgment of the district court, being erroneous, will be reversed; and as the cause was tried without a jury, and all the facts necessary for its final disposition are found in the record, it will be here rendered in favor of the appellants as against Wisnell as well as the other defendants. It is so ordered.

BASTROP COUNTY v. HEARN.

(Supreme Court of Texas. May 1, 1888.)

1. COUNTIES—DUTY OF TREASURER TO RECEIVE MONEY—POWER OF COMMISSIONERS TO AUTHORIZE COUNTY JUDGE TO RECEIVE SPECIAL FUND.

Under Rev. St. Tex. art. 994, providing that the county treasurer shall receive all moneys belonging to the county, from whatever source derived, and apply the same in such manner as the commissioners' court may direct, the commissioners' court cannot authorize the county judge to receive and disburse funds, though raised by the county for a special purpose.

2. SAME—DUTY OF TREASURER TO RECEIVE MONEY—RIGHT TO COMMISSIONS—RECEIPT OF MONEY BY ANOTHER OFFICER.

Where certain funds which the law required to pass through the hands of the county treasurer, and for the receiving and disbursing of which he was entitled to a commission, are received and disbursed by another officer, the treasurer is entitled to recover from the county the commissions to which he would have been entitled had he handled the funds according to law.

3. SAME—RIGHT OF TREASURER TO COMMISSIONS FOR MONEY RECEIVED AND DISBURSED—FAILURE OF COMMISSIONERS TO FIX RATE OF COMPENSATION—PRESUMPTION.

Under Rev. St. Tex. art. 2408, providing that the county treasurer shall be entitled to commissions not exceeding a certain percentage, to be fixed by the commissioners' court, for receiving and disbursing all moneys belonging to the county, (excepting school funds,) a failure by the commissioners' court to make an order regulating the allowance in a particular case raises an implied agreement on the part of the county that the treasurer shall have the maximum percentage allowed by law.

4. SAME.

Where the commissioners' court is authorized by law to fix the allowance of the county treasurer, within certain prescribed limits, and such court had for a long time invariably allowed the same percentage, a failure to make an order regulating the allowance in a particular case would raise an agreement by implication on the part of the county to continue to pay the same amount until it should notify the treasurer to the contrary.

Commissioners' decision. Appeal from district court, Bastrop county.

Fowler & Maynard, for appellant. *G. W. Jones* and *J. D. Sayers*, for appellee.

MALTBIE, J. In the year 1873, Bastrop county, by virtue of an act of the legislature approved the 11th day of February, 1881, issued bonds to the amount of \$30,000, for the purpose of building a court-house. The bonds were sold at par soon after their issuance, and the proceeds were disbursed

by the county judge of that county, under an order of the commissioners' court, during the years 1883 and 1884. At the time of the reception and disbursement of this fund, the appellee, John Hearn, was the duly elected, qualified and acting county treasurer of Bastrop county, and was at all times willing and ready to receive said fund, and pay it out according to law; but, it having been received and disbursed by the county judge, the commissioners' court refused to allow appellee commissions on the same. The district court, however, rendered judgment in his favor for $2\frac{1}{2}$ per cent. for receiving, and $2\frac{1}{2}$ for paying out, the amount received from the sale of the bonds. Appellant seeks to reverse this judgment—*First*, because the \$30,000, being a special fund, was lawfully disbursed without having passed through appellee's hands; *second*, the commissioner's court not having fixed any compensation for the services of the county treasurer of Bastrop county for receiving and paying out county funds, he is not entitled to recover a judgment for services that he should have rendered in this instance.

It is provided that it shall be the duty of the county treasurer to receive all moneys belonging to the county, from whatever source they may be derived, and to pay and to apply the same, as required by law, in such manner as the commissioners' court of his county may direct. Rev. St. art. 994. The statute makes no distinction between general and special funds, but explicitly requires that all moneys belonging to a county shall be received and paid out by the county treasurer under the direction of the commissioners' court. Clearly, the power to direct the county treasurer to pay out money would not authorize a diversion of it from its lawful depository, and confer a right to direct some other party to pay it out; and we conclude that the action of the commissioners' court of Bastrop county in causing the county judge to receive and pay out the fund in question was without authority of law. It was held in the case of *Beard v. City of Decatur*, 64 Tex. 7, that the municipal authorities of a city having a qualified treasurer cannot place its money in the hands of its mayor, to be by him disbursed, and thereby defeat the rights of the treasurer to commission on money that should have been delivered to such treasurer, and by him have been disbursed; and that, when moneys of the city are disbursed by another agency, a right of action exists in favor of the treasurer for the amount of the commission he would have received had he disbursed it. This decision was made in a case involving the rights of the treasurer of the city of Decatur, who was acting under article 365 of the Revised Statutes, which is not materially different from the provisions of the law governing the rights and duties of county treasurer; and no reason is perceived why the same doctrine should not apply in their favor. There is no principle better established than that an office is property, to the emoluments of which the incumbent is entitled during the term for which he may have been elected or appointed.

The constitution (article 16, § 44) provides that the legislature shall prescribe the duties of a county treasurer, and that he shall have such compensation as may be provided by law. The legislature has prescribed that the county treasurer shall receive all moneys belonging to the county, and shall be entitled to commissions, to be fixed by the commissioners' court, as follows: For receiving all moneys belonging to the county, (except the school fund,) not exceeding $2\frac{1}{2}$ per cent.; and not exceeding $2\frac{1}{2}$ per cent for paying out same. Rev. St. art. 2403. From these several provisions of the law it is evident that a county treasurer is the lawful custodian of all moneys that may belong to his county, and he has a property right in such moneys to the extent of his commissions. The legislature has fixed the maximum percentage to which a county treasurer may be entitled, and has imposed the duty on the commissioners' court fixing the compensation. The law prescribes no time when the court shall fix the compensation of the county treasurer for receiving and disbursing the public moneys, nor is there any inhibition to the changing of the

rate of percentage after it has been once fixed; the intention doubtless being to leave the compensation largely in the discretion of the commissioners' court, within the rate named by the legislature, and not to exceed \$2,000 in any one year, trusting that tribunal to do justice between the county and its treasurer. It is not claimed that the commissioners' court of Bastrop county could have deprived appellee of commissions on the fund in question if it had done its duty in making an order fixing his compensation; but the contention is that, by failing to make such order, there is no compensation provided by law for appellee, and for that reason he is not entitled to recover in this suit. If the county can, under the pretext set up by it, defeat a recovery of commissions from this special fund, it could by non-action deprive appellee of any compensation whatever for receiving and disbursing the public funds. Such an unjust result as this was never contemplated by the legislature, and we think no such construction should be given to the act under consideration. As before stated, the compensation of the treasurer is left largely, but not entirely, to the commissioners' court. If the court fails to act, there is still left some *data* from which the legislative will may be discovered. It has declared a maximum allowance for such officers. The commissioners' court of Bastrop county, it is true, could have curtailed it; but, having failed to do so, the alternative is presented whether such failure shall result in depriving an officer, who had no control over the court, of his just rights, or whether the act shall be regarded as directory to the court. We are of the opinion that, inasmuch as this provision of the statute was made in the interest of the counties, the commissioners being agents of the counties, a failure to make an order regulating the treasurer's allowance must be considered as an implied agreement on the part of such county that the treasurer shall have the maximum percentage allowed by law. The commissioners' court of Bastrop county, it is true, had passed no order allowing compensation to its county treasurer for services rendered, but had allowed $2\frac{1}{2}$ per cent. for receiving, and $2\frac{1}{2}$ for paying out, county funds since the year 1870. This state of facts, we think, would raise an agreement by implication on the part of the county to continue to pay the same amount until it notified appellee that it intended to reduce its compensation.

The judgment rendered was in the statutory limit, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

MCGLOIN v. MCGLOIN.

(Supreme Court of Texas. May 8, 1888.)

NEW TRIAL—PETITION FOR—FAILURE TO FILE MOTION DURING TERM—NEGLIGENCE OF COUNSEL.

In a petition for a new trial, where no motion therefor was filed at the term of court at which the adverse judgment was rendered, an allegation that petitioner's counsel and other attorneys whom he asked refused to file such motion, unsupported by an affidavit of neglect of duty by petitioner's counsel, is not a sufficient excuse for the delay.

Appeal from district court, Live Oak county.

Petition by Mathew McGloin against Bridget McGloin for a second trial of property rights. Defendant's exceptions were sustained, and she obtained judgment. Plaintiff excepts, and appeals.

Jas. C. Cade, for appellant. T. H. O'Callahan, for appellee.

WALKER, J. Appellant sued appellee for a new or second trial of property rights between parties. Complaint of appellant is that at September term, 1885, of the district court, a trial was had in a suit by his wife, the appellee, for divorce, and for a decree settling her claim to certain property, in which a judgment was rendered for divorce, and a verdict and judgment in her favor on her claim for the described property; that, prior to the trial, he had employed counsel, and informed his counsel of his defense to her property claim, of the names of his witnesses, of their testimony; that at the trial, and when the examination of plaintiff's witnesses was near the close, he was arrested on a *capias* issued out of the district court upon an indictment, and was by the sheriff taken from the court-house in search of bail for a short time, and on his returning to the court-room the jury were retiring to consider of their verdict; that a verdict for his wife was returned against him; that, learning his witnesses had not been examined, he desired his counsel to file a motion for new trial; the counsel refusing, he asked other attorneys to represent him in an effort to get a new trial, all of whom refused; and "he has not been able, using every effort in his power, to bring the matter before the court until this present term." Suit filed August 10, 1886. Complaint is made against his attorney that he examined no witness on the trial, and had only pleaded general denial. A statement follows, alleging as facts what would show, if proven, that in the decree against him on the property question he had suffered injustice. The defendant excepted to the petition, "for the reason that all the matters and things referred to in the petition were tried and finally determined between said parties in the former suit, and the same are adjudicated, and no sufficient reason is given why such judgment should be now disturbed." The exceptions were sustained. Plaintiff declining to amend, judgment was rendered for defendant, and the plaintiff excepted and appealed. The only question is as to the sufficiency of the petition. This is tested by the inquiries: (1) Does it show meritorious defense? (2) Is it shown that by fraud, accident, or that by act of the adverse party he was prevented from making his defense on the trial? And (3) has sufficient legal excuse been shown for not making the application during the term. *Taylor v. Huck*, 65 Tex. 288; *Overton v. Blum*, 50 Tex. 417; *Plummer v. Power*, 29 Tex. 6; *Vardeman v. Edwards*, 21 Tex. 787; *Burnley v. Rice*, Id. 171; *Caperton v. Wanstow*, 18 Tex. 125; *Spencer v. Kinnard*, 12 Tex. 180; *Cook v. De la Garza*, 13 Tex. 445. The petition is sufficient in showing material facts constituting a defense. The arrest, and detention from the court-room, at the time his presence and his own testimony were needed, may be regarded an accident excusing the failure to present his evidence upon the trial, although represented by his counsel. There are no allegations of fraud or misconduct charged against the plaintiff. It is not charged that she or her witnesses testified untruthfully,

save indirectly as to the grounds of the verdict. *McMurray v. McMurray*, 67 Tex. 670, 4 S. W. Rep. 357. The grounds of excuse for not moving for a new trial within 10 days after the verdict, or bringing his grievances before the court during the term, are not satisfactory. It is not pretended but during the term he knew of all the alleged failings on part of his counsel as to not calling witnesses, and in not preparing his pleadings so as to present his grounds of defense; for he alleges that, upon learning these facts, "he applied to his said attorney to file a motion to secure for him a new trial of the cause, when his attorney refused. Then he applied to other attorneys of the court at the said September term, 1885, all of whom refused." The court was open to the personal appeal of an injured suitor, and upon such application the court would have assigned to him counsel, upon a proper showing, to prepare and present the grounds for relief against the action complained of. Without affidavit to the petition the court would hesitate in allowing the charge of neglect of duty on part of the attorney to overcome the presumption that his official action was proper. The attorney probably should have presented the motion for new trial, and should have done so if the allegations in the petition here are true. If, in his opinion, a motion for a new trial was useless, it was his duty to so advise his client. That the other lawyers present, and presumably advised of the merits of the case, would not undertake for defendant the labor of setting aside the verdict and judgment, is not favorable to plaintiff's case. Lawyers, as a class, while not wanting in courtesy to their fellows, are generally ready to aid an oppressed litigant in securing justice. It is their profession and duty.

The petition does not show diligence on the part of plaintiff in asserting his rights, and the judgment below, sustaining exceptions, was proper. The judgment below is affirmed.

HORST v. HERRING.

(*Supreme Court of Texas. May 8, 1888.*)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—WHEN ACTION IS BARRED—REV. ST. TEX. § 3191.

In an action for the recovery of land, three year's possession by a defendant, who cannot show his possession to be within the limits of the survey under which he claims, is not a bar under Rev. St. Tex. 1879, § 3191, which requires that every suit for the recovery of real estate against a person in peaceable and adverse possession under title or color of title shall be instituted within three years from the accruing of the cause of action.

2. ESTOPPEL—BY ACTS—FAILURE TO OBJECT TO LOCATION OF BOUNDARY.

Where, in an action for the recovery of land, there is no evidence that plaintiff, by act or word, assented to the location of the boundary line claimed and used by the defendant, he is not estopped, unless by the statute of limitations, from asserting his claim.¹

Error to district court, Live Oak county.

Action by C. Herring to recover lands claimed and occupied by J. C. Horst. Judgment for plaintiff as to a portion of the lands, and defendant now brings error. Rev. St. Tex. 1879, § 3191, requires that "every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

J. F. Leisering and *J. C. Cade*, for plaintiff in error.

¹ Respecting the subject of estoppel by conduct, see *Johnson v. Insurance Co.*, (Ky.) 2 S. W. Rep. 154, and note; *City of Chicago v. Cameron*, (Ill.) 11 N. E. Rep. 899; *Kelley v. Fisk*, (Ind.) Id. 453; *Conkey v. Hawthorne*, (Wis.) 33 N. W. Rep. 435; *Hubbard v. Hart*, (Iowa,) Id. 233; *Reid v. Ladue*, (Mich.) 32 N. W. Rep. 916; *Crans' Appeal*, (Pa.) 9 Atl. Rep. 233; *Perry v. Dow*, (Vt.) Id. 12; *Wise v. Williams*, (Cal.) 14 Pac. Rep. 204; *Reichert v. Voss*, (Ga.) 2 S. E. Rep. 558; *Insurance Co. v. Slee*, (Ill.) 12 N. E. Rep. 543; *Brynum v. Preston*, (Tex.) 6 S. W. Rep. 428; *Forney v. Calhoun Co.*, (Ala.) 4 South. Rep. 158; *Stone v. Tyree*, (W. Va.) 5 S. E. Rep. 873.

WALKER, J. The litigation in this suit is to determine the locality of the north line of the Simon Ryan league of land, and, in event of its conflict with the O'Boyle, Killely, and Seale, Morris & Seale tracts, which are junior surveys, the effect of the adverse possession held by Horst under the junior surveys. The Ryan grant, made in 1835, called for the Frio river on the south. The O'Boyle and Killely surveys were made by the same man, O'Docherty, the surveyor of McMullin's colony, and called for the Atascosa river on the north, and bounded on south by Ryan survey. The Seale, Morris & Seale 640 appears to have been located in 1874, and calls for the south-west corner of the Killely survey upon the Ryan north line, and runs west calling for the north line of the Ryan survey. In 1874, Atkins, a deputy surveyor of the county, made a survey for Ussery (Horst's vendor) of the O'Boyle and Killely surveys, and by his survey the north line of the Ryan is placed some 1,750 varas south of where plaintiff in this suit claims it to be. In 1874, Ussery inclosed the land north of the line as run by Atkins, and within the lines of the three junior surveys above named. He sold to Horst in 1881, and the possession has been continuous and adverse from 1874 to the filing of this suit, August 15, 1883. Much testimony was introduced, and some difficulty was encountered in finding the lines called for by O'Docherty, and in satisfactorily identifying the locality of the Ryan north line. To avail himself of the statute of limitation of three years the defendant was bound to show his possession to be within the surveys under which he claimed. No controversy existed as to the locality of the south line of the 640-acres tract. As to the south line of the O'Boyle and Killely surveys, it was dependent upon the Ryan north line called for by the surveyor in running south from the Atascosa in making these surveys. The Ryan survey was made by the same surveyor. If the north line of the Ryan should be found further north than the supposed south line of the surveys, as determined in the Atkins survey, then the connection between the possession of Horst and his vendor and the sovereignty of the soil would be severed, and the plaintiff would be entitled to recover the north line so fixed. The court submitted the issue of limitation in the charge as follows, (after giving the facts making the defense:) Upon so finding, "they should find, on account of limitation, for the defendant all the land he has so possessed, and that is found to be included in and embraced in the field-notes of his respective surveys as expressed in the grants under which he claims; the jury to decide, under the rules given them, how far the defendant's grants call for and in fact embrace the land in defendant's possession, and whether or not the resurvey of the land for the defendant under Ussery takes the same land as in the original grants of title, for the defendant can only claim by limitation to the extent of the boundaries in his title." The verdict was for plaintiff for the Ryan grant as described in the petition, save as to the 640-acre tract, which was given to defendant under his defense of limitation of three years. We cannot determine that this finding, as to the locality of the Ryan lines, was not supported by the testimony. Upon so finding, its effect was to include in the Ryan survey that part of plaintiff's field situated upon the O'Boyle and Killely surveys. The length of time of possession is under 10 years, and there is no payment of taxes shown; so that only the statute of three years could apply. This possession as to the 640-acre survey was under the sovereignty of the soil. As to the other tracts, defendant only had naked possession for about nine years.

Plaintiff in error assigns error in the refusal of the court to charge upon the effect of acquiescence on the part of plaintiff, by words or acts, in the locality of the line, when the fence was built by Ussery, and when defendant bought, as an estoppel; and as to effect of an agreement as to the locality of the line by declarations, or by some positive act calculated to deceive, acted upon by the defendant. An examination of the general charge shows that the same issues are carefully submitted. But the statement of facts is silent as

to any act or word on the part of the plaintiff showing assent, or tendency to show it, on his part. Mere silence or inaction will not destroy a legal title, unless added to it is adverse possession for a sufficient time, and under conditions prescribed by the statutes of limitation to mature such possession into title. *Williams v. Conger*, 49 Tex. 602.

The motion for new trial presented, only in general terms, error in adjudging to plaintiff more land than he was entitled to, the refusing of charges asked, and the verdict as contradictory to the law. We have noticed all the questions properly raised in the record, and find no error. The judgment is affirmed.

KING *et al.* v. HARTER.

(Supreme Court of Texas. May 1, 1888.)

1. HOMESTEAD—ABANDONMENT—CLOSING PLACE OF BUSINESS UNDER ATTACHMENT.

H. owned a house and lot, in which he carried on the saloon business as a means of support for himself and family. Attachments were issued against him, and the personal property and fixtures used in the saloon were levied on. While the saloon was closed under these attachments, other creditors attached the house and lot. *Held*, that the closing of the business by the levy of the former attachments did not work an abandonment of the homestead character of the property.

2. SAME—HOW LOST—CARRYING ON BUSINESS IN THE NAME OF ANOTHER.

Subsequently to the levies, H. resumed the saloon business in the name of another. *Held* that, as the business was exempt, it was immaterial whether the arrangement was fraudulent or not; nor could any estoppel to assert a homestead be based on it.

3. SAME.

H. having died before the house and lot were sold on execution, his widow applied to have it set off to her as her homestead. On trial of the issue, she was asked, on cross-examination, "if she made any objection to the business being carried on in the name of W." *Held*, that as, during the life-time of the husband, he had the right to control and manage the property, it was wholly immaterial, as to the question of her rights, whether she made any objection or not.

4. APPEAL—PRACTICE—ASSIGNMENTS OF ERROR.

An assignment of error that "the court erred in each and every paragraph of his charge, and said charge was not applicable to and warranted by the evidence, nor is said charge authorized by the law when applied to the facts of this case," is too general to be considered.

Commissioners' decision. Appeal from district court, Clay county.

John Harter owned a residence and lots in the town of Henrietta, in which he resided with his family, consisting of his wife and four children. He also owned a business house and lot in Henrietta, in which he carried on the saloon business, which last-named property is the subject-matter of this suit. In October, 1883, Harter was indebted to various persons, and on the 28th of that month his bar-fixtures and billiard tables were levied on by attachment, and the next day all other property in the saloon business was levied on by attachments. He owned no other property, except two milch cows, and household furniture, etc. His license as a retail liquor dealer had expired about a month before the attachments were levied, but he had paid \$400 on new license for a year; leaving \$50 balance due on the license, which had not been issued. On November 2, 1883, Le Gierse & Co. instituted suit in the county court for their claim against Harter, and sued out an attachment, which they caused to be levied on the house and lot in which the saloon business was carried on. About 10 days after the attachments were levied, a saloon business was again opened in the building in the name of A. P. Weaver; the license having been issued to him at Harter's request, the balance of \$50 due on the license being paid. Appellants were creditors of Harter. Le Gierse & Co. brought suit on their claim, and levied a writ of attachment on the saloon building and lot on the 2d of November, 1883, on which they recovered judgment, on the 9th of January, 1884, in the county court, for \$491, and foreclosing the attachment lien. Order of sale was issued on this judgment, but

the property was not sold, because Harter died on January 29, 1884, before the day of sale. King & Davidson recovered judgment against Harter in the justice's court on the 28th of November, 1883, for \$170.70, on which execution was issued, and levied on the saloon building and lot on the same day the Le Gierse order of sale was issued. Both the execution and order of sale were returned without making sale, because of Harter's death. Appellee, S. E. Harter, was the widow and administratrix of Harter's estate, and allowed the claims of both appellants for the amounts named in the respective judgments, but refused to allow or recognize the liens against the house and lot, and appellants instituted suits to enforce their liens acquired by levy of the execution and attachment, which suits were pending at the time of the trial of this case. From about August, 1883, up to the time of his death, Harter was in bad health, unable to give personal attention to his business. He was down town but once after October 28, 1883. The business run by Weaver was Harter's. It was put in Weaver's name to protect the creditors, who let him have the stock of liquors on a credit. This arrangement was made a condition necessary by the parties who furnished the stock of liquors. Harter declared his intention to continue business in the house in Weaver's name, and said he expected to be able to resume in his own name in a short time. It was admitted that the value of the property was \$450. Appellee, S. E. Harter, made application to the probate court to have the residence and saloon property both set apart to her and her children as exempt homestead property, which was contested by appellants. The contest resulted in the probate court entering judgment sustaining the application, from which appellants appealed to the district court, where the case was tried by jury, May 19, 1885, and verdict and judgment returned and entered sustaining appellee's claim to the property as homestead.

Chestnut & Wellborne, for appellants. *Swan & Bomar*, for appellee.

ACKER, J., (after stating the facts.) Property used by the head of the family for carrying on the business he pursues, for the support of his family, is just as much a part of the urban homestead as the urban residence; and, when the homestead character attaches, it continues until voluntarily abandoned. The residence is accorded the protection of the homestead laws because of being the place of the home of the family, and the business house is protected because of its occupation and use for the purpose of carrying on the business or calling of the head of the family. To be an abandonment that would subject such property to seizure and sale, there must be a voluntary leaving or quitting of the residence, with a then present intent to occupy it no more as a home; and, to subject the business property to such liability, there must be a voluntary closing of the business for which it was used by the head of the family in pursuit of his calling. *Clift v. Kaufman*, 60 Tex. 64; *Cline v. Upton*, 56 Tex. 320; *Griffie v. Maxey*, 58 Tex. 214. Being Harter's place of business at the time of his death, we think it immaterial that the business was conducted in the name of another. We think the homestead claim is fully sustained by the evidence given upon the trial, and that there was a total failure to prove abandonment. Conceding there was fraud on the part of Harter in resuming and conducting the business in the name of Weaver, we cannot see how that could be made to operate as an estoppel against appellee's homestead claim. The property, being homestead, and protected against creditors, could not be the subject of fraudulent dealing as to creditors. *Beard v. Blum*, 64 Tex. 59. We discover none of the elements of the doctrine of estoppel in this case. Whatever rights appellant had, remained unchanged by reason of the business being resumed and carried on in the name of Weaver. *Blum v. Merchant*, 58 Tex. 400. A satisfactory reason is given for carrying on the business in the name of Weaver. Harter had to obtain his stock of goods on a credit. Those who furnished him with

the goods required that the business should be so conducted to protect it against the demands of Harter's other creditors.

On the trial, appellee testified as a witness in her own behalf. On cross-examination she was asked by counsel for appellants, "if she made any objection to the business being carried on in the name of Weaver," to which counsel for appellee objected upon the ground that the testimony sought to be elicited was irrelevant and immaterial. During the life-time of the husband he had the right to control and manage the property, and it was wholly immaterial, in determining the rights of herself and children in the property, after his death, whether or not the wife objected to the use which was made of the property by the husband.

The only other assignment of error insisted upon is: "The court erred in each and every paragraph of his charge, and said charge was not applicable to and warranted by the evidence, nor is said charge authorized by the law when applied to the facts of this case." That this assignment is too general to require consideration is too plain to demand discussion. Rules Sup. Ct. 24, 25.

We are of opinion that the judgment of the court below should be affirmed.

STATTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

KAMPMANN *et al.* v. WILLIAMS *et al.*

(*Supreme Court of Texas. May 1, 1888.*)

1. NEGOTIABLE INSTRUMENTS—WHAT IS—BILL OF EXCHANGE.

A draft, in the following words: "Mr. L.: Please pay to K. & Co, \$500, and charge the same to account. P."—accepted by the drawee, and indorsed by payee, is not a negotiable instrument, and need not be protested to bind the indorser.

2. ASSIGNMENT—OF NON-NEGOTIABLE BILL OF EXCHANGE—DUTY OF HOLDER TO USE DILIGENCE—EVIDENCE.

In an action by the holders of a non-negotiable bill of exchange indorsed to them for value by defendants, plaintiffs, under Rev. St. Tex. arts. 267, 268, which provides that, in order to hold the assignor of a non-negotiable instrument as surety for its payment, the assignee shall use due diligence to collect the same, and parol testimony shall be inadmissible to prove that the assignor, drawer, or indorser of such instrument has released the holder from his obligation to use due diligence to collect it, must show due diligence to collect the same; and where no suit had been brought thereon until the third term of court after the cause of action against such indorser had accrued, and no excuse for such delay had been alleged in the original petition, parol testimony is not admissible to prove that defendants released plaintiffs from their obligation to use such diligence.

3. SAME—ACTION BY ASSIGNEE OF NON-NEGOTIABLE BILL OF EXCHANGE—PLEADING—TITLE OF ASSIGNEE.

In such case a supplemental petition averring that plaintiffs held the bill of exchange for collection as a favor to one of defendants, and that he never instructed plaintiffs to bring suit on it, shows that plaintiffs did not own the instrument so that they could sue either the acceptor or indorser.

Commissioners' decision. Appeal from district court, Bexar county.

Action by Williams & Russell against G. A. Kampmann & Co. on the following written instrument: "SAN ANTONIO, June 21, 1884. *Mr. L. Lambert:* Please pay to Gus. A. Kampmann & Co. five hundred dollars, and charge the same to account. *W. J. PRINCE.*" The draft was accepted by the drawee, Lambert, June 23, 1884, and was indorsed by Gus. A. Kampmann & Co. There was a judgment for plaintiff, and defendants appeal.

Winter & Altgelt, for appellants. *Jas. W. Stephenson*, for appellees.

MALTBIE, J. The petition alleges that the plaintiffs are the owners and holders of the draft, and that it became due and payable on the 5th of December, 1884, by reason of the fact that demand for payment was made on that day. The other allegations were appropriate to the relief sought. Defendants excepted to this petition substantially for the reasons that the instru-

ment sued on had not been protested and notice given as required by law, and also because suit was not brought to the first term of the court after the right of action accrued, or to the second term, showing good cause for not bringing suit to the first term. Plaintiffs, in their supplemental petition, allege, by way of excuse for not using due diligence to collect the draft, that defendant Boelhauwe, of the firm of G. A. Kampmann & Co., represented to plaintiffs that the draft was to be held by plaintiffs for collection, as a favor to Boelhauwe, and that he never at any time instructed plaintiff to protest or institute suit on it. All civil jurisdiction was by an act of the legislature approved February 25, 1881, taken from the county court of Bexar county, and given to the district court, and for that reason it had jurisdiction of the matter in controversy; otherwise it would not, as the amount of the debt, exclusive of interest, does not exceed the sum of \$500. An allegation of the petition that the debt became due on the 5th day of December, demand of payment having been made on that day, would not have the effect to prevent the draft from becoming payable until that time; but, the undertaking being payable on demand, it became due on the 23d of June, the date of acceptance, or as soon thereafter as demand of payment could reasonably have been made. 1 Daniel, Neg. Inst. p. 542, § 605; *Cook v. Cook*, 19 Tex. 487. This instrument was not negotiable; and there was no necessity for protest to fix the liability of indorsers under the law-merchant.

It is provided, however, by articles 267 and 268 of the Revised Statutes that, in order to hold the assignor of a non-negotiable instrument as surety for its payment, the assignee shall use due diligence to collect the same, and parol testimony shall be inadmissible to prove that the assignor, drawer, or indorser of such instrument has released the holder from his obligation to use due diligence to collect it. The diligence required under this statute is the same as that required in negotiable instruments under the law-merchant. *Thompson v. Payne*, 21 Tex. 625. Suit not having been brought until the third term of the court after the cause of action accrued, and no excuse for the delay being alleged in the original petition, the exceptions to it should have been sustained. Nor do the allegations of the supplemental petition, hereinbefore set out, cure the defect of the original petition. If the plaintiffs, as is alleged, only held the draft for collection, and as an accommodation for one of the defendants, the instrument not being their property on which they could maintain an action against the acceptor, they could not against the indorsers. It is further averred in the supplemental petition "that on or about the 2d day of August, 1884, the plaintiffs, at the special request of the defendant Boelhauwe, in order to enable the said Boelhauwe to close up the business of Gus. A. Kampmann & Co., credited the amount of the said bill on the account of Gus. A. Kampmann & Co., being assured by Boelhauwe that he would be liable for the amount should said Lambert fail or refuse to pay said bill." Defendants answered this supplemental petition by a general denial, and, further, that they did not in writing or otherwise make such promise. The supplemental petition does not appear to have been intended to form the basis of a suit for the recovery of money paid out and expended at the request of Boelhauwe for his use and benefit, or for the use and benefit of the firm of Kampmann & Co., but as an excuse for appellees' failure to use diligence in the collection of the draft. We are clearly of the opinion that, under the facts stated, no suit can be maintained on the draft, but think the judgment should be reversed and remanded, so that appellees may have an opportunity to amend their petition, if they desire. No opinion is expressed, however, whether they can maintain an action against appellants or not.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed and cause remanded.

MISSOURI PAC. RY. CO. v. CORNWALL.

(Supreme Court of Texas. May 4, 1888.)

1. CARRIERS—OF LIVE STOCK—SPECIAL CONTRACT—DELAY IN TRANSPORTATION.

A railroad company is liable for delay in transporting cattle accepted by it for carriage, regardless of a special contract made with the shipper limiting its liability to injuries resulting from willful negligence. Following *Railway Co. v. Harris*, 2 S. W. Rep. 574.¹

2. SAME—AGREEMENT FOR NOTICE—VALIDITY—WHAT ANSWER MUST SHOW.

Whether an agreement between a railroad company accepting cattle for shipment beyond its line and the shipper, requiring the latter, as a condition precedent to his right, to recover for any loss or injury, to give notice to some officer of the company or its nearest station agent, before the removal of the cattle, is reasonable, and therefore binding on the shipper, depends upon whether the company had an officer or agent to whom notice could be given near the place of delivery; and an answer in an action against the company, setting up such contract, but making no allegation upon this latter subject, is bad on demurrer. Following *Railway Co. v. Harris*, 2 S. W. Rep. 574.

3. SAME—OF LIVE STOCK—NEGLIGENCE IN CARING FOR CATTLE—INSTRUCTIONS.

In action by a shipper against a common carrier for negligence in transporting cattle, the court properly refused to instruct the jury that "if any cattle were injured, or had died from the effects of being overheated on account of hot weather, then plaintiff could not recover," the jury having been instructed that defendant would not be liable for any loss not caused by want of care, and there being evidence of negligence by defendant in watering the cattle, such instruction might tend to mislead the jury by eliminating the condition of the weather in determining the question of want of care by the defendants in supplying the cattle with water.

Appeal from district court, Tarrant county.

Action for negligence of common carrier in transportation of cattle, by T. R. Cornwall against Missouri Pacific Railway Company. Defendant filed, among other special pleas, one to the effect that in consideration of the reduced rate of freight given, the shipper especially agreed, as a condition precedent to his right to any damages for loss or injury to the cattle, during transportation, he would give notice in writing of his claim, verified by affidavit, to some general officer of said company, or its nearest station agent, before said stock was mingled with other stock, within one day after delivery at destination, which plaintiff failed to do. Verdict for plaintiff. Defendant appealed.

Davis, Beall & Rogers, for appellant. *Ball & McCart*, for appellee.

WALKER, J. Cornwall sued the appellant for damages for negligence and delay in transporting 99 beeves from Colorado, Tex., via Whitisboro, Muscogee, Sedalia, and Hannibal, to Chicago. The plaintiff's case in pleadings and evidence was the refusal of the employees of the defendant company at Whitisboro and at Sedalia to allow the cattle to be watered. Both were regular feed stations, and at both the trains were late, and the cattle suffering from heat and thirst, and request had been made at both places for facilities for watering the cattle. Delays were shown on the route. At times the trains with the cattle would be side-tracked and halted in the sun. The heat was intense, and the cattle were fat. Loss was estimated by witnesses at 100 pounds per head, and the price \$15 each. The defense relied upon a shipping contract, signed by the parties exempting the company from liability for delay in transportation and making as a prerequisite to suit that a claim for damages verified by affidavit be given. The charge of the court submitted the plaintiff's case, disregarded the contract as affecting the right

¹ Respecting the right of common carriers to limit their liability by contract, see *Express Co. v. Darnell*, (Tex.) 6 S. W. Rep. 765, and note; *Railroad Co. v. Thomas*, (Ala.) 3 South. Rep. 802, and note; *Railroad Co. v. Riordan*, (Pa.) 13 Atl. Rep. 834 and note; *Platt v. Railroad Co.*, (N. Y.) 15 N. E. Rep. 393; *Railroad Co. v. Sherrod*, (Ala.) 4 South. Rep. 29; *Ayres v. Railway Co.*, (Wis.) 87 N. W. Rep. 432; *Blook v. Transportation Co.*, (Tenn.) 6 S. W. Rep. 881.

to recover for negligence in the transportation, and held that the stipulation for notice before suit was not obligatory on plaintiff. Verdict and judgment for plaintiff for \$915.

The questions of law arising in the case as to the effect of the contract requiring notice, and for exemption from liability from negligence, have been settled by this court adversely to appellant since the trial of this case in the district court. *Railway Co. v. Harris*, 67 Tex. 166, 2 S. W. Rep. 574. Complaint is made that the court refused a charge that "if any cattle were injured or had died from the effects of being overheated on account of hot weather, then plaintiff could not recover for such loss." The court had already charged that defendant would not be liable for loss in value necessarily incident to the transportation, and not caused by want of care of the agents of defendant. It would seem that the heat, with the want of water, was a matter to be considered by the jury, and the charge might have been misleading; as it would be if understood as eliminating the condition of the weather in determining the question of want of care on part of the defendant as to facilities for watering the cattle.

The verdict was not excessive, under the testimony. The other assignments do not appear to be relied upon. The judgment below is affirmed.

HARRIS *et al.* v. SPENCE.

(*Supreme Court of Texas. May 4, 1888.*)

1. PLEADING—AMENDMENT—WHEN ALLOWABLE—REV. ST. TEX. ART. 1192.

Under Rev. St. Tex. art. 1192, which provides that pleadings may be amended by leave of court, upon such terms as the court may prescribe, before the parties announce themselves ready for trial, and not thereafter, a court cannot, without any showing of surprise or injury by the rulings of the court, or that the party has a meritorious cause of action or defense, after announcement of ready for trial, allow pleadings to be amended as a matter of course.

2. APPEAL—REVIEW—MATTER NOT APPARENT ON THE RECORD.

Where the record contains no statement of facts, and there is nothing in the pleadings or evidence to show that the evidence excluded is relevant to the pleadings and material to the case of appellant as made, judgment will not be reversed for such exclusion.

Appeal from district court, Tom Green county.

This was an action by Robert Spence on a note executed by J. W. Lawhone, D. D. Kennon, A. K. Barfield, H. C. Barfield, L. B. Harris, J. N. Upton, J. W. Barfield, and A. J. Rogers to one Rainey, and by him indorsed to plaintiff. Judgment for plaintiff. Defendants Harris and Upton appealed. Rev. St. Tex. art. 1192, provide that pleadings may be amended, by leave of the court, upon such terms as may be prescribed by the court, before the parties announce themselves ready for trial, and not thereafter.

Mays & Wright and *J. W. Timmins*, for appellants. *Fisher & Townes*, for appellee.

WALKER, J. Spence the appellee, sued J. W. Lawhone, D. D. Kennon, A. K. Barfield, H. C. Barfield, L. B. Harris, J. N. Upton, J. W. Barfield, and A. J. Rogers on a joint and several note made by them to ——— Rainey, and indorsed to plaintiff, for \$5,000, and 12 per cent. interest from maturity, the note being of date September 16, 1884, and due 90 days thereafter; renewed, and time extended six months; a credit of \$63. The defendants Harris and Upton pleaded usury; and, further, that they signed as sureties only for the accommodation of J. W. Lawhone, A. K. and M. C. Barfield, and D. D. Kennon; that, when they (Harris and Upton) signed the note, Rainey, the owner of the note, had a deed of trust for security upon 2,300 head of cattle (giving marks and brands) on the range in Tom Green and Concho counties, being ample security for the note; that but for this deed of trust they would not

have signed the note; that Rainey, while owner of the note, permitted the principals thereon to sell 300 head of cattle, and apply the proceeds to their own use, and not upon the note. Defendants pleaded the value of said cattle as offset, and also the sum of \$775 proceeds of sale of cattle under the deed of trust alleged to have been otherwise appropriated. February 12, 1887, on trial without a jury, judgment was rendered for plaintiff against the appellants, Harris and Upton, for \$4,754.31, and against all the others for \$6,522, and costs, including stipulated attorney's fees of 10 per cent. Harris and Upton appealed. There is no statement of facts.

The record contains two bills of exceptions. The first shows that appellants introduced Dan Kennon as a witness, who testified "that, after the execution of the deed of trust to Rainey, and prior to the sale under it, he and defendant Lawhone sold 400 or 500 head of cattle, principally in the brands covered by the deed of trust, and the proceeds had been applied to other purposes than on the note," when defendant's counsel then asked the witness "if Rainey gave his consent to the sale of said cattle;" to which question, and the answer, plaintiff objected, on the ground "that defendants had not alleged in their answer the insolvency of the principals on the note, and that said answer did not show that defendants were injured by the sale." The objection was sustained. The second bill of exceptions shows that appellants offered to prove, by the witness Kennon, "that Rainey, the original holder of the note sued on, while the holder of the note, gave his consent to and permitted the principals to squander and dispose of certain cattle upon which there was a deed of trust given by the principals to secure the payment of said note, and which deed of trust was alleged by said Harris and Upton to have been an inducement for their signing the note as sureties;" to which plaintiff objected, because "it was not alleged in their answer that the principals were insolvent, and no charge was in the answer that Rainey had notice of such inducement." The objections were sustained. Appellants then asked leave of the court to withdraw their announcement of ready for trial, on the ground of surprise, so that they might amend their answer so as to conform to the views of the court. This was refused, and defendants excepted. The assignments attack the action of the court in excluding the testimony of the witness Kennon, and in refusing to allow appellants to withdraw the case from trial in order that they might amend. The motion for new trial merely urged the action of the court on the trial, and no affidavit or other showing is made showing injury by the rulings of the court, or that the defendants have a meritorious defense. It appears that the judgment against the alleged principals in the note was for \$1,767.69 in excess of the recovery against appellants. From this it must be presumed that there was some kind of adjustment, testimony, and action thereon favorable to appellants; and, in absence of a statement of facts, we cannot determine from the record that the excluded testimony could have increased the amount of the credit allowed them on the trial. After announcement of ready for trial, the court cannot allow amendment to pleadings as matter of course. Rev. St. 1192. No showing of surprise or injury was shown, at the time or afterwards, as basis for the court to act upon the amendment to the pleadings asked.

The practice of testing the sufficiency of pleading by objecting to testimony for defects in it is deprecated. Beyond what appellants seem to have been allowed on the trial, it does not appear that it (the excluded testimony) could have benefited appellants. The insolvency of the alleged principals, and knowledge of the alleged motive to the appellants signing the note, were not alleged. If material, the absence was not supplied by the testimony. *Wallace v. Rogel*, 62 Tex. 638; *Chrisman v. Miller*, 15 Tex. 161; *Hall v. Jackson*, 3 Tex. 305. The absence of these allegations, with the absence in the record of any showing that appellants were in fact sureties, renders the exclusion of the testimony harmless in the final result. In absence of state-

ment of facts, and it not being shown that the excluded testimony was relevant to the pleadings as they are of record, and material to the defendant's case as made, the judgment cannot be reversed. *Lanier v. Perryman*, 59 Tex. 106; *Railway Co. v. Sutor*, 56 Tex. 496; *Jones v. Cavaasos*, 29 Tex. 482; *Thompson v. Callison*, 27 Tex. 488; *Blackwell v. Patton*, 23 Tex. 674; *Guffey v. Mosley*, 21 Tex. 408; *Hutchins v. Wade*, 20 Tex. 7; *Galbreath v. Templeton*, Id. 46; *King v. Gray*, 17 Tex. 62; *Payne v. Benham*, 16 Tex. 365; *Sublett v. Kerr*, 12 Tex. 368. Judgment below is affirmed.

MORRIS et al. v. RHINE.

(Supreme Court of Texas. May 4, 1888.)

1. PAYMENT—PRESUMPTION OF—DISMISSAL OF ACTION FOR PURCHASE MONEY.

In trespass to try title it appeared that one S. sold the land in controversy to A., executing to him a bond for title binding her to convey the land to him on payment of three notes executed by him for the purchase money; that, on suit brought on the first note, a judgment was obtained, and the land sold, under the judgment, to B.; that B. conveyed the land to C., and that on C.'s death the land was sold by his administrator to plaintiff under order of the probate court; that S. married M., and jointly sued on the second note, but the execution issued on the judgment was returned satisfied; that suit was also brought on the third note, but the same was dismissed; that M.'s wife died leaving defendants her heirs at law, her husband having predeceased her; that a deed dated during the husband's life-time, but not signed by him, purporting to convey the land to C. in consideration of a sum the aggregate of the three notes, was produced, and allowed by the court, as evidence of receipt of the purchase money; and that the evidence showed that C., and after him the plaintiff, had been in uninterrupted possession of the land for 17 years. *Held*, that plaintiff had a good title, and that there could be no doubt that the purchase money had been fully paid.

2. TRESPASS TO TRY TITLE—PLEADING—ALLEGING PAYMENT OF PURCHASE MONEY.

On trespass to try title, where plaintiff alleges ownership generally, he is properly permitted to prove facts tending to show he had either the legal or equitable title, and his petition need not specifically allege payment of the purchase money.

3. EXCEPTIONS, BILL OF—STATEMENT OF FACTS—FAILURE TO FILE BEFORE END OF TERM.

A bill of exception founded on a statement of facts cannot be considered where such statement was not filed until after the adjournment of the court at the end of the term.¹

Appeal from district court, Fannin county.

David Rhine brought an action in trespass to try title to certain land against Edgar Morris and others. Judgment for the plaintiff. Defendants appeal.

¹Bills of exceptions must be prepared and settled before the end of the term at which the cause was tried, *Sweet v. Perkins*, 24 Fed. Rep. 777; *Stave Co. v. Manufacturing Co.*, 32 Fed. Rep. 822; *George v. State*, (Tex.) *ante*, 25; or within such time as the parties, by their agreement made part of the record, may stipulate, or within the time allowed by the court in its order to that effect, made in term-time and appearing in the record, *Hake v. Strubel*, (Ill.) 13 N. E. Rep. 676; *City of Westminster v. Shipley*, (Md.) 13 Atl. Rep. 365. A distinction is to be observed in this respect between the settling and allowance of a bill, which is an act judicial in its nature, and the act of signing and sealing the bill, which is merely ministerial. *Hake v. Strubel*, (Ill.) 13 N. E. Rep. 676. The bill must be signed during term-time, unless authorized to be signed after adjournment by consent or agreement of counsel. *Markland v. Albes*, (Ala.) 2 South. Rep. 123; *State v. Smith*, (Kan.) 16 Pac. Rep. 254. Bills of exceptions filed more than 10 days after the expiration of the trial term of the court below will not be considered on appeal. *Stewart v. State*, (Tex.) 6 S. W. Rep. 317. But where one has done all in his power to procure the settlement of, and signature to, the bill, he cannot be prejudiced by the delay of the judge. *Davis v. Patrick*, 7 Sup. Ct. Rep. 1102; *Stave Co. v. Manufacturing Co.*, *supra*. If, during the progress of a trial, a party took exceptions, which were reduced to writing, or noted on the judge's minutes, and for any satisfactory cause he was unable to have his bill of exceptions drawn out in form and signed during the term, the judge who presided at the trial has the power to sign the same afterwards, and it becomes a part of the record, with the same effect as if signed during the term. *Che Gong v. Stearns*, (Or.) 17 Pac. Rep. 871.

C. C. Loveritt and C. D. Grace, for appellants. R. B. Semple and W. A. Bramlette, for appellee.

GAINES, J. The appellee, David Rhine, brought this suit in the court below. His amended petition contains the allegations required by the statutes for an action of trespass to try title, and also specially sets up title acquired by the statute of limitations. The defendants pleaded, "Not guilty," and also specially answered that they were owners of the land as the sole heirs of Catherine Morris, deceased. The land was patented to Felix G. Saddler in 1845. The evidence showed that he died, leaving Catherine Saddler, his wife, surviving him, and that, in a partition of his estate, the lands were set apart to her. In 1858, she married one R. L. Morris, who died in 1877. She also died in 1881, leaving defendants as her sole heirs. Before her marriage to Morris, in 1858, she sold the land to James Abercrombie, executing to him a bond for title, which bound her to convey the land to him upon the payment of three promissory notes executed by him for the purchase money thereof, which aggregated the sum of \$4,400. One Dagley became the obligor's surety on the bond; and one Sims, obligee's surety upon the notes. The first note was payable to Dagley, or to Catherine Saddler, or bearer. Dagley brought suit upon the note against Abercrombie and Sims, and obtained a judgment enforcing a vendor's lien upon the land. The land was sold by virtue of an order of sale issued under this judgment, and was brought by and conveyed to Sims. Sims then conveyed it to one D. A. Abercrombie. Abercrombie having died, the land was sold by his administrator by virtue of an order of the probate court, and appellee became the purchaser. It was also shown that suit was brought on the second note by Catherine Morris, formerly Catherine Saddler, joined by her husband; that judgment was obtained, upon which an execution issued; and that the execution was returned satisfied. Suit was also brought on the third note, but that suit was dismissed. The plaintiff also read in evidence a deed from Catherine Morris to D. A. Abercrombie for the land in controversy, reciting that it was in consideration of the sum of \$4,400, the receipt of which was therein acknowledged. The deed was dated during the life-time of her husband, and was not signed by him. It was admitted by the court, not as a conveyance, but as a receipt for the purchase money of the land.

We think the evidence clearly showed that appellee had title to the land. He had whatever title was conveyed by the bond. This, upon payment of the purchase money, became a perfect equitable estate. There can be no doubt that the purchase money was fully paid. The payment of two of the notes was enforced through the courts, and the receipt in the deed from Catherine Morris to D. A. Abercrombie was doubtless intended as an acknowledgment of the payment in full. The previous dismissal of the suit brought on the last note indicates that the obligation was then discharged. The evidence leaves no doubt that Abercrombie occupied the land from the time of the conveyance by Sims to him, in 1867, to the time of his death, in 1875; and it was shown that Rhine had occupied it, ever since his purchase, up to the time this suit was brought, in 1884. The presumption derived from this long adverse possession strengthens the proof of payment, if any corroboration were needed. This makes it unnecessary to pass upon the effect of the sheriff's sale under the judgment enforcing the vendor's lien upon the first note, or upon the title by the statute of limitations set up by plaintiff. The sheriff's deed was clearly sufficient to convey such title as James Abercrombie then had in the lands.

Do the assignments of appellant point out any error? The first complains that the judgment is unsupported by the pleadings, because the petition does not allege the payment of the purchase money. But the plaintiff did not undertake to plead his title specially, except as to the statute of limitations, and

this the law required. Otherwise he alleged ownership generally, and was properly permitted to prove any facts tending to show that he had either the legal or equitable title. The rule announced in *Riters v. Foote*, 11 Tex. 332, does not apply to this case.

The other assignments, from the second to the fourteenth, inclusive, must all be disposed of together. They are all to the admission of evidence, and are founded upon exceptions which are found only in the statement of facts. The statement of facts was not filed until after the adjournment, and therefore the bill of exceptions contained in it cannot be considered. *Howard v. City of Houston*, 59 Tex. 76; *Railroad Co. v. Eddins*, 60 Tex. 656. We will say, however, that, upon an inspection of the statement of facts, we find no ruling upon which appellants can complain. The description of the land in the bond and conveyances was sufficiently certain. The fact that one of the deeds appeared to be dated on the day after it was acknowledged before the officer was doubtless a clerical error, and was no ground for excluding it. The deed from Mrs. Morris to Abercrombie was properly admitted, as showing the receipt of the purchase money, for which purpose only the court allowed it to be read. There is no error in the judgment, and it is affirmed.

RICE v. MILLER *et al.*

(Supreme Court of Texas. May 4, 1883.)

1. SHERIFFS AND CONSTABLES—LEVY OF MALICIOUS ATTACHMENT—KNOWLEDGE OF MALICIOUS INTENT.

The owner of property taken under an attachment, where the proceedings are valid and regular, will have no recourse against such sheriff for damages caused by the seizure and detention of the property, though it appears that the sheriff knew that the person suing out the writ had no cause of action against such owner, and took out the writ with a malicious intent.¹

2. DAMAGES—WHEN EXEMPLARY DAMAGES ARE RECOVERABLE—MALICIOUSLY SUING OUT ATTACHMENT.

A petition alleging that defendant, knowing he had no cause of action against plaintiff, maliciously sued out and levied two writs of attachment on the latter's property, and that, by reason of such attachment, plaintiff has suffered injury, states a cause of action against such defendant; and, if the facts are proven as alleged in the petition, plaintiff may recover actual and exemplary damages.²

Appeal from district court, Wichita county.

Action by W. S. Rice against Will Miller and others for an alleged wrongful levy of an attachment. Defendants demurred to the petition, and the demurrer was sustained. Plaintiff appeals.

W. W. Flood, for appellant. *S. B. McBride*, for appellees.

GAINES, J. The appellant brought this suit against appellees Miller and Wright, and the other appellees as sureties on the official bond of Wright as sheriff of Clay county, to recover damages for an alleged wrongful suing out and levy of an attachment and wrongful seizure of a certain stock of horses belonging to him. The petition, among other averments, alleged that defendant Miller brought two suits against him, one in Wichita and another subsequently in Wilbarger county, upon a pretended judgment rendered against him in Iowa, in a suit in which there was no service upon him, and in which

¹Respecting the immunity of sheriffs and constables in the execution of process, see *Lloyd v. Hahn*, (N. J.) 11 A. Rep. 846, and note; *Blum v. Strong*, (Tex.) 6 S. W. Rep. 167.

²To recover exemplary damages for suing out and levying a writ of attachment on plaintiff's goods, it must be shown, not only that the attachment was issued without probable cause, but that it was done with malicious intent to injure the plaintiff. *Kaufman v. Babcock*, (Tex.) 2 S. W. Rep. 878. See, also, on the subject as to when exemplary damages may be awarded in action for wrongful attachment, *Blum v. Stein*, (Tex.) 5 S. W. Rep. 454; *Tynberg v. Cohen*, (Tex.) 2 S. W. Rep. 784; *Biering v. Bank*, (Tex.) 7 S. W. Rep. 90.

he neither appeared nor answered; and at the same time sued out attachments in each of them, upon the ground "that he was about to remove his property out of the state without leaving sufficient for the payment of his debts." It also averred that the attachments were placed in the hands of Wright, sheriff of Clay county, and were levied upon a stock of horses belonging to plaintiff, "as they ran in their range in Clay county;" that, at the time of the levy, he was about to drive the horses to market, but was prevented by the levy from doing so for 20 days. It also alleged that, at the end of this time, he removed the horses to Caldwell, Kan., but that one Herron, a deputy under Wright, followed him, and took possession of the horses, and drove them back into the Indian Territory for 50 days. It is not shown that the attachments had been released when the horses were removed. It is further alleged that Miller knew that he had no cause of action against the plaintiff; that plaintiff was not about to remove his property out of the state, without leaving a sufficiency to pay his debts, as was known to Miller; that the attachments were sued out wrongfully and maliciously, for the purpose of injuring and harassing the plaintiff; and that Wright knew all these facts. The petition also alleged actual damages, and claimed a recovery therefor against all the defendants, as well as for exemplary damages against Miller and Wright. Wright and his sureties filed a joint demurrer to the petition, and Miller demurred separately. Both demurrers were sustained; and, plaintiff declining to amend, the suit was dismissed.

We are of opinion that there was no error in sustaining the demurrer of the defendant Wright and his sureties. The writs of attachment were valid and regular, and protected the sheriff in making the levy. However full his knowledge may have been of the insufficiency of the cause of action, or of the wrongful and malicious intent of Miller in suing out the attachments, it was his duty to make the levy. As we construe the petition, no actual possession was taken of the horses before plaintiff, Rice, removed them to Kansas; but the levy was made under article 2293 of the Revised Statutes, by an indorsement upon the writ and notice to the defendant therein. The property, nevertheless, was in the constructive possession of the officer by the levy of the writ; and it became his duty to prevent their removal, and, if removed without his knowledge, to pursue and recapture them. For any loss that resulted to plaintiff by the seizure of the horses after he had driven them off, he cannot recover. This was a lawful result from his own wrong, for which he has no cause of action. But, as to the demurrer of defendant Miller, we think the court was in error. If the allegations of the petition were true, the attachments were both wrongfully and maliciously sued out. The effect of the levy, though there was no actual seizure of the horses, was to take them from the control of the plaintiff; and he is entitled to recover such actual damages as resulted to him by being virtually dispossessed of his property during the time the levy was continued in force, provided he can show that the writs were wrongfully issued. If there was malice in issuing the process, he would be entitled to recover exemplary damages, and these are laid at a sufficient sum to give the court jurisdiction.

For the error in sustaining the demurrer of defendant Miller, and in dismissing the suit, the judgment is reversed, and the cause remanded.

HOUSTON v. BROWN *et al.*

(*Supreme Court of Texas. May 4, 1888.*)

I. PUBLIC LANDS—CONFLICTING SURVEYS—EVIDENCE.

In an action of trespass to try title, plaintiff claimed under the Curtis (the senior survey, and defendants under the Floyd. The boundary line was called to run N., 40 W. Defendants had marked off this tract so as to extend some 580 varas upon the Curtis survey, as claimed by plaintiff. A surveyor testified that he had run the lines of the two surveys; that running the call of the Floyd from the south cor-

ner of the Berry N., 50 E., 1,441, he found no corner as called for, but 58 varas further on he found a corner with a bearing tree corresponding with the call in the Curtis patent for its west corner. From this point there was an old marked line running S., 40 E.,—the course of the line in controversy. He then went to the north corner of the Curtis, and ran its north-west line the distance called for, and again found no corner; but by continuing the course 27 varas reached the corner above described. From this corner he ran, along the marked line, the course called for in the field-notes of the Curtis, and at the distance named found no corner, but by extending his measurement 32 varas found a corner marked by two post oaks, as called for, except that one of the trees stood N., 23 E., 9 varas, instead of N., 23 W., 9 varas, as called for. By returning to the north corner of the Curtis, and running the other two lines the course and distance, this latter corner was again reached. There was no evidence in rebuttal of this. *Held*, that the court erred in not giving judgment for plaintiff.

2. LIMITATION OF ACTIONS—ADVERSE POSSESSION.

The constructive possession of occupants of land under a junior title, as to a strip of interference between two surveys, yields to that of the owner of the senior the instant he takes actual possession of any part of his land.

3. TRESPASS TO TRY TITLE—POSSESSORS IN GOOD FAITH—COMPENSATION FOR IMPROVEMENTS.

Where, owing to a mistake as to boundary line, defendants improved plaintiff's land under an honest belief that it was their own, they are possessors in good faith within the reasoning of the statute; and, on recovery of the land by plaintiff, they are entitled to compensation for their improvements.

Appeal from district court, Caldwell county.

Trespass to try title, brought by Hugh Houston against A. J. Brown *et al.* Judgment for defendants, and plaintiff appeals.

Nix, Storey & Storey, for appellant. *Thos. McNeal*, for appellees.

GAINES, J. This was an action of trespass to try title, brought by the appellant against the appellees to recover a certain tract of land described in his petition. The question primarily involved, is as to the true location of a boundary line between the Washington Curtis and the Floyd surveys, which line is called to run N., 40 W. The plaintiff claimed under the Curtis, which is the older survey; and the defendants under the Floyd. That portion of the latter survey which adjoined the former on the south-west had been subdivided into four tracts of 100 acres each, and to these defendants severally set up title. Each of these tracts had been surveyed and marked upon the ground, and extended some 580 varas upon the Curtis, according to the boundaries of that survey as claimed by the plaintiff. The court found, in effect, that the evidence failed to establish the south-west boundary of the Curtis as plaintiff claimed, and gave judgment, accordingly, for all the defendants. In this we think there was error. One Chapman, the county surveyor, testified that he had run the lines of the two surveys in controversy about two years previous to the trial; that, running the call of the Floyd from the south corner of the Berry "N., 50 E., 1,441," he found no corner at the distance called for; but that he ran on 58 varas further, and there found a corner with a bearing tree corresponding with the call in the Curtis patent for its west corner, and a stump of another tree the proper distance, but not in the proper direction. From this point there was an old marked line running S., 40 E.,—the course of the line in controversy. He then went to the north corner of the Curtis, and ran its north-west line the distance called for, and again found no corner, but by continuing the course 27 varas reached the corner above described. From this corner he ran along the marked line the course called for in the field-notes of the Curtis, and at the distance named found no corner, but by extending his measurement 32 varas found a corner marked by two post oaks, as called for; the only discrepancy being that one of the trees stood N., 23 E., 9 varas, from the corner, whereas the call was for a post oak N., 23 W., 9 varas. By returning to the north corner of the Curtis, and running the other two lines the course and distance, this latter corner was again reached. This seems to show, with reasonable certainty, the true location of the south-west boundary of the Curtis survey, and this is the line which the plaintiff claims.

It is rare, in these old surveys, that the corners are found so nearly at the distance called for, and that the corners are so definitely and accurately marked. We have no doubt that the call for the post oak N., 23 W., is the result of a clerical mistake in transcribing the field-notes. The line, as run by Chapman, gives a little excess in each survey; while, on the other hand, that claimed by appellee would reduce the Curtis more than one-third below the proper quantity. We are referred by appellees to no testimony which rebuts the case so made by the plaintiff, and a careful examination of the record has disclosed no evidence of any considerable weight which tends to establish a different line. No other surveyor was examined. One Reed, a witness for the defendant, testified that he bought the land for himself and the defendants, and that he was present when it was surveyed for the purposes of that purchase, and that the surveyor, one McCord, ran the line as defendants claim it. How McCord established or found the line does not appear. It does appear, however, that this latter was an old marked line. For the error of the court in holding the evidence not sufficient to show the true location of the south-west boundary of the Curtis survey, and in not giving judgment for plaintiff against such of the defendants as had not established the defense of limitation, the judgment must be reversed, and the cause will be remanded.

With a view to another trial, we announce the following conclusions in reference to defendants' plea of the statute of limitations: Counsel claims that, because defendants' deeds call for land upon the Floyd survey, they cannot have the benefit of constructive possession as to any land described in their deeds which is actually embraced within the Curtis. This claim cannot be supported. Their deeds call for lands described by well-defined boundaries and corners marked upon the ground. Until they took actual possession of some part of the disputed strip their constructive possession was limited to the Floyd survey. *Peyton v. Barton*, 58 Tex. 808. When any one of these actually occupied any part of the conflict, then his possession is to be construed to extend to the boundaries of his deed, unless plaintiff was in actual possession of some part of his survey. *Anderson v. Jackson*, 6 S. W. Rep. 575. It is claimed by appellant that the evidence shows that he was in possession of a portion of his land during some part of the time required to perfect the title of defendants by virtue of the statute of limitations. If this were so, the Curtis grant being the older, his possession would extend, by construction of law, to the limits of his deed as to all land not actually occupied by the defendants. The constructive possession of those claiming under the junior title, as to the strip of interference, yields to that of the owner of the senior the instant he takes actual possession of any part of his land. *Anderson v. Jackson, supra*. But we do not think plaintiff's claim in this respect borne out by the record. We fail to discover that he proved possession of any part of his land at any time.

The testimony of Reed, that he had sold a part of the land to Robert Duke, should have been excluded. The deed was the better evidence. If there had been no deed, it would have been competent for Duke to have shown that Reed purchased the entire tract of Mrs. Clark in trust for himself and the defendant, and that in a parol partition the land claimed by him (Duke) was set apart to him. But we do not see why Duke could not make out his defense of limitation of 10 years, without proof of any written title, provided he could establish possession for the requisite period of time.

The position assumed by appellant, that defendants could not claim to be possessors in good faith because of mistake as to boundary, is not well taken. If they improved plaintiff's land under an honest belief that it was their own, they were possessors in good faith within the reasoning of the statute, and, in the event of plaintiff's recovery, are entitled to compensation for their improvements, subject to the limitations therein described. The judgment is reversed, and the cause remanded.

DOLSEN v. DE GANAHL.

(Supreme Court of Texas. May 4, 1888.)

1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

In an action against the maker of a promissory note by the administratrix of the payee, her testimony, that the deceased had stated, but not in the presence of defendant, that defendant had admitted the note, and promised to pay it, is inadmissible, if objection is made, even to rebut improper evidence which has been admitted without objection.

2. EVIDENCE—PAROL, TO AFFECT WRITING—AGREEMENT NOT TO ENFORCE NOTE.

In an action on a promissory note, a charge asking a finding for defendant if the note was executed with the understanding that it was not to be paid, is properly refused, although evidence has been admitted, improperly, but without objection, to show such parol contemporaneous agreement.

Appeal from district court, Bexar county.

Action by Mrs. Charles De Ganahl, administratrix of the estate of S. B. Spotts, against D. P. Dolsen, upon a promissory note. Judgment for plaintiff, and defendant appeals.

John A. Green, Jr., Wm. Aubrey, L. C. Grothaus, and S. G. Newton, for appellant. A. S. Chevalier, for appellee.

STAYTON, C. J. As the administratrix of the estate of S. B. Spotts, deceased, the appellee brought this action to recover the sum due on a promissory note executed by the appellant to the deceased on December 11, 1882, and due one year after its date. It is urged that the court erred in admitting testimony offered to show that the appellee was the administratrix of the estate she assumed to represent. It is unnecessary to inquire whether the evidence was properly admitted, for there was no plea putting her capacity to sue in issue, and there was no necessity for any proof on that point.

There was a plea of want of consideration for the note, which contained much irrelevant matter, of which evidence was admitted; and, after this, the appellee was permitted to testify that, in a conversation between herself and the deceased when the appellant was not present, the deceased stated that the appellant acknowledged the note sued upon to be a just claim against him, and admitted that it was justly due for a horse that had died through ill usage by the appellant, and that he would certainly pay it or secure it. This testimony was objected to, on the ground, among others, that it was hearsay. The judge of the district court seems to have thought that it was admissible in rebuttal of testimony offered by appellant. There was testimony offered by appellant that the court would, no doubt, have excluded, had it been objected to; but the fact that improper evidence was admitted without objection did not authorize the admission of improper evidence, even in rebuttal, when objection was made to it. The evidence admitted, over objection, was clearly inadmissible, and should have been excluded.

In view of the further disposition of the case, we deem it proper to say that the note sued on evidences the contract of the parties, and, under the pleadings, all evidence as to parol contemporaneous agreements between the appellant and the deceased affecting the contract evidenced by the note, and tending to vary or contradict it, should be excluded. The note fixes the obligation of the appellant to pay, and his pleadings leave open to him only the defense that it was executed without consideration. Evidence tending to support that defense is admissible. If the deceased had in his custody a horse belonging to another person, which, without permission of the owner, he loaned to the appellant, who injured it, or if there was a claim that he had injured it, and the note in suit was given in settlement for the injury, or claim of injury, then it cannot be said that the note was without consideration. As the custodian of property, bound to the exercise of proper care for its safe-keeping, the deceased would have been liable to the owner for an injury resulting from

his want of proper care; and if one having possession of it, with his permission, injured it, we do not see but that a note given in settlement of such injury would not be on sufficient consideration. If the deceased loaned the horse of which he was the bailee, this was upon an implied contract that the borrower would not injure it, but use it carefully; and for breach of such implied contract the bailee, doubtless, might have maintained an action to recover from the borrower for any injury done to the property for which the bailee would be liable to the owner. Story, Bailm. 93b, 93c; Add. Torts, 631, 1292. In any case in which a bailee may maintain an action for an injury done to the property placed in his custody, he surely may take a note in settlement, for the same facts which give a right to recover in an action by a bailee give sufficient consideration to support a promise.

It is unnecessary to consider whether the charge given was in all things technically correct. The appellant asked the following charge: (1) "If the jury believe from the evidence that the defendant executed the note in question with the understanding that he was never to pay the same, and that it was not to be transferred or assigned, they will find for the defendant." It was properly refused, for the note is conclusive as to what the real contract between the parties was. The charge asked is based on evidence admitted to show the parol contemporaneous agreement, which, as we have before said, ought not to have been raised, but, having been raised, should have been disregarded, as it was, in effect, by the charge given.

For the error in the admission of evidence before referred to, the judgment will be reversed, and the cause remanded.

FREIBERG *et al.* v. ELLIOTT *et al.*

(Supreme Court of Texas. May 4, 1888.)

1. ATTACHMENT—OF PROPERTY CONVEYED IN FRAUD OF CREDITORS—ACTION FOR—BURDEN OF PROVING FRAUD.

In an action for damages for wrongful attachment of property claimed by defendant to have been conveyed to plaintiff in fraud of creditors, the court properly instructs that the burden of proving the fraud, either by direct or positive testimony or by circumstantial evidence, rests upon defendant.

2. SAME—ACTION FOR WRONGFUL ATTACHMENT—INSTRUCTIONS—DAMAGES.

In an action for damages, actual and punitive, for wrongful attachment, a charge is not error in stating, merely in a general way, what facts would furnish a basis for actual damages, and instructing the jury, if they believe plaintiffs entitled to such damages, to find for them the value of the goods at the time of the seizure, with interest; the defendant having made no request to the court to charge differently, and no objection being made that the actual damages found are excessive.

3. SAME—ACTION FOR WRONGFUL ATTACHMENT—INSTRUCTIONS—CONVEYANCE BY INSOLVENT DEBTORS.

In an action for damages for wrongful attachment of property claimed by defendant to have been conveyed to plaintiff in fraud of creditors, the court, instructing that sales of property by insolvent debtors for the purpose of defrauding their creditors are void, does not err in defining what is meant by insolvency; that being one of the material issues made.

4. SAME—ACTION FOR WRONGFUL ATTACHMENT—DAMAGES.

In a complaint for wrongful attachment, alleging that the property seized by defendant was *in custodia legis*, having been seized by others before, and claimed, under the statute, by plaintiffs, who were purchasers, and in possession at the time of defendant's seizure, and alleging the character of plaintiffs' business, and the loss to them arising from the seizure, it is unnecessary to consider, upon demurrer, the materiality of such allegations as to the actual damages, since, as punitive damages are alleged, the allegations may be looked to to show aggravating circumstances.

5. DAMAGES—SUBMITTING IMPROPER ISSUE TO THE JURY—REMITTING PORTION OF VERDICT.

The submission to the jury of the issue, unauthorized by the proof, of punitive damages for wrongful attachment, is not ground for reversal, if so much of the verdict is remitted, unless it appears that such submission improperly influenced the jury in finding the actual damages.

Appeal from district court, Comanche county.

Action by Elliott & Wright against Freiberg, Klein & Co., for alleged wrongful seizure of personal property. Judgment for plaintiffs, from which defendants appeal.

Scott & Levi, for appellants. *Lindsay & Hutchison*, for appellees.

STAYTON, C. J. This action was brought by appellees to recover damages, actual and exemplary, on account of an alleged seizure and conversion by appellants of goods claimed by appellees. Appellants were creditors of Fernandez & Ackerman, and seized, under an attachment, the goods which, in part, had formerly belonged to these debtors, and they subsequently caused them to be sold in satisfaction of a judgment recovered against Fernandez & Ackerman. The goods were, in part, claimed through a sale made by Fernandez & Ackerman to appellees, which appellants claimed was made in fraud of creditors. The petition alleged that the goods had been seized, by other creditors of Fernandez & Ackerman, after the purchase by appellees; but that, as against them, appellees had made claim under the statute, and were in possession at the time appellants caused an attachment to be levied; that the goods were *in custodia legis*; stated the character of their business, and daily profits before appellants seized the property, and that this would have continued but for the seizure; and that they had procured license as liquor dealers for a year, which they could not use by reason of the fact that their business was broken up by the seizure of their stock. A demurrer to so much of the petition as contained these averments was overruled, and this is assigned as error.

1. It is unnecessary to inquire how far, if at all, matters thus alleged might have been considered in estimating actual damages; for, as the petition stood, it asserted a claim for punitive as well as actual damages, and the matters alleged might be looked to to show the aggravating circumstances under which the seizure was made. The demurrers were to be tested by the case made by the petition, and not by the facts as they might subsequently be found.

2. It is probably true that no proof was made which would have authorized the imposition of punitive damages on the appellants, and that the court would have been justified in not submitting that issue to the jury. The fact, however, that the court did submit such an issue, and that the jury may have found in favor of the appellees upon it, so much of the verdict having been remitted, would furnish no reason for reversing the judgment, unless there was some ground for believing that the charge had an improper influence upon the jury as to the right of the appellees to recover at all, or upon the question or amount of actual damages. There is no complaint that the verdict for actual damages is excessive. The issue on which the right of the appellees to recover at all was, was their purchase in good faith or fraudulent? And we do not see that the finding on this could have been influenced by the submission of an issue as to whether the appellants acted maliciously in causing their attachment to be levied. Juries must be presumed to have ordinary intelligence, and sufficient capacity to understand the issues made in a case, and to apply the facts before them, where they have a proper bearing.

3. The eighteenth assignment of error assumes that the court instructed the jury, if they found for appellees, that they must find damages punitive as well as actual, but the record shows no such charge.

4. After informing the jury, in a general way, what facts would furnish a basis for actual damages, the jury were instructed, if they believed the appellees entitled to such damages; "you will find for plaintiffs the value of the goods so seized at the date of the seizure, together with interest on such sum from such date, at the rate of 8 per cent. per annum." There was a verdict directly responsive to this charge, but it is urged that the general statement of the basis for actual damages should not have been given without applying it to the facts in proof. We do not see how the court could more directly

have made the charge applicable to the case. If it was thought that the general statement was likely to mislead, by inducing the jury to consider some fact referred to in it as an element on which to base actual damages, a charge should have been asked which would clearly have placed the charge beyond the liability to misconception. We see no reason to believe that there was anything in the charge that misled the jury in this respect, and, as before said, there is no complaint that the verdict, as to actual damages, was excessive. Among other things, the court charged the jury that "the term 'insolvent' is usually applied to one whose estate is not sufficient to pay all of his debts from his own means, and a man is said to be insolvent when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do." "All sales of property made by insolvent debtors for the purpose of either hindering, delaying, or defrauding their creditors, when such intention is known to the purchasers, or could have been obtained by the use of ordinary diligence, even though the purchaser may have paid a valuable consideration for such property, are void as against the creditors of the vendor." And it is urged that the court erred in calling the attention of the jury to the matter of insolvency as affecting a conveyance claimed to have been made with intent to hinder, delay, or defraud creditors. An issue had been made as to the solvency or insolvency of Fernandez & Ackerman. It was a material issue, and the court very properly informed the jury when a person, within legal contemplation, was deemed insolvent. It is not claimed that the charge was erroneous, but that it ought not to have been given.

6. The appellants alleged, and attempted to prove, that the conveyance through which appellees claim was fraudulent, and the court very properly instructed the jury that the burden of proving this rested upon them; but that this might be proved, "as any other fact, by either direct or positive testimony or by circumstantial evidence."

7. It is urged that the verdict was contrary to the evidence. It may be that the jury would have been authorized to find a different verdict, but there is ample evidence to sustain the verdict, if the jury believed the witnesses. It was the peculiar province of the jury to pass upon the credibility of the witnesses, and the weight to be given to their testimony; and we are not authorized to set aside their verdict, sustained by evidence, even if, upon an examination of all the testimony; we should incline to the opinion that a different finding would have the better support.

There is no evidence that would justify a reversal, and the judgment will be affirmed.

CLENDENNING *et al.* v. BELL.

(Supreme Court of Texas. May 4, 1888.)

VENDOR AND VENDEE—BONA FIDE PURCHASERS—WHO ARE.

The title of a purchaser for valuable consideration, claiming under a deed executed by the former owner of real estate prior to, but not recorded until after, the rendition of a judgment against such owner, and the issue and levy of execution thereon, is superior to that of one who purchased at the execution sale, made after the recordation of the deed, where such purchaser took actual possession of the land shortly after obtaining his deed, and held the same, by his tenant, for some time previous to the rendition of the judgment, and continuously until the sale, the execution purchaser having notice of such adverse title before the sale.¹

Appeal from district court, Cooke county.

¹ As to how far possession of land is notice of the rights of the occupant, see *Hafter v. Strange*, (Miss.) 8 South. Rep. 190, and note; *Stiffier v. Retzlaff*, (Pa.) 11 Atl. Rep. 876; *Sanford v. Weeks*, (Kan.) 16 Pac. Rep. 465; *Sprague v. Haight*, (Iowa,) 6 N. W. Rep. 698; *Roll v. Rea*, (N. J.) 12 Atl. Rep. 905; *Buck v. Holt*, (Iowa,) 37 N. W. Rep. 77.

Action for the recovery of part of a lot in the town of Gainesville, Cooke county, Tex., brought by W. J. Bell against D. B. Glendenning, C. M. Bailey, and George L. Hill. Judgment for plaintiff. Defendants appealed.

Sarils & Green, for appellants. *Hunter & Stuart*, for appellee.

STAYTON, C. J. This action was brought by appellee to recover a part of a lot in the town of Gainesville. V. C. Holland formerly owned the property, but he conveyed it to appellants by a deed delivered on October 20, 1885, which, however, was not filed for record until March 15, 1886. That this conveyance was made in good faith, and upon valuable consideration, is not questioned. A judgment was secured against Holland in a justice's court on February 22, 1886, on which an execution issued March 9, 1886. That was levied on the property in controversy on March 11th, and it was sold and bought by the appellee on April 6th following, and the officer executed a deed to him. At the sale, notice of the right of appellants was given. At the time the levy was made, and at the time of the sale, through which the appellee claims, the property was occupied by a tenant holding under the appellants, who had entered after their purchase. The notice given at the sale would not protect the appellants' rights, but there is no fact shown which would prevent the possession of the tenant of appellants from operating as notice to appellee, and to the creditor of Holland, of their right at the time the levy was made. The general rule is that the possession of a tenant operates as notice of whatever right the landlord has as fully as would his own possession. *Mainwarring v. Templeman*, 51 Tex. 213; *Watkins v. Edwards*, 23 Tex. 449; *Hawley v. Bullock*, 29 Tex. 224; *Woodson v. Collins*, 56 Tex. 175. The creditor of Holland, under whose execution appellee bought; having notice of the appellants' rights before his execution was levied, and the appellee having notice before he bought, the latter cannot be held to be an innocent purchaser, nor can he be protected, as he would be entitled to be if the creditor of Holland had acquired a lien on the property by his levy without notice of the right or claim of appellants.

The judgment should have been for appellants, and it will be reversed, and here so rendered. It is so ordered.

INGLE *et ux.* v. LEA *et al.*

(*Supreme Court of Texas. May 4, 1888.*)

HOMESTEAD—ACQUISITION—CONTINUED OCCUPATION.

When real estate is claimed as a homestead, it is immaterial whether or not the claimant has, at all times since his acquisition thereof, used or claimed the same as a homestead. His rights depend on the facts existing at the time the levy is made thereon; and, if so used at that time, such real estate is not subject to forced sale.¹

Appeal from district court, Cooke county.

Action to try title to a lot in the city of Gainesville, Tex., brought by Lea & Simpson against H. Ingle and wife, who defended on the ground that the sale under which plaintiffs claimed was void; the property having been the homestead of defendants at the time it was sold under execution. Judgment for plaintiffs. Defendants appealed.

Blanton & Wright, for appellants.

STAYTON, C. J. The appellees claim the property through a sale made under execution against H. Ingle, and whether they obtained any right depends

¹As to what occupation will support a claim of homestead exemption, see *Colbert v. Henley*, (Miss.) 1 South. Rep. 651, and note; *Fitzgerald v. Fernandez*, (Cal.) 12 Pac. Rep. 603; *Nance v. Hill*, (S. C.) 1 S. E. Rep. 897, and note; *King v. Goetz*, (Cal.) 11 Pac. Rep. 656, and note; *Myrick v. Bill*, (Dak.) 37 N. W. Rep. 869.

on whether the property was homestead at the time the execution was levied. The property embraces the west halves of lots 2 and 3 in block 22, in the town of Gainesville, making a piece of ground 50 feet wide, and 100 feet long, which was in one inclosure. On the block north of block 22, Ingle owned another lot, or rather a half interest in it, on which was a house, which for some time before the levy on the property in controversy he had used as a residence, and for his place of business as a dentist and photographer. This last-named property is about 150 feet distant from that in controversy, and there is evidence to show that Ingle and wife have at times resided on the one or the other as suited their convenience, but that at all times the property in controversy has been used to some extent for home purposes. The court below found that the half of lot 2 was not homestead, and that title to it passed by the sale under which appellees claim, but that the half of lot 3 constituted a part of the homestead. Situated as was the entire property in controversy, the reason for holding a part subject to forced sale, and the other not, is not to us clear. It is not necessary, however, for us to enter into a consideration whether, at all times after Ingle acquired the property, it was so used, while he was actually residing on the other block, as to make it a part of his homestead; for at the time the levy and sale were made he was actually residing upon it. The right of appellees must depend on the facts existing at the time the levy under which they claim was made. What may have been the facts before or after that time, under the issues presented, are unimportant. The property being the actual residence of appellants, and used for all the purposes of a home, at the time the levy and sale were made, was not subject to forced sale.

The judgment should have been for appellants, and will be reversed, and here rendered in their favor. It is so ordered.

COLLINS v. DIGNOWITY.

(Supreme Court of Texas. May 8, 1888.)

1. PLEADING—ANSWER—JUSTICE OF THE PEACE.

In an action before a justice on an account, an answer denying the correctness of the account, and averring "that plaintiff is indebted to defendant for failing to comply with his contract, * * * to his damage in the sum of five thousand dollars, which defendant now pleads in abatement against plaintiff's claim, if he has any, but asks no judgment against plaintiff, but reserves his right to sue for such damages in the court having jurisdiction thereof, and that the material in the account sued upon is part of such contract," sets up a good defense in bar, and the admission of evidence in support of such answer is not error.

2. EVIDENCE—PAROL, TO VARY WRITTEN—SALE.

A written agreement by a purchaser setting out an order for a windmill, and the purchase price and manner of payment for the same, the penalties in case of default on the part of the purchaser, and his stipulation to dig the post-holes and furnish the posts, and with a warranty indorsed, is complete in itself; and parol evidence that it was not intended to represent a prior agreement entered into, but was merely a note for the purchase price of the windmill, is inadmissible.

Appeal from district court, Bexar county; G. H. NOONAN, Judge.

Action by F. F. Collins against H. L. Dignowity on an open account. Judgment for defendant, and plaintiff appeals.

J. S. Carr, for appellant. *Oscar Bergstrom*, for appellee.

GAINES, J. The appellant sued appellee upon an open account in a justice's court of Bexar county. Judgment was there rendered for appellee; and, the county court of that county having no civil jurisdiction, appellant appealed to the district court, where judgment was again rendered against him. The account was sworn to under the statute. The defendant filed a sworn answer, which denied the correctness of the account, and which contained the following averments: "That plaintiff is indebted to defendant for failing to comply with his contract to furnish a windmill and material for

defendant's pasture, to water at least six hundred head of stock, to his damage five thousand dollars, which defendant now pleads in abatement of plaintiff's claim, if any he has, but asks no judgment against plaintiff, but reserves his right to sue for such damages in the court having jurisdiction thereof, and that the material in the account sued upon is a part of such contract." It is insisted in the brief of counsel that, because the answer purports to be a plea in abatement, and is not good as such, and there is no answer in bar, that the court erred in hearing, over appellant's objection, any evidence in support of it. The answer is not good as a plea in abatement, nor do we think is intended as such. The facts stated, of themselves, would constitute a bar to the action. We presume the object of the answer was to plead the defense in such a manner as to preclude a plea of *res adjudicata* to an original action by defendant against plaintiff for the damages accruing from the alleged breach of contract. Whether this could be done or not we are not called upon to decide in this case. We think the court did not err in treating the answer as setting up a good defense to the action.

During the progress of the trial the defendant was permitted to testify in his own behalf, over the objections of plaintiff, to the effect that he "had told plaintiff he wanted to get a pump and power that would raise water out of his well on his ranch, to water six hundred head of stock," and that plaintiff told him "he could put in an eighteen-foot windmill that would do the work." He also testified that the contract was reduced to writing, but that this occurred "some time afterwards." The plaintiff's counsel introduced the written contract, and moved to exclude the testimony, on the ground that its object was to vary the writing, and was therefore inadmissible. The written agreement is as follows:

"POST-OFFICE, TOWN OF SAN ANTONIO, COUNTY OF BEKAR, STATE OF TEXAS.

"To F. F. Collins, Houston, Tex., (date,) SAN ANTONIO, June 14, 1884.

"Please send me from San Antonio to my ranch, and erect thereon, one 18-foot Eclipse windmill, and a 36-foot substantial tower, and connect same to pump in well, for which I agree to pay you, or order, five hundred dollars, as follows: Twelve months after date, with ten per cent. interest from date of delivery, payable at San Antonio, Tex. And it is hereby agreed by the undersigned that F. F. Collins does not relinquish his title to said mill and fixtures until they are fully paid for; and, in default of the undersigned in the performance of any of the terms of this agreement, the said F. F. Collins may declare the whole amount agreed to be paid by this contract due and payable, and he or his agents may, without process of law, take possession of and remove said mill and fixtures, and collect reasonable charges for damages and expenses. If said F. F. Collins finds it necessary to place this contract in the hands of an attorney for collection, I agree to pay all charges and expenses of collecting the same. It is also agreed that the undersigned may retain possession of and use said mill and fixtures until he shall make default in the terms of this agreement. The undersigned agrees to dig the corner post-holes for foundation of tower, and to furnish corner posts to be built by F. F. Collins as soon as practicable. If the undersigned delays longer than thirty days after the above date having the mill built, then this contract shall become due and payable the same as though the mill was built at the date above given.

HENRY L. DIGNOWITY.

"Witness: H. M. MOORE."

And upon the back of said contract is indorsed the following, to-wit: "Warranty. We hereby warrant the within-ordered windmill to be made well, and of good material. We warrant it to furnish more power, to be self-regulating, and to be stronger and more reliable in storms, than any other mill made. We will furnish free of charge the parts necessary to make good any defect in workmanship or material, for the term of one year from date. We

will recognize no alterations or changes in the warranty. It must stand as printed. FAIRBANKS & Co., St. Louis." In connection with this matter, the defendant also testified: "The instrument so signed was not intended to represent the agreement between us, but as a note for the price. It was signed some time after the agreement was made." The writing introduced in evidence contains all the elements of a contract. It is not the mere written evidence of a promise to pay the consideration of a more extended agreement. Though signed by one of the parties only, it contains the stipulations to be performed by both, and must be held to express fully the final agreements upon which their minds met, and to have merged in it all preliminary negotiations. *Milliken v. Callahan Co.*, 6 S. W. Rep. 681. We think the evidence, which was objected to, inadmissible, and for the error of the court in admitting it the judgment is reversed, and the cause remanded. The testimony of the witness Roe, in so far as it tends to prove the same facts testified to by appellee, is subject to the same objection, and should have been excluded.

ANDREWS v. STATE.

(Court of Appeals of Texas. April 18, 1888.)

LARCENY—EVIDENCE—EXPLANATIONS AS TO POSSESSION OF STOLEN PROPERTY.

On an indictment for larceny, where witnesses differed in their statements of defendant's explanation made when first seen in possession of the alleged stolen property, some of the state's witnesses agreeing with the version of defendant's witnesses, defendant's statement on the following day is admissible to corroborate his version of the first explanation.¹

Appeal from district court, Harrison county; J. G. HAZLEWOOD, Judge.

Alex. Pope and Wilson & Lane, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. Defendant proposed to prove by several witnesses that, the day after he took possession of the alleged stolen cow, he stated that he took her up as an estray, believing her to be an estray. This proposed testimony was rejected upon the objection of the district attorney, upon the ground that such statements were self-serving declarations. At the time said declarations are alleged to have been made, the defendant had possession of the cow. We are of opinion that the court erred in rejecting the said testimony. It is well settled that, when possession of recently stolen property is relied on as inculpatory of the defendant, his explanation of such possession is admissible in his behalf, if such explanation was given on the first occasion for any explanation by him; that is, when he was first directly or circumstantially called upon to explain his possession. Willson, Tex. Crim. Laws, § 1300. It is true that the rejected explanation was not the first made by the defendant. He had explained his possession of the cow to other witnesses on the day previous,—the day on which he was first seen in possession of the cow. With respect to these prior explanations, some of which were proved by the state, and others by the defendant, the testimony was conflicting; and even the state's witnesses, with regard to said explanations, contradicted each other. One of these prior or first explanations was that he had taken up the cow in town, that she belonged to some movers, and that he thought he would get paid for taking care of her. This explanation was made when he brought the cow home, and when he was first called upon to explain his possession of her. The rejected testimony as to explanations subsequently made by him were corroborative of said first explanation; and while, perhaps, ordinarily, such subsequent explanations would not be held admissible, we think where,

¹ As to the presumption of guilt arising from the possession of recently stolen property, see *Young v. State*, (Fla.) 8 South. Rep. 881, and note.

as in this case, the testimony is conflicting and uncertain, it is fair and just that the defendant should have the benefit of them when they are in corroboration of his first explanation, as they are in this case. It had been proved by the state that defendant, on the day he took the cow, made different explanations of his possession of her from that proved by the defendant. The state's witnesses did not agree, but contradicted each other, as to these explanations. In this state of the case the rejected testimony, corroborating, as it does, the other testimony of the defendant, was very material to him. It was for the jury to determine what explanation, in fact, he gave of his possession of the cow when he was first called upon to explain possession, and whether or not such explanation was reasonable, and, if so, whether or not it had been disproved by the state. And, to assist the jury in determining these questions, we think it was the right of the defendant to have placed before them every fact and circumstance legitimately bearing upon and tending to sustain his defense, and tending to support his testimony upon that issue.

Because of the error discussed, the judgment is reversed and the cause remanded.

SHOOK v. STATE.

(Court of Appeals of Texas. April 18, 1888.)

GAMING—INDICTMENT.

An indictment under Pen. Code Tex. art. 185, prohibiting gaming, for money or other consideration, within the limits of a city or town, on Sunday, which charges that defendant played a game of cards for a horse, without alleging the name of the person with whom he played, or with whom the wager for the horse was made, is fatally defective.

Error from Haskell county court; C. J. CHAPMAN, Judge.

Ed. J. Hamner, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. The conviction in this case is under article 185 of the Penal Code, defining the offense of "engaging in any species of gaming, for money or other consideration, within the limits of any city or town, on Sunday." In substance, the indictment charged that the appellant, on the 14th day of August, 1887, in the town of Haskell, Haskell county, Tex., did engage in a species of gaming, and did then and there play at a game of cards for a horse. To be sufficient under the article cited, the indictment should allege the name of the person or persons with whom the defendant engaged in the gaming; or it should have alleged the name of the person or persons with whom defendant played the game of cards, or with whom the wager for the horse was made. While it is true that the elements of the offense are alleged, still a description of the offense, that is, the facts of the transaction, should be given. We can perceive no difference in principle in this case and the cases of *Burch v. Republic*, 1 Tex. 608; *Lewellen v. State*, 18 Tex. 538; *State v. Catchings*, 43 Tex. 654; and *Dixon v. State*, 21 Tex. App. 517, 1 S. W. Rep. 448. Because the indictment is insufficient, the judgment is reversed, and the prosecution is dismissed.

LOUISVILLE CITY RY. CO. v. CENTRAL PASS. R. CO.

(Court of Appeals of Kentucky. May 10, 1888.)

1. HORSE AND STREET RAILROADS—RIGHT TO USE TRACK OF ANOTHER—AGREEMENT FOR COMPENSATION.

Act Ky. March, 1868, grants to the city of Louisville power to contract for the construction of street railways. In the contract made with plaintiff, the council reserved the power to permit other companies, upon compensation, to use plaintiff's track. Defendant, under its charter authorizing it and the city council to contract "in such manner * * * and with such rights and privileges as the council may prescribe," contracted with the council to have the privilege of running over plain-

tiff's track "when the consent of said City Railway Company [plaintiff] shall be obtained." Contract was then entered into between the two companies regarding the use of the track; the terms to be readjusted when necessary, "upon an equitable consideration." Readjustment was determined upon the basis that defendant's right to use plaintiff's track was derived by its charter from the legislature, and that it was therefore liable only to pay for the use and wear of the track. *Held* error, and that plaintiff's compensation should be determined by a consideration of the contract between them and of the growth of the business.

2. SAME—CHARTER AND FRANCHISE—RIGHT TO USE THE TRACK OF ANOTHER.

Act Ky. March, 1863, grants to the city of Louisville power to contract for the construction of street railways. Plaintiff was by its charter "authorized and empowered to construct * * * a railway * * * in such manner and upon such terms and conditions, and with such rights and privileges, as the city council, by contract or otherwise, may prescribe." In the contract between them, the council reserved the power to grant to other companies the right to use plaintiff's track upon payment of compensation. *Held*, that plaintiff's charter did not take from the legislature the right to permit other companies to go upon the same streets, or upon plaintiff's track.

Appeal from Louisville law and equity court.

Plaintiff appeals from the determination of the chancellor fixing the amount due it from defendant for the use by defendant of plaintiff's street-railway track.

Alex. P. Humphrey and *St. John Boyle*, for appellant. *Barnett, Noble & Barnett*, for appellee.

PYOR, C. J. This controversy is between the Louisville City Railway Company and the Central Passenger Railway Company as to the value of the use of the railway track and the franchise on Fourth street between Main and Jefferson streets. The power of the city of Louisville to authorize the construction of street railroads is derived from legislative grant, that confers on the general council the authority, by contract, to empower any corporation or company, etc., to construct street railroads; "the council reserving all rights to regulate and control the same." The appellant, the Louisville City Railway Company, was chartered on the 15th of February, 1864; the second section of its charter providing: "The corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railway, with all necessary and convenient tracks for turnouts, side tracks, and appendages, in the city of Louisville, and in, on, over, and along such street or streets, highway or highways, within the present or future limits of the city of Louisville, as the general council of said city shall authorize said corporators so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the said general council may, by contract or otherwise with said corporation, or any of them, prescribe, as provided in an act entitled 'An act for the benefit of the city of Louisville,' approved March 2, 1863; but said corporation shall not be liable for any baggage carried on said railways, kept in and under the care of its owner, his servant or agent." By virtue of its charter, and the power conferred on the city council, a contract was entered into between the city and this company for the construction of street railroads, the terms and conditions of which, or so much as is deemed material to this controversy, is as follows: "First. The general council of the city of Louisville hereby consent and agree that the Louisville City Railway Company may construct and operate a street railroad or railroads, to be operated alone by animal power, on, over, and along the following streets, and the right and privilege to construct and operate said railroad or railroads is hereby granted to said Louisville City Railway Company by the general council of the city of Louisville on, over, and along the following designated streets, to-wit: Commencing at or near Main and Twelfth streets, running through and along Main street, with double track, to or near Beargrass street, at the Eastern end of Main street; also at Twelfth street to Jefferson street,

through and along Jefferson to its junction with the Bardstown turnpike; also at Twelfth street and Jefferson street, through and along Twelfth street to Broadway, through and along Broadway to the city limits, in the direction of Cave Hill cemetery; also from Main street, through and along Sixth street, to Broadway, with double track; also commencing on Preston street near the Ohio river, thence over, along, and through Preston street to the city limits, in the direction of Belleview and Spring Gardens; and the said railway company shall have the right to connect any of said railways the one with the other. If the First & Second Street Horse Railroad Company shall, within thirty days of the signing of this contract, file in the office of the mayor of the city of Louisville their consent to the rescission of their contract with the city, then, in consideration thereof, it is made a condition of this grant, irrevocable without the consent of said First & Second Street Horse Railroad Company, that the Louisville City Railway Company shall lay down, under the provisions of this agreement, a line of road from the corner of Fourth and Main streets, out Fourth to Jefferson, up Jefferson to Second, out Second to Breckinridge, within twelve months from the completion of this contract; said line to be extended up Breckinridge to First street, and out First street to the city limits, whenever the improvements in that part of the city shall render such extension proper, to be determined by the general council. And it shall not be a breach of this contract if this extension from Breckinridge street is not made in three years from the signing of this contract, unless ordered by the general council; but the right hereby vested in the Louisville City Railway Company, as expressed in the foregoing clause, shall not confer on said company any right or power before given to the First & Second Street Horse Railroad Company, unless by the consent of said last-named company, evidenced by writing as aforesaid. *Second.* The right of the Louisville City Railway Company, hereby vested in them, to operate said railways, shall extend to the full term of thirty years from the date of this agreement, that being the term for which said company is vested with corporate privileges by the legislature; and at the expiration of said time the said railway company, operating said railways, shall be entitled to enjoy all of said privileges, on the conditions expressed, until the city of Louisville, by the general council, shall elect, by ordinance or resolution for the purpose, to purchase said tracks or said railways, cars, carriages, station-houses, station grounds, depot grounds, furniture, and implements of every kind and description used in the construction and operation of said railways, and of the appurtenances in and about the same, and pay for the same in the manner hereinafter mentioned. *Third.* Such ordinance or resolution shall fix the time when the city of Louisville will take said railways and other property before mentioned, which shall be not less than six months after the passage of ordinance or resolution; and at the time of taking said railways and property, if the city shall so elect, before mentioned, the city of Louisville shall pay to the said Louisville City Railway Company a sum of money to be ascertained by three commissioners, to be appointed for the purpose, as follows: One to be chosen by the general council from the disinterested freeholders of Jefferson county, one in like manner to be chosen by the said Louisville City Railway Company, and these two persons to choose the third in like manner from said freeholders of Jefferson county; but in making the estimate by the commissioners the city is not to be charged with the right of franchise or right of way over the streets herein granted to said railway company for any value or supposed value growing out of the same. * * * *Ninth.* The said Louisville City Railway Company shall, for the franchise and privilege herein granted to construct and operate railways over the streets hereinbefore named, pay into the city treasury of the city of Louisville, each and every year, the sum of twenty-five dollars tax or license for each and every car run upon their said railways, or such other sum as the general council may fix, not less than twenty-five and not to exceed

fifty dollars for each car so used by said company, so long as said company shall operate said railways, or so long as the same shall be operated by any other company. * * * *Eleventh.* The city council shall at any future time have the power, when the public good demands, to grant a second or third company or individual the right to occupy any track already laid down, provided the expense of laying and keeping in repair said track, so far as used by different companies or individuals, shall be equally borne by all those that use them; but the council shall not have the right to grant a permit to run upon any route already disposed of, for a greater distance than one-tenth of the whole route; and provided, that no privilege or right shall be granted to any other company or individual to run to the same terminal point over the track of the Louisville City Railway Company, or such terminal point or points over their track, than the one-tenth of the whole route, but may run upon another street or line to any other point."

Under this contract the Louisville City Railway Company constructed a line of double-track street railway from Fourth and Main, along Fourth street, to Jefferson, with a stand at Fourth and Main streets. The appellee, the Central Passenger Railroad Company, was chartered in the year 1865, December 29, and, by the second section of the act, was authorized to construct a street railroad as follows: "This corporation is hereby authorized and empowered to construct, maintain, and operate a single or double track railroad, with all necessary and convenient tracks for turn-outs, side tracks, and appendages, in the city of Louisville, commencing at the intersection of Water and Second streets, and running south, over and along Second street, to Main street; thence west on Main to Fourth street; thence south, over and along Fourth street, to Oak street; and over and along Seventh street from Main street to the southern limits of the city; also on Walnut street, from eastern to western limits of the city, with such further extension in the same or other streets in the city of Louisville as the general council of said city may authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the general council may, by contract or otherwise with said corporation, or any of them, prescribe." Under this charter, and by virtue of the power conferred on the city, the Central Passenger Railroad Company contracted with the city, the first section of which is as follows: "*First.* That, in consideration of the payments herein mentioned to be made, and the acts hereinafter stipulated to be done and performed by said Central Passenger Railroad Company, the city of Louisville hereby agrees that said Central Passenger Railroad Company may construct and operate street railroads, to be operated alone by animal power, on, over, and along Fourth and Walnut streets, as hereinafter shown; and the right and privilege to construct and operate said street railroads are hereby granted to said Central Passenger Railroad Company by the city of Louisville, on, over, and along Fourth and Walnut streets, as follows, viz.: Commencing at or near Fourth and Jefferson streets, running thence through and along Fourth street, with double track, and the necessary turn-outs, southwardly to Oak street; also over and along Walnut street from Garden to Eighteenth street with double track,—the track to be laid beyond Kentucky street so soon as the street beyond Kentucky street shall be graded. It is further agreed that the said Central Passenger Railroad Company shall have the privilege of running their cars to Main street, on Fourth street, over the track of the Louisville City Railway Company, as provided in section eleven of the agreement between said Louisville City Railway Company and the city of Louisville, when the consent of said City Railway Company shall be obtained." On the 28th of June, in the year 1866, these companies, the Louisville City Railway Company (appellant) and the Central Passenger Railway Company, (appellee,) entered into a contract for the use of appellant's tracks on Fourth between Main and Jefferson streets by the appellee, as follows: "This con-

tract witnesseth, that the Louisville City Railway Company, of the first part, and the Central Passenger Railway Company, of the second part, have this day entered into the following agreement: The first party is to permit the second party to have the use of their tracks on Fourth street between Jefferson and Main streets, in the city of Louisville, for the purpose of running their cars over and along the same, for one year from the date hereof, on the following terms and conditions, to-wit. The second party is to use said road, and run their cars thereon, in strict compliance with the contract of the first party with the city, and are to keep said streets and tracks in good repair, as is required by the contract of the first party with said city, at their own expense, during the continuance of this contract. The second party is to pay the first party, in cash, the sum of \$913.13, which is fifteen per cent. on the actual cost of the construction of the said tracks, the receipt of which is hereby acknowledged. The second party also covenants and agrees to pay the contractor with the city of Louisville, for bowldering Fourth street from Main to Jefferson, the sum of \$500, being the sum agreed to be paid by the first party to said contractor; and the second party do hereby assume said contract for the first party, and agrees to carry out the same, and hold the first party free and harmless therefrom. The second party is to comply with all the ordinances and laws of the city of Louisville, and the contract of said party with said city in regard to said road, and the operating the same, and in every respect to hold the first party free from damage or cost resulting from their failure to keep said road in order, or in not complying with said contract of the first party with the city, or the laws and ordinances of said city. The second party is to have the use of the stand at Main street, but is not to use it, or any part of said track, so as in any way to interfere with or interrupt the first party in the free and full use of said road for their own purpose; and, to prevent any interference on the part of the second party with the first party in using and operating said road, the second party is to be governed, in their use of same, by the time-tables of the first party. Should any change of the tracks or stand be necessary in operating said road, said change is to be made at the expense of the second party, but under the direction and advice and with the consent of the superintendent of the first party. It is also understood and agreed that, in the use of said tracks by the second party, they are not in any way to interfere with the running of the cars of the first party on Jefferson street, and in crossing the Jefferson-Street tracks the cars of the first party are to have the preference; and the second party are to pay all damage to the first party, or to any one else, that may at any time occur by reason of the privilege hereby granted to the second party to cross Jefferson street with their cars. It is also hereby distinctly agreed that Main and Fourth streets is a terminal point of the road of the first party; and by this contract the second party claims no right to run over any other road, or part of road, belonging to the first party than they otherwise would have had had this agreement not been made; and by this agreement it is understood that the first party guaranties to the second party that they shall at all times have the uninterrupted use of said road, but to the extent only that they have the power to grant or control the same as above set forth. The terms of this contract may be altered from year to year, or at any time after the expiration agreed on, upon notice of thirty days by either party. In the event of such notice, then new terms are to be agreed upon. Should the parties hereto be unable to agree, then each party is to select one person, and these persons, disagreeing, are to select an umpire, to determine upon an equitable consideration for the privileges herein granted to the second party. Their decision, then made, shall be binding on both parties. Should the second party, at any time within _____ days after notified so to do, fail to fully comply with the terms of this contract, or any that may hereafter be made by the parties hereto, touching the privileges herein granted them, then the first party shall have the right

to stop the second party from using said track, and the other privilege herein granted. It is understood that the use of the tracks, as hereinbefore granted, is to be continued to the second party during the charter of the first party, but the terms therefor may be altered as hereinbefore provided for."

Under the terms of this contract it could be altered from year to year upon notice as provided, and new terms agreed on; and, in the event of a disagreement as to the terms, resort was to be had to arbitration, the decision of the arbitrators to determine their respective rights. The appellant, the City Railway Company, becoming dissatisfied with the terms of the contract, or the rental value agreed on, gave the proper notice that a change of terms was desirable; and the parties, failing to agree, and making ineffectual efforts to obtain arbitrators, applied to the chancellor to fix the compensation the appellant was entitled to for the use of its tracks by the appellee. The chancellor, on the hearing, gave as compensation, annually, the sum of \$172.08 as rental, and required the appellee, the Passenger Railway Company, in addition, to pay three-fourths of the taxes, and the annual cost of maintaining the track, which would amount in all to not exceeding \$300. Of this judgment the City Railway Company complains.

It is conceded by counsel for the appellant—or, if not, the authorities settle the question—that the grant of the franchise in the first instance to the appellant did not take from the legislature the right to permit other companies to go upon the same streets of the city, or upon the track of appellant's railway, and compete with the latter in the business of carrying passengers from one part of the city to the other. This may be done upon making compensation to the company whose railway track is used; and, when not used, such grants not being exclusive, the right to construct other and competing tracks in the same street may be allowed without compensation. If the franchise is exclusive, it only applies to the use of the track by the company owning it; and for this use, and not the value of the franchise, the company owning it is entitled to compensation as against a company deriving a like franchise, although of a later date, from the sovereign power. This seems to be the doctrine recognized by Mr. Redfield in his work on Railways, and in the cases of *Railroad Co. v. Railroad Co.*, 12 Allen, 262, and *Railroad Co. v. Railway Co.*, 118 Mass. 290. The grant in this case to the appellee includes in its route Fourth street between Main and Jefferson; and having a like franchise, if unrestricted, would entitle it to use the track of the appellant on Fourth between Main and Jefferson, by compensating the latter for the use and wear of its tracks only, and no compensation should be allowed for the injury to the franchise, or the profits resulting from it. It is urged by counsel for the appellee that such is the nature of its grant; and that under its charter the right was given, not only to run on the street at the point in controversy, but to use the track of the appellant; and the chancellor below, taking this view of appellee's charter, rendered the judgment complained of. By the act of March, 1863, the general council of the city of Louisville was authorized to have constructed a railroad or railroads, with single or double tracks, on such streets as it might by resolution designate, etc.; and, further, that "the general council might, by contract, sale, or bargain, empower any corporation or corporations, parties or company, to construct said street railroads,—the general council reserving all rights to regulate and control the same." Under this power vested in the city council, the appellant entered into the contract for the construction of its railway, and obtained from the council a stipulation that no privilege or right shall be granted to any other company or individual to run to the same terminal point over the track of its railway. The council, however, reserved the right to permit other companies to occupy the track of the appellant, already laid down, upon the conditions prescribed. This contract has never been modified, either by the council or by amendment to appellant's charter; and whether the exclusive privilege

conferred on appellant in denying any other company the right to run to the same terminal point over appellant's track can be enforced, as between the appellant and the city, is not a question before us. That provision of the contract has not been violated so far as this record shows, but has been complied with. When the appellee entered into its contract with the city, it knew the terms of the legislative grant to the appellant, and the nature of the rights and privileges given it by the contract with the general council, and therefore it was provided in the contract with the appellee as follows: "It is further agreed that the said Central Passenger Railroad Company shall have the privilege of running their cars to Main street on Fourth street, over the track of the Louisville City Railway Company, as provided in section 11 of the agreement between said Louisville City Railway Company and the city of Louisville, when the consent of said City Railway Company shall be obtained." After this, the contract between the two companies was entered into, and the consent of the appellant obtained upon the terms therein expressed. The contract is to continue until the appellant's charter expires; and by its terms the appellee is to pay the appellant \$913.18 per annum, and keep the streets and track in good repair at its own expense, with the proviso that, when either party became dissatisfied as to the terms, the matter was to be referred to arbitrators for an adjustment on equitable terms. The contract was not to be canceled as to the right of the appellee to the use of appellant's track, but the terms of the occupancy might be changed by arbitration in the event the two companies failed to agree.

The contention by the appellee that it derived its right to the use of the appellant's track from the legislature, and not by contract with the city or with the appellant, and therefore is only liable for the use of the rails and ties, cannot be sustained. In the first place, the charter of the appellee gives it no right, unless by implication, to use the rails and ties of the appellant. The right to the appellee to construct and operate a single or double track railway along this route did not confer the right to use the appellant's tracks. The right to use the property of another, without his consent and without any provision made for compensation, although for the public use, cannot well arise from mere implication. It is argued that as the appellant already had double tracks on Fourth street, that it is unreasonable to suppose the legislature intended to authorize the laying of two additional tracks on the same street by the appellee, and therefore the right to the use of the tracks already down must have been the legislative will. This view seems not only reasonable, but clear, when taken in connection with the power previously conferred by the legislature on the city council with reference to street railways. A general power to contract with companies for the construction of such railways had been previously given the city, with the right to regulate and control the same. Under this power, the appellant had executed its contract; and when the legislature made the grant to the appellee defining its line of railway, with the right to extend its line to other streets, the power was reserved to the city and the appellee to contract "in such manner, and on such terms and conditions, and with such rights and privileges, as the general council may, by contract or otherwise with said corporation, or any of them, prescribe." They did contract; and it is evident that the city, in prescribing the terms, recognized its obligation to the appellant, and required the appellee to obtain appellant's consent to the use of its tracks on Fourth between Main and Jefferson. This view is in harmony with the legislation under which the appellee obtained its charter, and the previous legislation conferring on the general council the power to contract for the construction of street railways. Both the legislature and the appellee looked to this power given the city; and from that source, and that only, under such a charter, could the appellee have obtained the right to the use of appellant's tracks. Neither the law-makers nor the appellee could have understood that appellee's charter gave it the right to

use appellant's property, where there was no express authority given, in the grant, to that effect, without appellant's consent or that of the city council; but, when considering the legislation already in existence with reference to the city on the same subject-matter, the mode of obtaining the use was well understood. The consent of the city having been given that this use might be obtained by the appellee from the appellant, the contract between the two was entered into. The rights or equities of the parties must, to a great extent, be determined by its terms.

This is not a case where the one company has the legal right to enter upon and use the tracks of another company by reason of legislative authority. It is true that the charter confers upon the appellee the right to lay down tracks on Fourth street; but the city, having a voice in the legislation of street railways, so essential to its interests, and having contracted with the appellant, required that an arrangement should be made between the two companies before the one should use the track of the other; and, to accomplish this, the contract regulating the compensation to be paid the appellant was entered into. The one was contracting for the use of so much of the other's tracks as lay in the most populous part of the city, and at a location where, as the proof shows, is the most desirable terminus. At no point can so many passengers be obtained. It is in the business part of the city; the lines of travel going in all directions from that point, and, as the proof shows, the appellee running four times as many cars as the appellant. These valuable contract rights that were granted to the appellee by the appellant during the existence of its charter were estimated by the two companies, in June, 1866, the sum of \$913 per annum, with the obligation on the part of the appellee to keep the streets and tracks in good repair. Neither party had the right to abandon the contract; but had the right after notice to fix upon new terms, and to call on arbitrators if they failed to agree, "to determine upon an equitable consideration for the privileges granted the appellee." If this use was worth, in 1866, as much as \$913, what was it worth in 1886, when this judgment was rendered, or at the end of the rental year next ensuing after the date of the notice? The population of the city had increased rapidly from the time of the contract made in June, 1866. The profit in conducting such a business becomes greater as the population increases. The value of the use of the franchise was, at the date of the notice, several thousand dollars annually,—greatly more than any of the parties contemplated; and, while the appellant is not entitled to the value of this use, it is evidently entitled to an equitable consideration; and what that consideration should be, is difficult to determine. If the parties regarded it as worth \$900 in 1866, it should be worth per annum, from June, 1881, the year ending after the date of the notice, as much as \$1,500 per annum. The parties were evidently contracting with reference to an increase in population when the question of consideration was left open, or could be changed upon notice given by the one party or the other; so, if the profits of travel increased or diminished, either company could avail itself of the advantage. Neither the value of the use of the franchise, nor the mere compensation for the use of the rails, formed the basis of the contract stipulations. The two companies acquired contract rights that are capable of being enforced upon equitable terms. The appellant will not be allowed to say that it must have the value of its franchise, or the appellee that it will only pay \$172 per annum as compensation. Neither view of the case would be equitable, or within the true meaning of the joint obligation. The surrender of the use of appellant's tracks for near 30 years to the appellee, when the city had by its contract with the appellee left it voluntary with the appellant as to its consent to the use, and at a point where the life of the city as to travel existed, was something more than a mere nominal consideration, and therefore it seems to us the compensation allowed by the chancellor is entirely inadequate.

The judgment is reversed, and the cause remanded, with directions to fix the compensation at \$1,500 per annum from the 26th of June, 1881; the other stipulations in the contract to be as binding on the parties as if no change in the compensation had been made.

SUTTON *et al.* v. SUTTON *et al.*

(Court of Appeals of Kentucky. May 13, 1883.)

DESCENT AND DISTRIBUTION—BASTARDS' RIGHT TO TRANSMIT INHERITANCE.

The legitimate children of a deceased bastard inherit from their parents' bastard brother by the same mother, when such bastard brother died before the death of the parent, under Gen. St. Ky., providing that bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock.

Appeal from circuit court, Henderson county.

This was a suit by the legitimate children of W. S., Stephen and Greenberry Sutton, for a division of the estate of Kelly Sutton, deceased. Kelly, Miles, W. S., Stephen, and Greenberry Sutton, and Mrs. Sarah Overfield were brothers and sister born out of wedlock, and bastards, of the same mother. Miles Sutton and Mrs. Overfield survived Kelly Sutton, while his other brothers died before he did. Miles Sutton and Mrs. Overfield appeal from a judgment for plaintiffs.

John Young Brown, Thos. E. Ward, and Edward W. Hines, for appellants. Yeaman & Lockett, S. B. & R. D. Vance, Cissell & Dudley, and John T. Handley, for appellees.

HOLT, J. This appeal presents but one question: Can the legitimate children of a bastard inherit from the bastard brother of their parent who dies after the death of such parent? At the common law a bastard is *nullius filius*. Blackstone says that he is of kin to no one, derives no inheritable blood from any one, and can therefore neither be heir to any one, or have heirs save of his own body. It was provided, however, by our statute of descents, in 1796: "Bastards, also, shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother." 1 More. & B. St. 565. This was the first innovation upon the common-law rule in this state. It was copied *verbatim* from the Virginia statute of 1785; and in the case of *Stevenson's Heirs v. Sullivan*, 5 Wheat. 207, where bastards claimed to inherit from a legitimate brother, the supreme court of the United States construed it as meaning only that bastards "shall have a capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate." This court considered it, in 1834, in the case of *Scroggins v. Allan*, 2 Dana, 363. Henry Edgar, a bastard, died, leaving a legitimate child, to whom his land descended, but who died in infancy. The mother of the bastard was also dead; and the question was whether his legitimate brothers and sisters, or his wife, took the estate. This court followed the supreme court, holding that the statute only permitted the bastard to inherit from the mother, and transmit an inheritance to his own issue; and while, to this extent, *quasi* legitimate, yet in all other respects he was a bastard, the mother being unable to take from him, and he being in law without father, brothers, or sisters. Thus the law remained until 1840, when another change was made. The act then passed provides "that the mother shall be, and is hereby rendered, capable to inherit and take by descent or distribution as heir or distributee of her bastard child; and brothers and sisters of the same mother, born out of wedlock, shall be capable to inherit and take by descent or distribution from each other, as though born in wedlock, and as brothers and sisters of the whole blood." Lough. Dig. 211. In *Remington v. S. S. W. no. 5*—22

v. Lewis, 8 B. Mon. 606, (1848,) it was said that the statute as thus amended permitted the mother to inherit from her illegitimate child, and her illegitimate children from each other; but the question there was whether the legitimate brother of the bastard, or the latter's wife, should take, and it was held that it did not operate to establish a right either in the illegitimate children to inherit from the legitimate, or in the legitimate to take from the illegitimate. The bastard, under this construction, has, under the law of descent, no brothers or sisters, save the illegitimate children of the same mother. The acts of 1796 and 1840 were, in substance, incorporated into the Revised Statutes, (1852,) and also into the present General Statutes, (1873.) The provision is the same *verbatim* in each, and reads thus: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother, and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents." It was said in *Allen v. Ramsey's Heirs*, 1 Metc. (Ky.) 635, (1858,) that this statute embraces all the provisions of both the act of 1796 and that of 1840, so far as they relate to bastards; but the question in this case was whether a bastard (his mother being dead) could take as the heir of the mother's brother, and the claim was rejected. In *Berry v. Owens' Heirs*, 5 Bush, 452, O. survived his sister, and her only child, an illegitimate daughter. It was decided that B., the son of the illegitimate daughter, could not inherit from O., who died intestate, and without descendants. The record in this case was an imperfect one; and, doubtless owing to this fact, some portions of the opinion are not only wanting in that clearness of statement for which the writer was justly distinguished, but go beyond the question presented. It is evident, however, that the case now presented is unlike it. In *Jackson v. Jackson*, 78 Ky. 390, it was held that a bastard cannot inherit, through his mother, from her ancestors or collaterals.

We have briefly noticed the above cases by way of calling attention to the fact that they are unlike the one now before us. In the most of them the right of a bastard to inherit was in issue. Here the legitimate heirs of parents, who, if alive, would take, are asserting a right to the inheritance. We must not confound the law applicable to bastards with that applicable to the legitimate children of a bastard. If the appellees in this case were bastards, undoubtedly they could not inherit from the brother of their deceased parents; but, being legitimate, why do they not succeed to all the inheritable rights of their parents? The latter and the intestate were all bastards, by the same mother. This being so they could, by the express language of the statute, inherit from each other. It says: "Bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents." It is urged that the bastardy of the parents stopped the current of inheritable blood. While this is true at common law, yet the statute has declared that it shall flow on as between bastards by the same mother, and that they shall inherit from each other. It legitimates bastard children by the same mother—*First*, as to their mother; and, *second*, as to each other. It puts them upon the footing of legitimate brothers and sisters, as to each other; and the statute of descent applicable to legitimate brothers and sisters, therefore, applies, as between them and to their legitimate descendants. It follows from this, in our opinion, that the legitimate child of a deceased bastard may inherit from the bastard's mother, and that such a child succeeds to the parent's right of inheritance from a bastard brother or sister. The legitimate child of a bastard has all the rights of any child, as to the parent; and the bastard parent can transmit to his or her legitimate child all the rights he or she has equally with any other parent. Among them is the right to inherit from a bastard brother or a bastard sister; and, if they are brothers and sisters in contemplation of law, it follows logically that the legitimate child of a deceased one

should succeed to the inheritance that would have belonged to the parent were he or she alive. This is equitable.

It is contended that the statute is in derogation of the common law; that it should therefore be construed strictly; and that while it permits bastards by the same mother to inherit and transmit an inheritance "on the part of each other," that yet the legitimate children of one of them cannot take what the parent would have inherited if alive, because the statute does not expressly say so. Section 16, c. 21, Gen. St., however provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this Revision. On the contrary, its provisions are to be liberally construed, with a view to promote its objects." To say that the legitimate offspring of a bastard shall not take what he would have inherited if alive, would not only be unjust, but unreasonable. If, as we think, the effect of the statute be to make bastard children by the same mother legal brothers and sisters as to inheritance from each other, then it follows that not only the spirit, but even the letter, of our statute of descents gives to the legitimate children of one of them, *per stirpes*, the portion the parent, but for his or her death, would have inherited. Judgment affirmed.

BREWER v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 10, 1888.)

1. HOMICIDE—MURDER—EVIDENCE.

On the trial of an indictment for murder, evidence that defendant, a short time before the killing, became angered at a brother of deceased, and said that deceased and such brother were trying to run him off, but that he intended to arm himself, and would not be run off, is competent as tending to show the state of defendant's feelings towards deceased; and evidence that defendant accused his wife of showing a preference for deceased is competent for the same reason.

2. SAME—SUBMITTING CASE IN DEFENDANT'S ABSENCE—WHEN NOT ERROR.

On a trial for murder, it is error to submit the case to the jury to consider their verdict in the absence of the accused; and, unless it affirmatively appears from the record that such error is not prejudicial, a new trial will be granted.¹

Appeal from circuit court, Franklin county.

P. W. Major and Scott & Violet, for appellant. P. W. Hardin, for appellee.

BENNETT, J. The appellant was indicted, in the Henry circuit court, for the murder of John T. Downey, and was convicted of the crime of manslaughter, and his punishment fixed at confinement in the penitentiary for the term of 21 years. The argument of counsel was concluded about 10 o'clock at night. The case was not finally submitted to the jury that night; but, in the absence of the appellant, and while he was in jail, the case was finally submitted to the jury on the following morning to consider of their verdict. It is the settled law of this state (see *Allen v. Com.*, 6 S. W. Rep. 645, and the authorities there cited) that it is error, in a felony case, to submit the case to the jury to consider of their verdict in the absence of the accused; and, unless it affirmatively appears from the record that such error is not prejudicial to the rights of the accused, he should have a new trial. In this case it does not affirmatively appear that the appellant was not prejudiced by the final submission of the case to the jury in his absence, nor does it positively appear that he was prejudiced by such submission; but we must presume, in the absence of record evidence to the contrary, that he was prejudiced by such submission, which entitles the appellant to a reversal.

¹ On the general subject of the presence of the accused, see *State v. Kelly*, (N. C.) 2 S. E. Rep. 185, and note; *Roberts v. State*, (Ind.) 12 N. E. Rep. 500; *Jackson v. State*, (N. J.) 9 Atl. Rep. 740; *Bond v. Com.*, (Va.) 8 S. E. Rep. 149; *State v. Perkins*, (La.) 3 South. Rep. 647; *State v. Myrick*, (Kan.) 16 Pac. Rep. 330.

The instructions of the court are substantially correct. The commonwealth was permitted to prove, for the purpose of contradicting the appellant, that the appellant, a short time before the killing, becoming angered at Joe Downey, a brother of the deceased, for having hung a jack o' lantern on the yard fence, said that the Downeys were trying to run him off; but he intended to arm himself, and would not be run off. The appellant contends that this evidence was incompetent. But we think, as the jury had a right to infer that the deceased was included in the remarks, that it was competent to go to the jury as original evidence tending to show the state of the appellant's feelings towards the deceased. The evidence of Lizzie Gordon was not competent, for the reason that it did not tend to show the state of the appellant's feelings towards the deceased; and, as it related to a collateral matter, the commonwealth was bound by the appellant's answer. The evidence relating to the appellant's accusation against his wife, to the effect that she showed a preference for the deceased, was competent, because it tended to show the state of his feelings towards the deceased.

For the error in submitting the case to the jury in the absence of the appellant, the case must be reversed, with directions to grant the appellant a new trial, and for further proceedings consistent with this opinion.

PUGH *et al.* v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 10, 1888.)

RAPE—PROOF—NONSUIT.

On an indictment for rape upon the person of a child between 18 and 14 years of age, where the evidence discloses the fact that the defendants did have intercourse with her, and, from her testimony, compelled her to submit to their embraces, the court properly refused to instruct the jury, after the testimony of the state has closed, to find the defendants not guilty.

Petition for rehearing. For former opinion, see 7 S. W. Rep. 541. Appellants were indicted and convicted of the crime of rape.

G. A. Cassidy, M. H. Stitt, and L. J. Moore, for appellants. P. W. Hardin, for the Commonwealth.

PRYOR, C. J. I infer that the record before us is different from the one read by counsel, as he seems so confident as to the error committed by the court in saying that Fannie Barnet was a little girl, when there is no testimony on that subject. One witness states that Fannie Barnet was apprenticed to him about two years prior to the date of his testifying, and she was then said to be 10 or 11 years old. The question was submitted to the jury as to the venue. If the crime was committed in Fleming county, they were told they must find the parties guilty if the offense charged had been proven beyond a reasonable doubt. Petition overruled.

MAXWELL v. SMITH *et al.*

(Supreme Court of Tennessee. April Term, 1888.)

1. DESCENT AND DISTRIBUTION—EXONERATION OF LAND BY PAYMENT OF PERSONALTY TO HEIRS.

Under Code Tenn. §§ 2267-2269, providing that, the personalty of a decedent having been exhausted in the payment of *bona fide* debts, leaving debts unpaid, the real estate may be sold to satisfy such debts, if a personal representative, in due course of administration, without notice of any other debts, and after the expiration of the time fixed by section 2311 for payment to legatees and distributees, pay them the amounts in his hands due them, taking and causing to be recorded the refunding bonds provided for by sections 2316, 2317, with good security, conditioned for the payment of the *pro rata* of such legatee or distributee of any debts thereafter established by any creditor of said decedent, as provided in said sections, the real estate of such decedent will be exonerated from the payment of debt to the

amounts so paid to such legatees or distributees, and as to such amounts such creditor can only look to the distributees or legatees and the refunding bonds, regardless of the insolvency of such parties, or the sureties on said bonds; nor is it material that the legatee or distributee is the heir or devisee into whose hands the real estate has passed.

2. SAME—LIABILITY OF DISTRIBUTEES FOR DEBTS OF DECEDENT.

Where lands of a decedent, whose personalty was insufficient to pay his debts, have been partitioned among his heirs, some of whom have aliened their shares to *bona fide* purchasers, which are therefore not liable to such debts, the shares unaliened are liable to creditors for the full amount of the debts, although, as between each other, the heirs should bear the burden ratably; and those whose land is so subjected may compel contribution from the others.

3. SAME—SCIRE FACIAS.

Scire facias by a creditor on a refunding bond given by a legatee is, under Code Tenn. § 2318, the remedy to be pursued in the county court where such bond is of record as by said section provided; and it is error in a chancery suit upon a bill not filed for the purpose, and to which many of the sureties are not parties, to allow writs of *scire facias* to issue, requiring the legatees and their sureties on refunding bonds to show cause why judgment should not be rendered on such bonds. The proper course in such case, after a decree against the personal representative and a finding of fully administered, is to file an original or supplemental bill, setting up such decree and finding, as provided in said section.

4. PRINCIPAL AND SURETY—LIABILITY OF CO-SURETY.

The fact that lands, descended to the heirs of one of two deceased sureties, were partially exonerated from liability for a debt by personalty having been paid over to distributees, for which refunding bonds were taken, in accordance with Code Tenn. §§ 2316, 2317, does not operate as a payment of any part of the debt, or affect the right of the creditor to collect the whole of his debt, not actually paid, from the estate of the other surety.

5. EXECUTORS AND ADMINISTRATORS—SALE OF LAND BY ORDER OF COURT.

When real estate of a decedent is sold, under decree of court, to pay debts of the estate, such sale is absolute, and free from the equity of redemption.

6. EQUITY—DECREE—AMOUNT OF RELIEF GRANTED.

A decree is not erroneous for being for a greater sum than claimed by the bill, when the bill seeks the recovery of a certain sum, with interest from a given time, and the decree is for a sum less than the amount named in the bill, with interest "from the time specified until the date of the decree.

Appeal from chancery court, O'Brien county; H. J. LIVINGSTONE, Chancellor.

Bill in equity for settlement of guardian's account, by S. J. Maxwell, a minor, by next friend, against S. W. Howard, his guardian, J. G. Smith, personal representative of J. H. Meachum and J. J. Reeves, deceased, sureties on said guardian's bond, and the heirs, legatees, and devisees of said sureties. Decree for plaintiff for a sum of money, and for sale of real estate of heirs and devisees of decedent. Defendants appeal. Code Tenn. § 2311, provides that a personal representative shall, after the expiration of two years and six months, pay over the surplus in his hands, after payment of debts, etc., to the persons entitled thereto; sections 2316, 2317, that such persons shall give bond, with surety, conditioned to refund and repay their ratable part of any debts of the decedent afterwards appearing to be due, and that such bond shall be recorded in the county court, and have the effect of a record. Section 2318 provides that, when a personal representative has pleaded "fully administered," "no assets," or "not sufficient assets," and such plea is found in his favor, the creditor may have a *scire facias* against the obligors of such refunding bond to show cause why execution should not issue against them for the amount of the judgment against the personal representative. Sections 2267, 2268, provide that if the personalty of a decedent has been exhausted in the payment of *bona fide* debts, leaving debts still unpaid, the real estate may be sold to satisfy the same, but the court shall be satisfied that the personal estate has been exhausted in the payment of *bona fide* debts before decreeing sale of real estate.

W. G. Smith and Enloe & Wells, for appellants. *F. W. Moore*, for appellee.

LURTON, J. This is a bill filed by a minor ward against his guardian, S. W. Howard, and the sureties on his bond. The bill seeks an account with the guardian, and his removal; alleging that he has wasted the estate, and failed to make true settlements. The bond of the guardian was made in 1868, and is in the sum of \$8,000, and with two sureties, J. H. Meachum and J. J. Reeves. Both of these sureties are dead, and defendant J. G. Smith is the administrator of Meachum and executor of Reeves, and this suit is against him in both his official characters. The heirs at law of Meachum, and the devisees and legatees under the will of Reeves, are made defendants. The bill seeks to subject lands descended or devised, to the satisfaction of any decree obtained against the personal representatives of the two sureties, and which is not satisfied out of the personal estate. An account was stated by the master with the guardian, and confirmed by the chancellor. No such clear mistake is pointed out by the appellants as will justify us, under the well-settled rules of this court, in disturbing this decree. *Turley v. Turley*, 1 Pickle, 251, 1 S. W. Rep. 891. The objection that the decree is for an amount in excess of the amount of the liability stated in the bill is not supported by the bill. Two distinct decrees are prayed for in the bill: one for the amount supposed to be due from the guardian upon his general account, and for which his general bond is supposed to be liable; and a decree is likewise sought for a special fund arising from sale of some lands in Henry county, and for which a special bond was given. The amended bill states the balance due from the guardian, in 1881, to be "about \$2,500;" and this, with interest, is sought to be recovered upon his regular bond. The decree, on this branch of the case, is for \$3,273.35, which includes interest up to date of decree, in 1887. It is obvious that this sum is not in excess of the allegation in the bill, which sought interest upon the supposed balance of \$2,500.

There was a decree against the personal representative of the estates of the two sureties, but the plea of "fully administered" was found in his favor as to both estates. There was a decree to sell certain lands which had descended to the heirs of the surety Meachum. From this decree these heirs appealed. It is insisted that this decree to sell lands of the intestate which have descended to his heirs is erroneous, because the personal estate which came to the hands of the personal representative has not been exhausted in the payment of debts, but was paid over to the distributees, and that the personalty so paid to the distributees, to that extent, will exonerate the lands described. After the payment of such debts as had been filed with the administrator or brought to his notice, there remained several hundred dollars; and this fund, after the lapse of three years, was paid over to the distributees,—refunding bonds being taken with two good sureties; and these bonds were recorded in the county court, as required by Code, §§ 2316, 2317. Certain lands owned by the intestate at his death were subsequently, by decree of the county court, duly portioned among his heirs, some seven or eight in number. The heirs among whom the lands were portioned were likewise the distributees, being children of intestate. Several of the heirs have aliened their shares in the divided real estate, and no effort is made to reach such alienated lands; the decree of the chancellor, in so far as he refused relief against lands or shares alienated, not being appealed from. Several of the tracts, being the shares of some three or four of the heirs, were, however, as before stated, ordered sold for satisfaction of complainant's decree. The question for settlement is as to the validity of this decree, in view of the facts concerning the personalty paid over to the heirs as distributees, upon refunding bonds. The weight of English authority is that the administrator cannot ordinarily exonerate himself from liability to a creditor of the intestate by showing that he had distributed the fund to the distributees, even though he had not notice of the creditor's debt. 1 Lomax, Ex'rs, side page 114, and authorities cited. The administrator in such case had to protect himself by looking to the distributees, or to such

bond as he had given; but in this state such judgment would not be a *devastavit* after the lapse of two years and six months, where there was no notice of other debts, and refunding bond was taken, as required by section 2316. See Code, § 2311, requiring such distribution. This refunding bond, which the administrator may require, is for the protection of creditors who shall subsequently establish their demands by judgment against the administrator; and in such case, where the plea of "fully administered" is found in favor of the administrator, a summary remedy upon the bond is provided, which may be resorted to by the creditor. Code, § 2318. It is clear, therefore, that where the administrator has, without notice of debts, paid over the funds in his hands, after the time has expired within which domestic creditors may bring suit, and has taken solvent refunding bonds, and reported them to the county court, that he is exonerated from liability as to such assets, and that the plea of "fully administered" should be found in his favor upon suit by a creditor. But does it follow that the finding of "fully administered," in such a case, would alone entitle the creditor to subject lands descended? We think it would not. The bill in this case was filed under the act of 1827. Code, §§ 2267, 2270. This act, in express terms, requires that before any decree ordering lands of an intestate to be sold shall be pronounced, that "it shall be made to appear to the satisfaction of the court that the personal estate has been exhausted in the payment of *bona fide* debts." Now, where the personal estate has been paid over to the distributee, as in the case under consideration, it obviously has not been "exhausted in the payment of *bona fide* debts." This requirement, that the personalty shall be shown to have been exhausted in payment of debts, upon which rests the remedy in equity against lands descended, is in entire harmony with the policy of the law as contained in the statutes giving relief at law. There could be no relief at law, against the lands of the heir, while the personalty remained unapplied in payment of debts. The loss of the assets by the administrator, and the insolvency of his sureties, furnish no ground of relief against the heir, either in law or equity. Act 1787; Code, § 2263; *Peck v. Wheaton*, Mart. & Y. 353; *Bennett v. Coldwell*, 8 Baxt. 483. We think that it clearly follows that the creditor cannot subject the lands descended, but must rely upon his remedy against the distributee, or go upon the refunding bond, which stands in the place of the assets, and is given him in lieu of the responsibility of the administrator and his bond. Lands descended are exonerated to the extent of such personalty in the hands of the distributees; and this is so whether the sureties on the refunding bond be now solvent or not. The heir is no more surety for the solvency of the distributee who received the personalty, or the continued solvency of his sureties upon the refunding bond, than he is for the solvency of the administrator. In the latter case it is clear the heir's lands could not be reached, because the administrator had wasted the assets, and his bond had proven worthless. In such case the loss is that of the creditor, and we see no distinction between the two cases.

But can the heir, who has himself received the personalty, invoke the doctrine of the non-liability of the lands descended? This question has given us serious consideration. It seems never to have been settled in this state, though it must many times have arisen. It is not necessary to determine how this would be where no refunding bond has been given. But where, as in the case now under consideration, such bond has been given, in strict compliance with the statute, there is no estoppel upon the heir. The insolvency of an administrator who had wasted the personalty would not, in law or equity, entitle the disappointed creditor to go upon the lands. Why shall the insolvency of the bond given by the distributee subject his land received as heir? It may be said that the insolvency of the administrator is something for which the heir is not responsible, and that this reason does not apply where he himself has received and wasted or refuses to pay over the person-

alty. This is plausible, but it is not satisfactory. The heir, in the first case, does not escape responsibility by reason of his non-responsibility for the conduct or solvency of the administrator; but in that case, as in the second, his lands are exonerated because lands are assets for the payment of the debts of the decedent only *sub modo*. Primarily, the personality is the fund by law appropriated to payment of debts; and the express enactment of the statute, which confers upon the chancery court jurisdiction to subject lands as assets, requires that such jurisdiction shall not be exercised unless it is shown, not that the personality has been paid over to the distributee, or wasted, or otherwise placed beyond the reach of the creditor, but "exhausted in the payment of *bona fide* debts." So long as there is a fund in the hands of the administrator sufficient to pay the debts of decedent, the lands of the heir stand exonerated. After the lapse of the time provided by law for the presentation of debts, the law requires the surplus of such personality to be paid over to the distributees. If the distributee and heir be not the same, it is clear that the heir's land could not be reached because of such payment to the distributee, whether the latter gave bond or not. Nor would the solvency or insolvency of the distributee affect the question, as we have in the preceding part of this opinion determined. But the law, for the protection of the creditor who has not presented his claim within the two years and six months, and is not barred by reason of coming within some exceptions to the statute, requires that the administrator shall take from the distributee a bond, with two good sureties, conditioned to pay his *pro rata* of any debt subsequently established. This bond is for the benefit of the creditor, and the remedy upon it is given alone to the creditor. This is the security which the law gives the creditor in place of the liability of the administrator. This bond stands in place of the personality; and this bond, with its "two able sureties," exonerates the land as completely as it was before exonerated while the fund was in the administrator's hands. The land of the heir is, of course, liable to the creditor of the heir; and the creditor of the decedent may become his creditor by showing that he has received personality, and, upon obtaining judgment or decree against him for the personality so received, the land may be subjected to the satisfaction of such judgment. But this will subject it as the land of the heir, and not as the land of the decedent. This is an important distinction to observe. That in some cases this remedy against the heir may be fruitless, by reason of an incumbrance which would not be valid as against a debt of the intestate, or by reason of dower or homestead rights which have accrued, is no sufficient reason for departing from the policy of the law, which only suffers the lands of an intestate to be subjected when the personality has been exhausted in the payment of debts.

It is next urged that inasmuch as the lands descended were subsequently portioned, and that some of the shares have been sold to *bona fide* purchasers, that the shares of those unaliened can only be subjected to their *pro rata* of the entire liability, and that each several share can only be made liable for its ratable proportion. This is not sound. The creditor need not regard the fact that part of the lands descended have been aliened. He is entitled to subject all of those remaining to the satisfaction of his debt. As between the heirs, the burden should be borne ratably; and they are entitled, as among themselves, to have the lands marshaled, upon a bill filed for that purpose, if they shall be so advised, as such marshaling would not interfere with the right of the creditor to subject the realty to the satisfaction of his debt. *Jordan v. Maney*, 10 Lea, 146.

Many of the questions already disposed of arise with reference to the liability of the estate of the other surety, J. J. Reeves. A considerable personal estate was paid over to the legatees by the executor, upon proper refunding bonds. The personality thus paid over exonerates the lands to that extent. The complainant ignored all effort to reach the personality in the hands of the

Meachum heirs, upon the ground that the refunding bonds had become insolvent; but was permitted by the chancellor to sue out writs of *scire facias* in this cause returnable to the next term, requiring the legatees of Reeves, and their sureties upon their several refunding bonds, to show cause why judgments should not be rendered upon such bonds. The remedy by *scire facias*, upon motion of the creditor, is the remedy provided by statute to be pursued in the county court, where the bonds are of record. Code, § 2318. That suit may be brought upon these bonds in the chancery court we have no doubt. But this bill is not framed for relief upon these bonds, and many of the sureties are not parties. The proper practice, we think, would be to require the filing of either an original or supplemental bill upon the footing of the decree against the executor, and the plea of "fully administered" found in his favor. The decree ordering writs of *sci. fa.* was therefore erroneous. His honor, the chancellor, not deeming the lands exonerated by the refunding bonds, proceeded to decree a sale of realty; and, it appearing that a part of the realty of the estate had been sold for division among the devisees, he likewise pronounced a decree against the devisees, and the guardians of such as were minors, for the amount of the proceeds of the sale. Both these decrees were erroneous as premature. The personalty paid over to the legatees exonerated these lands, or the land fund, at least partially. There is, of course, no objection to a decree for a sale of realty devised or descended, before actual application of personalty, to the extent it is available, in exoneration of the lands, where it is clearly made to appear that such personalty will be insufficient. *Doherty v. Boyd*, 16 Lea, 192. But the insufficiency of the personalty to exonerate the lands was not ascertained by report of the master or otherwise. If a sale of the realty of the Reeves estate shall prove to be necessary, and the devisees shall so desire, the storehouse and lot will be first sold, as being less onerous upon the parties. If that is insufficient, there is no doubt of the power of the court to render a decree against the devisees for the proceeds of the 85-acre tract heretofore sold for division.

A novel question arises as between the estate of the two sureties, growing out of the partial exoneration of the lands of each estate by reason of personalty for which bonds were given. To what extent does such exoneration of the lands of one estate affect the rights of the creditor as against the other estate? The exoneration of lands descended does not operate as a payment; and the creditor will have a right to collect from the other estate the part of his debt not actually paid. The second surety will reap no benefit from the partial or entire exoneration of the lands of the estate of the other security. This is the benefit flowing from the double surety upon the guardian's bond.

The next assignment of error is that the chancellor decreed a sale of lands free from equity of redemption; the bill not praying for such sale. This is not error. If the lands were or shall be sold as the lands of the heir or devisee to pay or satisfy a personal judgment against him, then it would be error. But they were decreed to be sold as the lands of the decedent, and to pay his debt. In such a case the sale is free from right of redemption, whether so prayed or not. *Love v. Williams*, 2 Lea, 226.

The decree of the chancellor will be modified as herein indicated, and remanded for such further accounts, proceedings, and decrees as may be necessary upon the principles of this opinion. The costs of this appeal will be paid by appellee, Maxwell.

CALDWELL, J., did not participate in the consideration of this cause, being related to one of the litigants.

MISSOURI HISTORICAL SOC. v. ACADEMY OF SCIENCE OF ST. LOUIS *et al.*

(Supreme Court of Missouri. February 20, 1888.)

1. DEED—CONDITION SUBSEQUENT—HOW ENFORCED.

A condition subsequent in a deed can only be made operative to defeat the grant by entry by the grantor or his heirs for condition broken; and it is not sufficient for the grantor to obtain a surreptitious attornment from the tenant of the grantees, and to induce such tenant to accept a lease from him.

2. CHARITIES—GIFT TO SCIENTIFIC INSTITUTIONS.

A gift of real estate in Missouri to the Missouri Historical Society and the Academy of Science of St. Louis, being for the promotion of science, the education and benefit of mankind, and the diffusion of useful knowledge, is valid as a charity, though not so denominated in the deed of gift.

3. SAME—POWER OF COURT OF EQUITY—CY PRES—TRUSTS.

A court of equity has power to decree a sale of real estate conveyed jointly to two charitable institutions, for the purpose of erecting a building thereon for their joint use, and to authorize each society to use its portion of the proceeds of sale in the erection of a separate building for its own purposes; it being impracticable, from the location and surroundings of the property, to build upon and use it jointly, as intended by the donor, this power being the exercise of the equitable doctrine of *cy pres*, and inherent in a court of equity as part of its jurisdiction over trusts, independent of St. 48 Eliz. c. 4, concerning charities.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Suit in equity by the Missouri Historical Society against the Academy of Science of St. Louis and others, for sale of a city lot granted to said institutions jointly for their joint use, and to have the proceeds divided, with liberty to each society to use its part separately; it being found impracticable to carry out specifically the intention of the donor. There was a decree below in accordance with the prayer of the bill, and defendants appealed.

W. H. Clopton, for appellants. *M. L. Gray*, for respondent.

SHERWOOD, J. This proceeding in equity was instituted for the purpose of asserting and having enforced the rights of plaintiff and of the Academy of Science in a certain lot in the city of St. Louis, which lot was conveyed to the said institutions by deed of J. H. Lucas, dated in 1872, and by a deed from his heirs in 1878. The deed of J. H. Lucas was accepted by the said societies by indorsement on the deed, possession taken of the lot, and the tenant of Lucas attorned to the societies, with his consent, and such tenant accepted a lease from them thereunder, and paid them rent, and such rent was paid by him and his successors down to the time and after plaintiff instituted this proceeding; the societies meanwhile paying taxes. The petition, after setting forth that the deed of Lucas gave the grantees the privilege of selling the lot, and applying the proceeds to the purpose of erecting a building, etc., goes on to state that, though the conditions in the first deed were not complied with, yet that the heirs waived that condition by their quitclaim deed of 1878 to Engleman *et al.*, on condition that they, within three years after that deed should be filed for record, should erect a building, etc., and that said period had not elapsed, as said deed had not been so filed for record. It is further set forth in the petition "that it has been found impracticable to erect on said lot a building or buildings adapted to the uses and purposes of said two corporations jointly, because of the extent of said lot; it being too small to answer said purposes, and it being impossible to procure additional land adjoining, as said lot is bounded on the east and south by alleys, and on the west by Christ Church, and the intent of the donor cannot be literally carried out by erecting a building thereon suitable for the uses and purposes of said societies, and it is further impracticable from its location and surroundings. That the two societies wish to have separate buildings; and that, in the accomplishment of these purposes, the plaintiff has taken steps looking to the erection of a building of its own at some more desirable location. That, as the literal and exact purpose of the grantors (James H. Lucas and wife) in said deed

cannot now be carried out for the erection of a building or buildings on said lot, or otherwise, for joint occupancy and purposes of said two corporations, the plaintiff prays the court, as a court of equity, to frame and decree a new scheme for the use of said lot, or its proceeds, to-wit: To order sale in partition, and a division of the proceeds of such sale, and authorize, by proper decree, the plaintiff to use its share in said lot, or its proceeds, in the erection of a suitable separate building, and likewise to authorize the Academy of Science, etc. The answer of the Academy of Science was an admission of the allegations contained in the petition, and proper decrees were asked. The answer of John B. Johnson *et al.* is that the Missouri Historical Society was not incorporated until the 24th of February, 1875, and that the conveyance of 1872 was void. Defendants pleaded the conditions in the deed from James H. Lucas and wife, and the failure of the plaintiff to perform them. Defendants admitted the execution of the deed, in 1878, by them, as heirs of James H. Lucas, and say that there was no consideration for the deed, and deny that said deed was given with the view of dispensing with and waiving the conditions contained in the said deed from James H. Lucas. They allege that the said deed contained the condition that the grantees named, George Engleman, Peter L. Foy, Albert Todd, Jeremiah S. B. Alleyne, and Oscar W. Collett, would, within three years from the filing of said deed for record, erect, or cause to be erected, upon said piece of ground, a suitable building, etc., for the uses, objects, and purposes of the Academy of Science and the Missouri Historical Society, and that they should then convey said property to the said societies; and that, after the erection of said building and such conveyance, the said societies might convey the land, with the improvements, and apply the proceeds towards the erection of a like building, etc. The answer says that such building was never erected, nor was a conveyance made to the two societies as required by said deed. It was further pleaded that, in case said building be not erected within three years upon said lot, the deed should be void. The defendants pleaded, also, that, at the time of the execution of said deed by them, they, as heirs of James H. Lucas, owned valuable real property, improved and unimproved, in the vicinity of said lot, and that it was to their interest to have a suitable building, for the uses and purposes of said societies, on said lot. Defendants denied that either of said societies have entered into the possession of said lot; and that they, (defendants,) because said societies failed and refused to comply with the conditions of said deed, did enter into the possession of said lot, and now occupy the same. Defendants pray that the two deeds be declared of no effect, and that the title to said lots be declared to be in them, and for general relief.

1. The condition in the deed of J. H. Lucas was a condition subsequent, and the fee-simple title of the grantees, acquired by such deed, could only be defeated by entry for condition broken by Lucas or his heirs. 2 Washb. Real Prop. (4th Ed.) 12-24; 1 Smith, Lead. Cas. (8th Ed.) 180; *Iron Co. v. City of Erie*, 41 Pa. St. 341; *Jones v. Railway Co.*, 79 Mo. 92; *Toune v. Bowers*, 81 Mo. 497; *Warner v. Bennett*, 31 Conn. 468; *Chalker v. Chalker*, 1 Conn. 79. In this case there was no entry made by the heirs of Lucas. It is asserted, in the abstract for the defendants, that H. V. Lucas had testified that he made such entry; but, on turning to the record, it will be found that he expressly and in terms disclosed that he did not go upon the lot in controversy. It is also disclosed by the testimony that, after this proceeding was instituted, the heirs of Lucas induced Mrs. Wickenden, the tenant of the societies, to attorn to and accept a lease from them. But this surreptitious act, as a matter of course, could not obviate the necessity of entry for condition broken.

2. As already seen, the defendant was not incorporated until 1875, some three years after the deed of J. H. Lucas was made to it. But this does not matter if the purposes of plaintiff's organization may properly be termed a charity. That it was a charity I have no doubt. And the same remark is ap-

plicable to the Academy of Science. *Schmidt v. Hess*, 60 Mo. 591; *Chambers v. St. Louis*, 29 Mo. 543; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. Rep. 327; *Jackson v. Phillips*, 14 Allen, 589; 2 Perry, Trusts, (3d Ed.) §§ 687, 700. Any gift not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, is a charity, within the meaning of the authorities cited, and it is none the less a charity because not so denominated in the instrument which evidences the gift. And the validity of such charitable gifts is not at all dependent on the statute of 43 Eliz. c. 4, nor does the jurisdiction of courts of equity in such cases depend on that statute. The contrary view was at one time entertained by the supreme court of the United States, (*Association v. Hart*, 4 Wheat. 1,) but that idea was reversed—thoroughly exploded—in the *Girard Will Case*, 2 How. 127, which has since been followed, (*Perin v. Carey*, 24 How. 465; *Ould v. Hospital*, 95 U. S. 308; *Russell v. Allen*, *supra*.)

3. Now, as to the power of a court of equity to grant the relief asked. In exercising the power prayed by the plaintiff's petition to be exercised, the court applies the *cy pres* doctrine, not as one resting on extraordinary or prerogative powers, for no such powers, in the absence of legislative authority, belong to courts of chancery in this country, but as one belonging to its general jurisdiction as a court of chancery,—powers which were in active exercise long before 43 Eliz. c. 4, was enacted, and such powers are a part of its equity jurisdiction over trusts. These views are fully supported by the authorities. *Academy v. Clemens*, 50 Mo. 167; *Goode v. McPherson*, 51 Mo. 126; *Chambers v. St. Louis*, 29 Mo. 543; *Academy v. College*, 12 Gray. 582; *Jackson v. Phillips*, 14 Allen, 539, and cases cited; 2 Perry, Trusts, (3d Ed.) §§ 724, 727; 2 Story, Eq. Jur. (13th Ed.) §§ 1176–1187. Perry says: "When the *cy pres* doctrine is reduced to its elements, it becomes a very simple judicial rule of construction; and, as such, the courts in all the states can and do apply it without usurping any prerogative powers." 2 Perry, Trusts, § 728. Holding these views the judgment is affirmed.

All concur.

CITY OF ST. LOUIS v. GLEASON *et al.*

(Supreme Court of Missouri. October Term, 1887.)

EMINENT DOMAIN—JURISDICTION—CITY STREET.

In a proceeding to establish and open a street under an ordinance passed pursuant to city charter St. Louis, art. 6, § 2, providing that "whenever the assembly shall provide by ordinance for establishing, opening, widening, or altering any street, * * * either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting thereon, and it becomes necessary, for that purpose, to appropriate private property, the city counselor * * * shall apply to the circuit court, * * * by petition," etc., it not appearing from such petition to the court, or from the ordinance therein recited, that such ordinance was passed "either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting on the proposed street," the court has no jurisdiction to condemn the land in question.

Appeal from St. Louis court of appeals.

W. C. Marshall, for appellants. *Leverett Bell*, for respondent.

HENRY, C. J. The following is the statement of the case made by the court of appeals, (15 Mo. App. 26,) which we adopt: "This is a proceeding instituted by the City of St. Louis, under the provisions of its charter, and of an ordinance purporting to be passed in pursuance thereof, to establish and open Benton street, in said city, from Jefferson avenue to Garrison avenue. Commissioners were appointed, who made a report to the court; exceptions were filed by certain property owners to the same; these exceptions were overruled, the report confirmed, judgment entered accordingly, and an appeal has

been taken to this court. The petition fails to show that the ordinance on which the proceeding was based was passed on the unanimous recommendation of the board of public improvements, or on the petition of the owners of the major part of the property fronting on the proposed street, as required by section 2 of article 6 of the charter. 2 Rev. St. p. 1606. This section reads as follows: 'Whenever the assembly shall provide, by ordinance, for establishing, opening, widening, or altering any street, avenue, wharf, market-place, or public square, or route for sewer or water pipe, either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting thereon, and it becomes necessary, for that purpose, to appropriate private property, the city counselor, in the name of the city of St. Louis, shall apply to the circuit court of the Eighth judicial circuit, or to any one of the judges in vacation, by petition, etc. The question, then, is," say the court of appeals, "whether, in order to give jurisdiction to the circuit court to entertain a proceeding thereunder, it is necessary for the petition to show that the ordinance was passed, either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting on the proposed street. It is a proceeding in which the circuit court exercises a special jurisdiction, conferred by statute, and the rule, in such cases, is that the facts showing jurisdiction must affirmatively appear, [citing cases which abundantly support the proposition.] The ordinance recited in the petition, as the foundation of the proceeding, does not state that it was passed, 'either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting on the proposed street;' nor does the petition state that such was the fact. If, therefore, the question was an open one, I should be disposed to think * * * that, in order to give the circuit court jurisdiction to condemn land, in this summary mode, the city counselor would have to exhibit, in his petition, an ordinance passed in pursuance of the charter provision above quoted."

The court then proceeds to state that a different doctrine had been announced by this court, in the cases of *Young v. St. Louis*, 47 Mo. 492; *St. Louis v. Foster*, 52 Mo. 517; and *St. Louis v. Meyer*, 18 Mo. App. 367. We do not understand either of the two cases first above cited to decide the question involved here. In *Young v. St. Louis*, *supra*, the law provides that, "whenever the city council shall, by a vote of two-thirds of all the members elected, declare the laying of water-pipe to be necessary, the board of commissioners shall cause the same to be laid." There the body authorized to order the work done was authorized to act without the intervention of any other body, and it might well be, as held by this court, that "the city council, in passing the ordinance, necessarily exercised the discretionary power given by the statute, and must be presumed to have formed an opinion of the necessity or desirableness of the improvement." But, in the case at bar, the assembly had no power to act—no jurisdiction over the subject-matter—until directed to act by the board of public improvements, or the owners of a major portion of the ground fronting on the proposed street; until such action taken by the board of public works, or the owners of the ground, there was no authority in the assembly to pass the ordinance. The case of *City of St. Louis v. Foster*, 52 Mo. 518, involved the validity of an ordinance, which was questioned, because the ordaining clause had been omitted. The charter required that the style of the ordinances passed by the city of St. Louis should be as follows: "Be it ordained by the city council of the city of St. Louis;" but, said the court, "it was clearly decided, in *Railroad Co. v. Governor*, 23 Mo. 353, that the validity of a statute, authenticated in the manner pointed out by law, could not be impeached by showing a departure from the form prescribed by the constitution in the passage of the law." The questioned determined in that case has but slight analogy to that involved in this, and is by no

means decisive of the latter. Condemnation proceedings, if regular, deprive the owner of his property without his consent. The law authorizing them should be strictly construed, and every prerequisite to the exercise of the jurisdiction observed. When the power to condemn is vested in one tribunal, it cannot be exercised by another, and, when two or more are required to act conjointly, less than the whole number cannot condemn. 2 Dill. Mun. Corp. § 604, and cases there cited. On other questions in this case determined by the court of appeals, except that in relation to the amendment, upon which we concur in the conclusion, we concur with it; but, differing from it on the vital question involved, we reverse judgment and remand the cause to that court.

All concur.

OWENS *et al.* v. KANSAS CITY, ST. J. & C. B. R. Co.

(*Supreme Court of Missouri. May 21, 1888.*)

1. DAMAGES—PRACTICE—PERSONAL EXAMINATION.

In an action against a railroad company for personal injuries causing paralysis, it is not error to refuse to order plaintiff to submit to a personal examination by a medical commission, where she is cross-examined, before the motion is made, in the presence of physicians as to her physical condition, and there is evidence on that point covering almost her entire life.

2. SAME—EVIDENCE.

In an action against a railroad company to recover for injuries sustained while getting off defendant's train, it is competent for the plaintiff, in describing her injuries, to testify that the nerves of her head, side, and left limb are paralyzed.

3. CARRIERS OF PASSENGERS—LIABILITY FOR NEGLIGENCE OF SERVANT—INSTRUCTIONS.

In an action against a railroad company for injuries sustained in getting off a train, an instruction that, if the train did not stop long enough to allow plaintiff to get off, and while she was standing on the platform defendant's brakeman pulled her off, whereby she was injured, then plaintiff can recover, is not defective, where, in another paragraph, the court told the jury that, under such a state of facts, the plaintiff could not recover if guilty of contributory negligence.¹

4. SAME—EXTENT OF LIABILITY.

Where a passenger is negligently pulled off a railroad car by a brakeman, acting within the scope of his employment, the company is liable for all injuries occasioned thereby, though, owing to plaintiff's health, such injuries were more difficult to cure, and by reason of latent disease were more serious than they would have been to a person of robust health.²

5. WITNESS—CREDIBILITY—CONFLICTING STATEMENTS.

Statements of plaintiff purporting to be contained in her deposition partly taken, and then abandoned, are inadmissible to lay a foundation for impeaching her testimony, where she denies making such statements, and there is no other proof that she did.³

RAY and SHEERWOOD, JJ., dissent.

Appeal from circuit court, La Fayette county; JOHN P. STROTHER, Judge.

This action was brought by Annette Owens and her husband, Clay Owens, against the Kansas City, St. Joseph & Council Bluffs Railroad Company, to recover for injuries sustained by Mrs. Owens while alighting from defendant's train. Verdict and judgment for the plaintiffs; and from the order denying its motion to set aside the verdict and judgment, and grant a new trial, defendant appealed.

J. D. Shewalter, R. P. C. Wilson, and Strong & Mosman, for appellant.
Woodson & Woodson, Wallace & Chiles, Anderson & Cormack, Green & Burnes, and S. C. Woodson, for respondents.

¹Respecting the duty of carriers towards passengers alighting from their trains, see *Railway Co. v. Williams*, *ante*, 78, and note.

²See note at end of case.

³On the subject of impeaching a witness by showing contradictory statements, see *Zebley v. Storey*, (Pa.) 12 Atl. Rep. 569, and note; *Milligan v. Butcher*, (Neb.) 37 N. W. Rep. 596, and note; *Foster v. Worthing*, (Mass.) 16 N. E. Rep. 572; *Dunbar v. Mc-Gill*, (Mich.) 37 N. W. Rep. 235.

BLACK, J. This is a suit for personal injuries to the plaintiff, Mrs. Owens, wife of the other plaintiff. She prevailed in the court below, and the defendant appealed. On the 20th November, 1883, she and her daughter were passengers on one of the defendant's trains from Kansas City to Beverly. The petition, which is very lengthy, states, in substance, that defendant negligently failed and refused to stop the train at Beverly long enough to allow the plaintiff a reasonable time to alight in safety; that, as soon as the train stopped, she stepped to the door of the car to get off; that, when she arrived at the car platform, the train was negligently put in motion by defendant; that the brakeman, knowing the train was in motion, unlawfully assaulted, seized, and took hold of her, and violently and negligently pulled and threw her from the cars to the depot platform, inflicting upon her bruises, wounds, etc.; that on account of negligently putting the train in motion, and negligently pulling and throwing her from the platform of the car, she has suffered pain, etc. The answer is a general denial, with the further defense that plaintiff was guilty of contributory negligence in attempting to get off the train when in motion. The evidence for the plaintiff tends to show that, when the train began to slack up, the brakeman said, "This is Beverly;" that he picked up the plaintiff's valise, and walked towards the car door; that the daughter followed him, and plaintiff followed the daughter; that the brakeman assisted the girl to the depot platform. Plaintiff says, when she got to the platform, two persons were getting on the car, so that she stepped through, on the platform of the car in front; that she took hold of the iron rod that extended around the car; that the train was then moving faster; that the brakeman, who was on the depot platform, walking to keep up with the car, reached up, and caught her between the elbow and wrist, and pulled her to the depot platform; that she then became unconscious from injuries to her head, arm, hip, and side. This evidence is corroborated by that of the daughter; and other evidence is that the train stopped from 10 seconds to a minute only. The evidence for the defendant tends to show that the train stopped for the usual and for a reasonable time; that plaintiff attempted to get off after the train had started, and that she fell from the platform of the car; that the brakeman warned her not to get off, and at the same time was trying to signal the engineer to stop.

1. The suit was commenced in the Platte circuit court, and transferred to the La Fayette circuit court, by change of venue. There defendant, at the March term, 1884, filed a motion asking the court to require plaintiff to submit her person to an examination by a commission of medical experts, to be appointed by the court, in order to determine the character of the injuries, and to what extent they were due to the accident. This motion was not determined until the term at which the cause was tried, April, 1885, when it was overruled, and the defendant excepted. It was in substance held in *Shepard v. Railway Co.*, 85 Mo. 629, that the defendant has no absolute right to have a personal examination; that it is a matter in which the court has a discretion, the exercise of which will not be interfered with, unless manifestly abused. Of course, the court is not bound to refuse or to grant the motion to the full extent of the prayer. Its order may be moulded to suit the circumstances of the case. In that case, the plaintiff, a lady, had once submitted to an examination by one physician, and offered to submit to an examination by another eminent and reputable surgeon; but with this the defendant was not satisfied. Under these circumstances, we held, in that case, that there was no error in refusing the motion. In the later case of *Siddekum v. Railway Co.*, 98 Mo. 400, 4 S. W. Rep. 701, it was held there was no error in refusing such a motion. In that case the trial court was of the opinion that an examination was not necessary in order to ascertain the real condition of the plaintiff, and the nature and extent of her injuries. This court, upon an examination of the evidence, reached the same conclusion.

The ruling is certainly based, in part, upon that ground. The power of the court to make and enforce an order for the personal examination of the injured party must be taken as established in this state, as it is in many others. *Schroeder v. Railroad Co.*, 47 Iowa, 375; *White v. Railway Co.*, 61 Wis. 536, 21 N. W. Rep. 524; *Hatfield v. Railroad Co.*, 38 Minn. 130, 22 N. W. Rep. 176; *Railroad Co. v. Thul*, 29 Kan. 466. The court might, with propriety, have made an order for the examination of the plaintiff in this case, by a disinterested reputable physician, in the presence of her husband, if desired, and lady friends. But the real question here is whether there has been an abuse of the discretion lodged in the trial court. In the plaintiff's deposition, taken and filed before this motion was made, she says that, when the brakeman pulled her from the car-step, her head, left arm, and hip struck against the car; that, because of the injuries then received, she has lost the use of her left arm and her left leg; that the arm is paralyzed; that since then she has not been able to stand on her feet, whereas before she was able to attend to her household duties. She was cross-examined for many days, and at great length, answering between five and six hundred questions, often in the presence of physicians employed and taken to the bed-room by defendant, but not introduced to her. This examination shows that she received an injury in the back when 18 years of age; that, a few years before the accident in question, she went to Denver for her health; that, while there, her shoulder was dislocated; that she was subject to rheumatism in her left side and arm, and suffered from what she terms rheumatic neuralgia, and had been under the charge of a physician for years. Much other evidence was offered on the one side and the other, disclosing the state of her health, both before and after she received the injuries complained of. This evidence was given by persons who could and did detail facts within their observation. Some of it goes to show that there was no perfect paralysis; but that she was suffering greatly from the injuries cannot be doubted. A medical examination could add no information as to her previous health, and but little to her subsequent condition. It is suggested that she represents her condition to be worse than it really is, and that she has misled her two physicians, who were examined and cross-examined at length. We discover no real ground for such suggestion; and, if any there is, it was matter of observation to the jury. Since the evidence easily attainable, and really in the case, shows a history of her health for a large portion of her life, and also shows her physical condition since the accident, and what acts she can do, and what she cannot, we will not disturb the ruling of the trial court.

2. The court in the first instruction for plaintiff, in substance, said that if, after the station was announced by the brakeman, the plaintiff, with reasonable and usual expedition, went to the platform of the car, and that, before she could get off, the train was started, and while on the car-step waiting for the car to stop, the brakeman took hold of her arm, and pulled her to the depot platform, and she was injured, etc., then she was entitled to recover. The seventh instruction declares that it was the duty of the defendant to stop the train a reasonable time for the plaintiff to get off, *i. e.*, such a time as is required for a person using ordinary diligence to get off; and, if the train was started before plaintiff had such reasonable time, then defendant was guilty of negligence; and if the jury further believed that the brakeman pulled her from the car, while in motion, to the depot platform, and she was injured, then, etc. The objection to these instructions, that they allow a recovery upon proof alone of negligence in failing to stop a reasonable time, is not well founded; for in both instructions the jury were required to find the further fact that the brakeman pulled her from the car while in motion. It is true, no finding is, in terms, required that he negligently pulled her from the car; but if the train started without giving her time to get off, and the brakeman pulled her off while the car was in motion, it was a negligent act. The con-

trary theory presented by the defendant's evidence, namely, that she persisted in getting off, though warned not to do so, fell, and was caught by the brakeman, was presented by instructions given at the request of the defendant. The evidence of the defendant is an out and out denial that the brakeman pulled her off at all. The instructions present the real issue made by the evidence. The next objection to these instructions is that the plaintiff cannot sue for an assault, and recover for negligence in failing to stop the train. The petition does make some extravagant averments; but, notwithstanding it charges an assault by the servant, it also in terms charges negligence in not stopping the train a reasonable time, and negligence on the part of the servant in pulling her off. The instructions cannot be said to be a departure from the petition. The petition contains all that is in the instructions, and more too; and it follows that it is not a case of declaring upon one cause of action, and a recovery upon another. *Conway v. Reed*, 66 Mo. 350. The final objection to these two instructions is that they ignore the defense of contributory negligence, because they do not conclude with some such words as "provided the plaintiff was not negligent." On this defense the court gave a number of instructions, one of which is as follows: "(3) If the jury believe from the evidence that plaintiff recklessly or negligently attempted to alight or jump from the train, and the brakeman either tried to keep her from so doing, or to assist her to alight after she voluntarily attempted to do so, and that he tried to keep her from getting off, then the jury will find for defendant, no matter what her injuries may have been, or what her condition now is." To say, with these instructions, that the jury could find for plaintiff without regard to negligence on her part, is little short of charging them with corruption. The instructions are to be taken as a whole, are so taken by men of common understanding, and can be understood in no other way. There is no necessity for qualifying each by an express reference to the others. They thus qualify themselves when in the form these instructions are. The contrary ruling in *Sullivan v. Railway Co.*, 88 Mo. 182, is not to be followed.

3. The instruction that, if any witness had willfully sworn falsely to any material matter, the jury are at liberty to disregard the whole of his evidence, is without valid objection. It is sufficient that the witness either willfully or knowingly swore falsely. *State v. Palmer*, 88 Mo. 568; *White v. Macey*, 64 Mo. 552. Defendant asked and had given a like instruction, and it is in no position to say there was no evidence to justify the giving of such an instruction.

4. The fourth and eighth instructions are, in substance, the same, and may be considered together. The eighth is that if plaintiff was pulled off the car, against her will, by defendant's servant, acting within the scope of his employment, and that she thereby received injuries, "then the defendant is responsible for all the ill effects which naturally and necessarily follow the injuries in the condition of health in which plaintiff was at the time; and it is no defense that the injuries may have been aggravated, and rendered more difficult to cure, by reason of plaintiff's state of health, or that by reason of latent disease the injuries were rendered more serious to her than they would have been to a person in robust health." This instruction, it will be seen, is almost the same as that in the case of *Brown v. Railroad Co.*, 66 Mo. 588, which was approved by this court. There, it is true, the instruction was predicated upon the fact that plaintiff was "unlawfully and willfully put off the car." But, if the plaintiff was negligently pulled off the car, she has the right to be compensated for all the injuries which she would not have sustained had due care been exercised. Invalids, as well as persons in robust health, are entitled to the exercise of the highest degree of care on the part of the common carrier. It is no answer to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health. *Alison v. Railroad Co.*, 42 Iowa, 274.

5. It was competent for the plaintiff to describe the injuries which she received; and it is no ground for excluding this evidence because she says the nerves of her head, side, and left limb were paralyzed. It is not in the nature of expert evidence.

6. When the plaintiff's deposition was taken, and as a part of the cross-examination, counsel for the defendant read over 12 or 14 questions and answers, of which the following are a part. "Question. I will ask you if, during your suffering from inflammatory rheumatism, you were not in the habit of using opiates,—morphia? Answer. No, sir; not to excess. I could take morphia into the stomach, and it relieved it." Q. I will ask you if you did not take it regularly? A. Not for my shoulder." She was then asked, and made answer as follows: "Question. Is not the foregoing a true and literal statement of questions, and your answers made thereto, in this room, on the first day that your deposition was attempted to be taken in this case, and was not that statement made in the presence of Charles A. Blair, a stenographer, who at the time was, by agreement of parties, present for making such stenographic report? Answer. It is false from beginning to end. It is not a true statement." The court, on motion of the plaintiff, excluded all of the above-described portion of the deposition, and defendant excepted. It seems a previous effort had been made to take plaintiff's deposition by her attorneys, but it had not been completed, signed, or certified, and hence not filed in this cause. The plaintiff, throughout her examination read in evidence, concedes that she had used morphine, but says it was by way of injection only. Now, in the first place, as the witness was a party to the suit, it was not necessary to ask these questions to lay a foundation to impeach her evidence. Her declarations could be offered in evidence as against her, without laying any foundation therefor. Again, this portion of the deposition was of no benefit to defendant, unless followed by proof that she did make the alleged answers to the alleged questions. The defendant did not show, or offer to show, that she made any such statements; and the portions of the deposition in question were properly excluded.

7. Many other questions are made in the briefs for appellants, but they are less substantial than those before considered, and will not be followed out in detail in this opinion. The case seems to have been fairly tried, and the judgment is affirmed.

RAY and SHERWOOD, JJ., dissent. The other judges concur.

NOTE.

NEGLIGENCE—PROXIMATE CAUSE—PREDISPOSITION TO DISEASE. Where a passenger receives an injury in a collision caused by the negligence of the servants of a railroad company, and disease is excited or developed by such injury, the injury may be considered as the proximate cause of the disease. *Railroad Co. v. Falvey*, (Ind.) 3 N. E. Rep. 389. The death must be referred to the injury, unless it be shown that the death must have resulted if the injury had not been done. *Beauchamp v. Mining Co.*, (Mich.) 15 N. W. Rep. 65; *Railroad Co. v. Jones*, (Ala.) 8 South. Rep. 902. The cause of the alleged consequence itself must have been adequate and efficient. Thus where the injury inflicted was a slight cut, and the evidence showed that it became aggravated by the depraved condition of the plaintiff's system, it was proper to instruct that the plaintiff could not recover if the jury found the injury was occasioned by his impurity of blood. *Kitteringham v. Railway Co.*, (Iowa,) 17 N. W. Rep. 585; *Jucker v. Railway Co.*, (Wis.) 8 N. W. Rep. 862. The question of proximate cause, when the facts are disputed, is for the jury; where they are undisputed, the court may determine it. *Township v. Watson*, (Pa.) 9 Atl. Rep. 430.

STATE v. WEST.

(Supreme Court of Missouri. May 21, 1888.)

1. HOMICIDE—MURDER—EVIDENCE—DEFENDANT'S STATE OF MIND.

Where defendant, testifying in his own behalf, gave a detailed account of his feelings on the day of the homicide designed to show absence of malice, it is proper,

upon cross-examination, to ask, "Did you state to F., on the day of the homicide, that you had the same right to kill a man who was trying to steal your land as you would have if he was trying to steal your horse?"—as a foundation for proof of a state of mind different from and inconsistent with that testified to by him in chief.

2. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where, upon cross-examination for the purpose of impeaching a witness, extracts from his evidence were read before the jury, and questions predicated thereon, and excepted to by defendant without assigning grounds for his objection, he cannot, upon appeal, give as a reason for his objection that the witness ought not to be required to answer until the whole of his evidence had been read.

Appeal from circuit court, Barton county; D. P. STRATTON, Judge.

John W. West was indicted for the murder of Samuel K. Reynolds. A trial was had, and resulted in defendant's conviction of murder in the second degree. A motion for a new trial was overruled, and defendant appeals.

E. J. Montague, for appellant. *B. G. Boone*, Atty. Gen., for the State.

BRACE, J. The defendant, indicted in the circuit court of Barton county for murder in the first degree, was convicted of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for a term of 25 years. He appeals, and assigns for error that the court gave improper and refused proper instructions, failed to instruct upon the whole case, admitted illegal testimony, permitted an improper cross-examination of defendant, and of defendant's witnesses, and improper remarks to be made by the prosecuting attorney in his closing address to the jury. After a careful examination of all the instructions given, and due consideration of the objections urged by counsel against those criticised in his brief, we fail to detect reversible error in any of them. They are all such as have repeatedly received the sanction of this court, and proper to be given upon the facts in evidence in this case. The legal principles declared in those refused, so far as they were applicable to the case, and proper to be given, were previously covered in those given, and there was no error in the refusal. There was no manslaughter in the case. It was either murder in the first or second degree on the evidence, or justifiable homicide, and no error was committed in failing to instruct on manslaughter. No exception having been taken or saved to the remarks of the prosecuting attorney complained of, they are not before us for review. *State v. Pagels*, 92 Mo. 300, 4 S. W. Rep. 931. Of the errors assigned, there are but two that require any extended consideration.

1. The defendant, who testified as a witness in his own behalf, on his cross-examination was asked the following question: "Did you state to Si Finley, on that day, [the day of the homicide,] coming in here, that you had the same right to kill a man who was trying to steal your land as you would have if he was trying to steal your horse?" In answer to the question, he said: "I do not recollect of saying that; if I did, I did not intend saying it. I was bowed down in sorrow and terror, and I might have been misunderstood. I did not mean to say that, any way. I did not go to Reynolds after he was shot. I went in ten or twelve feet of him. I was struck with grief the moment after the shooting." No objection was made or exception taken to the other question asked and answered by the defendant, and we have only this one for consideration. The language of the statutory provision permitting a defendant in a criminal case to testify in his own behalf is that "he shall be liable to cross-examination as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case." Rev. St. 1879, § 1918. If the defendant, testifying in his own behalf, may be contradicted, and impeached the same as any other witness in the case, he is liable to have his credibility impeached by proof of former inconsistent statements. *State v. Brooks*, 92 Mo. 542, 5 S. W. Rep. 257, 330; 1 Greenl. Ev. § 462. The inconsistent statements, however, that can be shown for this purpose, on his cross-examination, must be confined to those

made concerning a matter referred to by him in his examination in chief. In this case, the defendant, in his examination in chief, gave a detailed and graphic account of the homicide, including all the events immediately preceding and leading up to the tragedy, and those that transpired afterwards up to the time of his arrest, and took occasion, all through his evidence, when to him it seemed apposite, to speak of his feelings, thoughts, intentions, fears, opinions, and even of what he called his instinct, portraying as vividly, perhaps, as his words would permit, the condition of his mind, on the day of the homicide, before, at the time of, and subsequent to its commission, in respect of that act, in connection with his supposed rights to the land which was the subject of the controversy, and the act of the deceased in interfering with those rights, all designed to show that on that day his mind was in such condition as to be void of that malice which was an essential ingredient of the crime with which he was charged. The question asked by the prosecuting attorney tended to elicit a declaration upon his part, or lay a foundation for proof of said declaration, showing a state of mind different from and inconsistent with that testified to by him in chief, and which was the subject of continual reference by him in that examination. How, then, can it be said that by it he was being cross-examined as to a "matter not referred to by him in his examination in chief?" This exception cannot be sustained.

2. The defendant's two sons were present with him at the time of the homicide. They were examined as witnesses at the inquest before the coroner's jury, before the grand jury, and were introduced and testified on the trial on behalf of the defendant. It is urged that the cross-examination of these witnesses in regard to their previous evidence before those juries was improperly conducted. The course that this examination took, can be most satisfactorily illustrated by setting it out in full as to one of these witnesses. Elger West, the eldest son, having been examined in chief by defendant's counsel, and cross-examined by the prosecuting attorney upon the matters to which he testified to in chief, on his examination continued as follows: "I am twenty years old; was nineteen then. I testified before the coroner's jury, and also before the grand jury, in regard to this case." Here a paper was shown to witness, purporting to be the written evidence of witness, taken before the coroner's jury, and witness asked if a certain signature was his. Witness answered: "I think that is my signature." Here a paper was shown to witness, purporting to be the written evidence of witness, taken before the grand jury, and witness was asked if a certain signature was his. Witness answered: "I think that is my signature." The prosecuting attorney asked witness: "Did you not testify, before the coroner's jury, as follows, [quoting from a paper purporting to be the written evidence of witness before the coroner's jury:] 'I was with my pa last Thursday or Friday, when we went through Mr. Reynolds' field. Pa stopped and talked with Mr. Reynolds. Walter and I went on. I heard Mr. Reynolds ask pa where he had been. Pa told him he had been setting posts on his eighty of land. I heard nothing else'?" To this question defendant objected, and, the objection being overruled, defendant excepted. Witness answered: "I did not testify that way." The prosecuting attorney (quoting from a paper supposed to be witness' testimony before the coroner's jury) asked witness the following question: "Did you not testify, before the coroner's inquest, as follows: 'I live on the east side of Horse creek. I went from home to the Walser farm, to plow around the west eighty, and burn it off. Walter, my brother, and my father, went with me, in the wagon. Pa left me and Walter at the corner of Mr. Reynolds' farm, and went across to the west eighty of the Walser farm. Walter and I got there first. Walter and I took a plow and a musket. We drove into the field, and unhitched the team, and took the plow out of the wagon'?" Question objected to, and objection overruled; to the overruling of which defendant, at the time, excepted. Witness answered: "I did not

make the statement exactly that way. I did not say we got there five minutes before he did. I did not say he came in at the stacks. I did not say I went; I said we went. I did not say we drove in, and took the plow out of the wagon, before father got there." The prosecuting attorney (quoting from a paper purporting to be the written evidence of witness before the grand jury) asked the witness: "Did you not make the following statement, before the grand jury, in the presence of A. Warden and others: 'I got to the eighty about five minutes before father did. Walter and I drove the wagon in at the gate, at the south-west corner of the eighty, and unhitched the team, and took the plow out of the wagon. While we were doing this, father came in at the stacks, about eighty or one hundred yards east of us, and came on down to the corner where we were'?" The question was objected to, and objection overruled; to the overruling of which the defendant, at the time, excepted. Witness answered: "I did not say we got there five minutes before he did. Some of the words are not mine. I did not say father came in at the stacks." The prosecuting attorney asked witness the following question: "Did you not testify before the grand jury as follows: 'I did not see any weapons with Reynolds; do not think Reynolds did anything towards hurting my father. His horse kept moving around all the time they were talking. As soon as father shot, Reynolds fell off his horse. Did not speak. The horse ran home. When father first jerked the gun up, I halloed to him not to shoot, but he made no answer'?" To which question, defendant, at the time, objected, which objection was by the court overruled; to the overruling of which defendant excepted. Witness answered: "There are words in there that don't sound like mine. I did not say it just that way. I testified that I did not see any weapons. I did not testify in that way about Reynolds doing nothing towards hurting father. I did not say, 'Don't shoot that man.' The balance is about right." The prosecuting attorney (quoting from a paper purporting to be the written evidence of witness before the grand jury) asked witness the following question: "Did you not make the following statement before the grand jury, in the presence of A. Warden and others, in regard to where you went out of the field: 'When my brother and I drove out, we passed about fifteen feet to the west of Reynolds, and then turned east, and drove about fifteen feet south of him. We did not stop the team'?" To this question defendant objected, which objection was by the court overruled; to the overruling of which defendant, at the time, excepted. Witness answered: "I do not recollect of saying anything about the team. I said, 'I supposed it was about fifteen feet.'" The prosecuting attorney (quoting from a paper purporting to be the written evidence of witness before the grand jury) asked witness the following question: "Did you not testify, before the grand jury, as follows: 'Reynolds was on the ground, moving his right hand up and down by his side'?" The question was objected to, and the objection was overruled; to the overruling of which defendant, at the time, excepted. Witness answered: "I did not say his right hand. I said I saw him move his right leg." The prosecuting attorney (quoting from a paper purporting to be the written evidence of witness before the grand jury) asked witness the following question: "Did you testify before the grand jury, before A. Warden and others, as follows: 'They talked rather loud at the last, as though they were getting mad, and right then father got the gun and shot'?" Hoyt Humphrey, called by the state, testified: "I was a member of the grand jury about March 3, 1886. Elger West was examined about the killing of Reynolds." Here a paper was shown to witness, purporting to be Elger West's written evidence before the grand jury. Witness said that "it was the statement of Elger B. West before the grand jury, and written down by Mr. Timmonds. I state that it is." The prosecuting attorney offered to read in evidence the statements identified by witnesses Warden and Humphrey as the evidence of Elger and Walter West

before the grand jury; to the reading of which defendant objected, and the court ruled that only such parts of said statements could be read as the attention of Elger and Walter West had been called to; and then the prosecuting attorney read in evidence, against the objection of defendant, the following extracts from the statement of Elger West, viz.: "I got to the eighty about five minutes before father did. Walter and I drove the wagon in at the gate at the south-west corner of the eighty, and unhitched the team; took the plow out of the wagon. While we were doing this, father came in at the stacks (7 or 8 of them) about eighty or one hundred yards east of us, and came on down to the corner where we were. * * * Do not think Reynolds did anything towards hurting my father. * * * When father first jerked the gun up, I halloed at him not to shoot. * * * When my brother and I drove out, we passed about fifteen feet to the west of Reynolds, and then turned east, and drove about fifteen feet to the right of him. He was on the ground, moving his right hand up and down. * * * They talked rather loud at the last, as though they were getting mad, and right then father got the gun and shot." After the reading of which the court informed defendant that he could have all the contents of the paper read, which he declined. A. F. Ryan, a witness for the state, testified: "I remember the coroner's inquest held on the body of Samuel F. Reynolds. I was acting coroner. The inquest was commenced on the 1st day of March, and adjourned until the 2d. Elger B. West and Walter West were examined as witnesses. I reduced their statements to writing. [A paper was here shown witness.] This is the statement of Elger B. West written by me, and signed by him in my presence." The prosecuting attorney then read in evidence, against the objections of defendant, the following extracts from the statement of Elger B. West before the coroner's jury, viz.: "Walter and I drove into the field, and unhitched the team, and took the plow out of the wagon." After the reading of which the court informed defendant that he was entitled to have the whole of the paper read in full, but he declined. "I was with pa last Thursday or Friday, when we went through Mr. Reynolds' field. Pa stopped and talked to Mr. Reynolds. Walter and I went on. I heard Mr. Reynolds ask pa where he had been. Pa told him he had been setting posts out on his eighty acres of land. I heard nothing else they said."

When it was proposed to introduce the previous sworn statements of the witness claimed to be inconsistent with his statements then just delivered in evidence, the defendant had the right to insist that the particular inconsistent statement be pointed out to the witness, so that he might have an opportunity to explain it understandingly, and that it be read in the light it appeared when taken in its proper connection with the whole of such statement, so that the force and meaning of such previous statement, as well as his explanation thereof, might be properly appreciated by the jury. 1 Greenl. Ev. §§ 462, 463; *State v. Russ*, 24 Mo. 475; *Prewitt v. Martin*, 59 Mo. 325; *Norris v. Brunswick*, 78 Mo. 257; *State v. Talbott*, Id. 347. There can be no question that the attention of the witness was called directly to the particular statement that was claimed to be inconsistent with the evidence he had just delivered on the stand; for the prosecuting attorney read the very words of that statement from the paper, identified by the witness himself and jurors as containing his evidence given previously before the coroner and the grand jury; and, if the defendant's case was in any way prejudiced by reason of the fact that the whole of that evidence was not read to the witness or the jury before he answered or afterwards, he has himself only to blame. When the witness was asked if he did not testify to the statement quoted from his evidence, the defendant simply objected, without assigning any reason for his objection. If he had then given, as a ground of his objection, that the witness ought not to be required to answer until the whole of the evidence had been read, the court would doubtless have required it to be read then. As he gave no reason

then, he cannot be heard to assign one now. It is evident, on the face of this examination, that if the defendant, on the trial, had desired to have the whole of the evidence of the witness read to the jury, he could, by pursuing the proper course, have had it read at any time when he was entitled to it, but he seems to have thought it would not benefit his case to have the whole evidence read to the jury; for, when the prosecuting attorney offered to do so, he objected, and, when the court tendered him the privilege of doing so, he declined. We see no ground upon which this complaint ought to be sustained. It is urged, however, that the evidence of witnesses before coroners' and grand juries written down by other persons, and subscribed to by the witness, is inadmissible as evidence for any purpose, and that the trial court committed error in permitting the extracts from the evidence of the witnesses Elger and Walter West to be read to the jury. This question is not before us on the record, no reason was assigned for the objection to the admission of this evidence, and no exception taken to the action of the court in overruling the objection.

Finding no reversible error in the record of this case, the judgment of the circuit court is affirmed.

All concur.

STATE v. GILMORE.

(Supreme Court of Missouri. May 21, 1888.)

1. HOMICIDE—TRIAL—JURY.

It is not error for the court to fill the panel by calling two jurors from the regular venire to take the place of two unavoidably absent who were on neither challenge list, defendant having declined to challenge the two thus called, and having waived his statutory right to additional time to make further challenges.

2. SAME—SELF-DEFENSE.

An instruction that "if defendant and M. had an altercation which resulted in the death of S., and if defendant commenced the difficulty or brought it on by any willful act of his committed at the time, or if he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self-defense in the case," is not reversible error, no evidence of self-defense having been given.

3. SAME—MURDER.

An instruction to the effect that "if A. shoots at B., and, missing him, kills C., this is murder, because the law transfers the felonious intent from B. to the innocent party, who is slain," is correct.

4. CRIMINAL LAW—TRIAL—REVIEW.

Where the ground of objection to the admissibility of evidence is not preserved, the objection will be presumed invalid.

Appeal from St. Louis criminal court; J. C. NORMILE, Judge.

A. W. Alexander and D. Castleman Webb, for appellant. The Attorney General, A. C. Clover, and C. O. Bishop, for respondent.

SHERWOOD, J. For shooting and killing Miles Stanton, in the city of St. Louis, with a pistol, on the 12th of January, 1886, the defendant was indicted for murder in the first degree, at the following March term of the St. Louis criminal court. After several continuances of the cause, defendant was put upon trial at the May term, 1886. A panel of 47 qualified jurors was obtained from the regular venire, and defendant was allowed the statutory 48 hours in which to make his challenges. At the close of that period the state and appellant had prepared their challenges, but they were not submitted to the court. Upon a call of the panel of 47, two of the jurors failed to respond. Neither of these jurors were on the challenge lists. The court thereupon issued attachments for the absentees, and the returns thereon showed that one of the jurors had left the city, and the other had met with an accident which confined him to his bed. The court directed the sheriff to call two jurors from the regular venire in place of the absent ones, who were then examined upon

their *voir dire*, and found to be qualified. This was done over the objection of defendant. The court then asked defendant if he desired an additional 48 hours in which to make challenges, but he waived his statutory privilege, and thereupon the state and defendant submitted their challenge to the court, and the trial panel was selected, containing the two jurors who had been called in place of the absentees, and who had not been challenged by either side, defendant saving an exception to the action of the court. The trial resulted in a conviction of defendant of murder in the second degree, the punishment being fixed at imprisonment in the penitentiary for the term of 50 years. After unsuccessful motions for new trial and in arrest, sentence was pronounced on July 2, 1887; stay of execution was had until July 25, 1887, at which time defendant was committed to the penitentiary, where he now is.

The testimony on the part of the state tended to show the following: Shortly after midnight of January 11, 1886, Gilmore, one Mooney, and several others met on the street, and together went to the saloon of one Leahy, on Sixth and Clark avenue, where they continued drinking and singing songs until about 3 o'clock in the morning. About 1 o'clock Stanton (the deceased) came into the saloon with a party of friends. Introductions followed, and the two parties drank and sang together. Gilmore and Stanton had never met before. In the course of the entertainment, Gilmore asked Mooney to pay him some money which Mooney owed him, the sum being about five dollars. Mooney said he had no money, but would pay to-morrow. Gilmore replied that Mooney's to-morrow's were slow in coming, and suggested that he should borrow the money from the bar-keeper, appealing to the bar-keeper at the same time to advance the money to Mooney. The bar-keeper expressed his readiness to let Mooney have two dollars or to pay Gilmore two dollars for Mooney, but Mooney said that Gilmore was "full enough now" and could wait until morning, and told the bar-keeper to give it to Gilmore in the morning. There was a good deal of talk between the two about it, and then Gilmore left the saloon for about 15 minutes. When he returned, he renewed his demand on Mooney for the money, and on Mooney's refusal to pay, exclaimed, "You son of a bitch! I'll make you pay me!" at the same time drawing a seven-barreled revolver from his pocket, which he began discharging at once. One bullet struck the mirror behind the bar, three struck Mooney,—in the wrist, thigh, and ankle,—and another struck Stanton, who was standing at the counter with his back to Gilmore, lodging in his heart, and killing him almost instantly. One of the party disarmed Gilmore, but not until he had emptied his revolver, and then he ran out of the saloon, and was arrested about three blocks away by two officers, who took him back to the saloon, where they found Stanton dead. Gilmore remarked to the officers that he was sorry it was not Mooney he had killed instead of Stanton. There was also testimony that between 2 and 3 o'clock Gilmore entered a saloon a block away, and obtained his revolver from the bar-keeper there, with whom he had left it previously, saying that he was going out to "Kerry Patch" that night, and feared some one might attempt to "slug" him. On the part of the state in chief, one Oldfield was sworn as a witness, who testified that he was a stenographer, employed by the coroner to take notes of the inquests; that he took short-hand notes of the testimony at the inquest of Stanton; that Gilmore was present there; that the coroner informed Gilmore of his right to make a statement or not regarding the killing, as he chose, and that his statement might be under oath or not, as he chose; that Gilmore then and there made a voluntary statement under oath, to the effect that he had had a dispute with Mooney about the money; that he did not intend to shoot Stanton, who was a perfect stranger to him, and that he did not intend to kill Mooney, either, although he might have said he did while he was drunk that night. This testimony of Oldfield's was admitted by the court over the objection of defendant. Defendant testified in his own behalf, and stated that, during the dispute with Mooney about

the money, Mooney said, "You son of a bitch! I won't pay you anything;" and snapped his finger in Gilmore's face, and then made a movement down as though he was about to draw a weapon, when he (Gilmore) drew his revolver, and commenced firing, but without intending to kill Mooney or any one else; that he had gotten the pistol between 9 and 10 o'clock that evening, before he met Mooney, and that, at the time he was seen to leave the saloon during the dispute, he had only gone out to the water-closet. The court instructed the jury as to murder in the first degree, murder in the second degree, manslaughter in the fourth degree, and self-defense, declaring that the principles of law in each applied to the killing of Stanton as if Mooney had been the victim. The instruction as to manslaughter was based upon the unintentional killing of Stanton.

1. There was no error in the action of the court in regard to filling the panel by calling other jurors in the place of the absentees; and the two who were thus called were unexceptionable, and were not challenged either peremptorily, or for cause, and those absent were not on either of the challenge lists; and, besides, the court offered to give the defendant an additional 48 hours in which to make his challenges; but this offer was declined. This action of the court placed the defendant in just as good a situation as he would have been had the two jurors failed to absent themselves, and this was all he could justly claim. The privilege of having 48 hours in which a prisoner is to make his challenges is a mere statutory one, and which he may waive. *State v. Klinger*, 46 Mo. 224; *State v. Waters*, 62 Mo. 196. The panel being filled in a proper manner, the two jurors first called being unavoidably absent, additional time being granted to defendant to make further challenges, the case stood precisely as if the two absentees had died pending the time challenges were being made.

2. So far as concerns the testimony of Oldfield, the ground of the objection to its admission is not preserved, and the presumption is therefore to be indulged that the objection taken to its admissibility was invalid, and this presumption should especially be indulged when such testimony is in certain circumstances competent as the voluntary admissions of the defendant.

3. The instructions, speaking of them in a general way, were correct. There was one of the instructions, however, the correctness of which cannot be indorsed. It was this: "If the jury find from the evidence that the defendant and Thomas Mooney had an altercation which resulted in the death of Miles Stanton, and that defendant commenced the difficulty or brought it on by any willful act of his, committed at the time, or that he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self-defense in the case, and the jury should not acquit on that ground. And, in such case, it makes no difference how imminent the peril may have been in which the defendant was placed during the difficulty." It is not true, as asserted in this instruction, that there is no self-defense in a case where a defendant begins a quarrel or voluntarily enters into the same. It is only true where he does so with the view to take advantage of the quarrel thus begun, and to slay his adversary or do him some great bodily harm. Whenever this is his purpose, he loses his right of self-defense, and if forced to slay his adversary, even though to save his own life, his act becomes murder in the first degree, and nothing less. Not so, however, if he began the quarrel or voluntarily entered into it with no such murderous or felonious purpose in view. In such case, the law measures the grade of his crime by the grade of his intent; and while it will not, because of his being in fault, exonerate him altogether, yet it will take into consideration his intent in beginning the quarrel or voluntarily entering into the same; and thus considering it, will cut down his offense from what would otherwise be the highest grade of homicide into manslaughter in the fourth degree. This whole subject was discussed in *Partlow's Case*, 90 Mo. 608, 4 S. W. Rep. 14, and the

distinction just mentioned fully approved, and this was done after a thorough examination of the authorities. *Partlow's Case* was approvingly followed in *State v. Berkley*, 92 Mo. 41, 4 S. W. Rep. 24, and it is unnecessary to go over the same authorities again. But it may be safely affirmed that though in some cases we find the unqualified assertion that if the defendant brought on the difficulty, etc., then there is no self-defense in the case, etc., yet, from the Year Books down to the present time, no court or text-writer can be found willing to come out and flatly assert that there is no distinction in the guilt of a person who brings on a difficulty in order to furnish a pretext for wreaking his malice, and, having thus brought it on, carries out his previous purpose and slays his adversary in defense of his own life, and in the guilt of a person who, without such prior purpose, brings on a difficulty in which to save his own life he takes that of his adversary. On the contrary, whenever the subject has been examined, wherever it has been analyzed by courts or text-writers, the result reached has invariably been substantially identical with that announced in *Partlow's Case*, *supra*. In quite a recent case in Illinois, the defendant asked the court to give the following instructions: "The court instructs the jury that, if they believe, from the evidence, that the defendant was assaulted by the deceased in such a way as to induce in the mind of the defendant a reasonable and well-grounded belief that he was actually in danger of losing his life or of suffering great bodily harm, then he was justified in shooting the deceased, whether the danger was real or only apparent. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances, and determine therefrom as to the actual state of things surrounding them; and in such cases, if persons act from honest conviction, induced by reasonable evidence, they will not be held responsible criminally for a mistake as to the extent of the actual danger." The court refused to give the instruction as asked, but added the following modification: "In connection with this instruction the jury are further instructed that if they find from all the evidence that the defendant sought for and attempted to provoke a personal difficulty with the deceased, Vigo, and that he, and not Vigo, was the first assailant, or that, the defendant being the first assailant, he had not really and in good faith endeavored to decline any further struggle before the mortal shot was fired; or if they believe, from the evidence, that the defendant sought for and attempted to provoke a personal difficulty with the deceased, with the intent to kill him if he did make the first assault,—then in neither of such cases would the defendant be justified in killing the deceased upon the theory of self-defense because of such assault by the deceased, Vigo, before the fatal shot was fired; and if the defendant, without any previous malice against the deceased, and with no intent to take his life, did seek for and provoke a personal difficulty with the deceased which resulted in such assault being made by the deceased, that the defendant at the time he so sought for and attempted to provoke such personal difficulty, did not expect such conduct of his to result in such assault by the deceased, but that it did result in such assault being made, and in defendant thereupon, with his revolver, firing the fatal shot, as stated in this instruction, then such act of defendant in so killing Vigo cannot be justified upon the ground of self-defense, and that, while such would not be murder, it would amount to manslaughter." And concerning this the court said: "We perceive no error in the modification. Under the evidence in this case we are of opinion that the modification was clearly within the rule announced in *Adams v. People*, 47 Ill. 378." *Kinney v. People*, 108 Ill. 519. And it is wholly immaterial what the right of a defendant is called which gauges his crime and his punishment by his intent, and, because of a lack of murderous intent on his part, cuts down his offense and his punishment to that of manslaughter. In some jurisdictions such right would be termed the right of

"imperfect self-defense." But it is wholly immaterial what the principle is christened, or how its name is entered upon the parish register. All that I ask is that its existence be not utterly ignored, as was done in the instruction being criticised. If its existence be conceded, then its application is quite easy, as I will now endeavor to show. If the principle I have announced, and the distinction I have endeavored to make, were formulated, this instruction would express the idea and the principle. If the jury believe, from the evidence, that the defendant provoked the difficulty or began the quarrel with the purpose of taking the advantage of the deceased, and of taking his life or of doing him some great bodily harm, then there is no self-defense in the case, however imminent the peril of the defendant may have become in consequence of an attack made upon him by the deceased; and if, in such circumstances, the jury believe that the defendant killed the deceased, then he is guilty of murder in the first degree. *State v. Hays*, 23 Mo. 287; *State v. Packwood*, 26 Mo. 340. But although the jury believe, from the evidence, that the defendant began the quarrel or provoked the difficulty with the deceased, yet if they also believe from the evidence that this was done by defendant without any felonious purpose, and that thereupon the deceased attacked him and compelled him, in order to save his own life, to take that of the deceased, still the law, while it will not entirely justify the homicide on the ground of self defense, will hold the defendant guilty of no higher grade of crime than that of manslaughter in the fourth degree. This I believe to be a correct exposition of the law applicable to such cases, and one which would be readily understood by the jury.

But though I hold the instruction in the case at bar to be faulty for the reasons already given, yet it does not follow that the judgment should be reversed because of the error the instruction contains. These are my reasons for this view: The defendant suffered no damage from the error, because there was no evidence of self-defense in the case. Self-defense is an affirmative, positive, intentional act. Here, according to the defendant's own story, his act of firing his pistol was wholly unintentional,—a mere accident. Again, at the time the defendant drew his weapon and fired, his danger was not imminent. His adversary had drawn no weapon, and no weapon was drawn by him. The right of the defendant to defend himself did not arise until he had done everything in his power to avoid the necessity of shooting his adversary. If he could safely have avoided using his weapon, he was not justified in using it. *State v. Johnson*, 76 Mo. 121. The duty of the defendant was to retreat, or at least avoid proceeding to the last resort,—to the exercise of the extreme right of self-defense,—so long as was consistent with his own safety. There was no such fierceness of assault in this case as sometimes forbids retreat and justifies instantaneous action. 1 Whart. Crim. Law, § 486a; 1 Bish. Crim. Law, § 372. Moreover, that there was no self-defense in this case is shown by the defendant's own conduct. He continued to shoot at his fleeing adversary, even after he had fallen to the floor. The physical facts in the present instance contradict the theory of self-defense, and are utterly inconsistent therewith. When this is the case, courts are not required to ignore such physical facts, and give instructions not in harmony with them. *State v. Anderson*, 89 Mo. *loc. cit.* 332. This principle is exemplified in *Wilson's Case*, 88 Mo. 13, where self-defense was also the plea and unsuccessfully interposed.

4. Relative to the instruction in regard to shooting at Mooney, and killing Stanton, an innocent by-stander, it only asserts the familiar principle that if A. shoots at B., and, missing him, kills C., this is murder, because the law transfers the felonious intent from B. to the innocent party who is slain. *State v. Payton*, 90 Mo. 220, 2 S. W. Rep. 394; *State v. Jump*, 90 Mo. 171, 2 S. W. Rep. 279; *State v. Montgomery*, 91 Mo. 52, 3 S. W. Rep. 379. The defendant has not been represented by counsel in this court, but, in obedi-

ence to statutory duty, the record has been examined, and the result is that the judgment should be affirmed.

BRACE and BLACK, JJ., concur.

NORTON, C. J., (*concurring*.) While I concur in affirming the judgment in this case, I do not concur, but dissent, from so much of the opinion as holds the following instruction to be erroneous, viz.: "If the jury find from the evidence that defendant and Thomas Mooney had an altercation which resulted in the death of Miles Stanton, and that defendant commenced the difficulty or brought it on by any willful act of his committed at the time, or that he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self-defense in the case, and the jury should not acquit on that ground. And in such case it makes no difference how imminent the peril may have been in which the defendant may have been placed during the difficulty." This instruction has been accepted by the bench as a correct exposition of the law in this state for nearly a half century, and has received the sanction of this court in the following cases: *State v. Underwood*, 57 Mo. 50; *State v. Starr*, 88 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Shultz*, 25 Mo. 153; *State v. Christian*, 66 Mo. 138-145; *State v. Hudson*, 59 Mo. 135-138; *State v. Vansant*, 80 Mo. 69, 70; *State v. Jones*, 78 Mo. 278; *State v. Brown*, 64 Mo. 368; *State v. Peak*, 85 Mo. 190; *State v. Rose*, 92 Mo. 201, 207, 4 S. W. Rep. 733. The opinion in condemning the instruction above quoted in effect overruled the principle enunciated in the cases cited. These cases establish the proposition that if A. voluntarily provokes by any willful act of his a difficulty with B., and voluntarily enters into the difficulty with a purpose to gratify his malice by killing him, and does kill him, his crime would be murder, and nothing less. If, on the other hand, A. commence a difficulty with B., or brings it on by any willful act of his, and enters into it of his own free will and accord, with no purpose of taking B.'s life, still if in the difficulty thus provoked brought on and entered into he kills B., while he may not be guilty of murder, he is guilty of manslaughter in some degree to which the evidence in the case may apply. But in either case, whether the difficulty is sought, provoked, and voluntarily entered into by A. with a felonious and malicious purpose to kill, or without such felonious purpose, there is no self-defense in the case, and he cannot be acquitted on that ground. The principle announced in the instruction, and so repeatedly approved by this court in the cases herein cited, is an emphatic declaration to every citizen of the state that if he violate the law in provoking a breach of the peace by seeking and bringing on a difficulty, and voluntarily entering into the same he takes the life of his adversary in the difficulty thus provoked and entered into, he will not be heard to justify or excuse himself on the ground of self-defense, and he must either suffer the penalty of murder, if it appear that he brought on the difficulty for the purpose of killing his adversary and provoked an attack as a cover for such purpose, or, if he brought on the difficulty without any such felonious or malicious purpose, that he must, if he kill his adversary, suffer the penalty of some grade of manslaughter which the evidence may show it to be. In other words, the principle announced in the instruction is a command to every citizen to keep the peace, and also warns him who breaks it, by provoking and entering into a difficulty with another and killing him, that he cannot escape punishment on the ground of self-defense for some grade of homicide either for murder or manslaughter in some of the degrees which the evidence and circumstances attending the killing may show it to be. The doctrine of the instruction, and of the cases above referred to, is sound and conservative in principle, promotive of good order, and conducive to the preservation of the peace. It affords protection to the law-abiding, and threatens certain punishment to the law-breaker, and

I am unwilling to see it shaken in its integrity one jot or tittle, or so modified as either to afford an avenue of escape to the lawless, or so as to withdraw from the peaceful law-abiding citizen any of the protection which it affords him in the quiet walks and pursuits of life. Crime, as shown by the records of this court and otherwise, is so enormously on the increase as to demand a strict adherence to every principle of law established to punish it, and I am unwilling to give my sanction to a departure from the principle announced in the instruction, and which has so often received the sanction of this court. The opinion, if I understand it correctly, asserts that where a person willfully brings on a difficulty, and enters into it of his own accord, and kill his adversary, that he cannot justify the act at all. This being so, I am at a loss to see how the instruction in question, which declares that, when a person kills another under the circumstances above stated, there is no self-defense in the case, and he cannot justify the killing on that ground, can be condemned. If the killer, under such circumstances, cannot justify the act on any ground, how is it possible that an instruction can be erroneous which declares that he cannot justify on a particular ground, viz., self-defense.

Judge RAY concurs with me in the views above expressed

STATE v. RAMBO.

(*Supreme Court of Missouri*, May 21, 1888.)

1. HOMICIDE—INDICTMENT—ASSAULT WITH INTENT TO KILL.

An indictment charging that four persons named, with malice aforethought, shot at nine other persons named, with intent to kill, is not invalid, on the ground that it charges nine different offenses in one count.

2. SAME—EVIDENCE.

Under an indictment charging four persons with making an assault upon nine other persons, one of the defendants may be convicted although the others are acquitted, and although the proof shows that the assault was made on only one of the nine.

3. CRIMINAL LAW—TRIAL—EXCEPTIONS.

It is not sufficient to except to the giving and refusing of instructions for the first time in a motion for a new trial.

Error to circuit court, Phelps county; C. C. BLAND, Judge.

W. C. Kelly, for plaintiff in error. *The Attorney General*, for the State.

BLACK, J. 1. The indictment is in one count. The substance of the charge is that Chalmer, Elmer, Alvin, and Addie Rambo, of their malice aforethought, with guns and pistols, and with intent to kill, shot at J. W. Clark and eight other persons, who are named. The evidence for the state shows that John P. Marlow resided in a house which he had procured of Alvin Rambo. This house and a wagon shop, which was used by Rambo, were in the same inclosure, and not more than 30 or 40 feet apart. Marlow had procured the use of the house until such time as he could erect a log-house on his own land, about a half mile distant. On the day of the difficulty, the persons named in the indictment as having been shot at, and others, some 20 in all, including Walter Clark, were assisting Marlow in house-raising. Clark and the Rambos were not on friendly terms, the former having been warned to keep off the premises of Alvin Rambo. Marlow invited the men assisting him to his house for their dinner, and, as they were approaching the house, Alvin Rambo stepped up to the opening in the inclosure with hammer in hand, and at the same time Chalmer Rambo placed a gun over the fence and shot towards the crowd, but Reed hit the gun so that the shot went upwards. At the same time, Clark retaliated by shooting at Chalmer Rambo with a pistol. Elmer Rambo had a gun which he endeavored to use, and Addie Rambo assisted, by reloading Chalmer's gun, which Chalmer fired the second time. There

is some evidence that the affray began between Alvin Rambo and Rigden, each claiming that the other made the first assault; but the weight of the evidence is that the Rambos had determined to resist the entrance of the inclosure by Clark, and that Chalmer Rambo made the first assault by shooting. The defendants were all acquitted, except Chalmer Rambo, who was convicted, and sentenced to two years' imprisonment. Objection was made to the indictment by motion to quash, and in arrest, on the ground that it charges nine different offenses in one count. The law is now well settled that a man may be indicted for an assault and battery upon two or more persons in one count. 1 Russ. Crimes, (9th Ed.) 1030; Whart. Crim. Pl. (8th Ed.) § 469; 1 Bish. Crim. Proc. (3d Ed.) § 437. Where two or more persons are charged with having committed one offense jointly, they should be joined in the same indictment, (section 1811, Rev. St. 1879;) and they may all be charged as principals in one count. *State v. Payton*, 90 Mo. 223, 2 S. W. Rep. 394. It follows that two or more persons may be charged in the same indictment and in the same count for an assault and battery upon two or more persons. It was so held in *Fowler v. State*, 3 Heisk. 154. In *Ben v. State*, 22 Ala. 11, it was held that an indictment for administering poison to three persons with intent to kill was not bad for duplicity; and in *Com. v. McLaughlin*, 12 Cush. 615, where the defendant was indicted in two counts,—one for a felonious assault upon two persons by shooting at them with intent to kill both, and the other for a common assault,—it was held that defendant could be found guilty of an intent to murder both persons, and, further, that if he intended to kill one, but regardless as to which, he might be convicted on a charge of assaulting both. The indictment in this case does not undertake to set out different and distinct acts on the part of the defendant, but one act in which they all participated. It is neither a legal nor a physical impossibility for the four defendants to shoot at nine persons with intent to kill all of them. The indictment is therefore good.

2. There can be no doubt but on this indictment one defendant may be convicted, though the others are acquitted; but whether one or all may be convicted of an assault with intent to kill one of the named nine persons presents a different question. In 3 Greenl. Ev. § 22, it is said: "As it is required, in indictments, that the names of the persons injured, and of all others whose existence is legally essential to the charge, be set forth, if known, it is, of course, material that they be precisely proved as laid." In *State v. McClintock*, 8 Iowa, 206, where several persons were indicted for an assault and battery upon two persons, it was held that they could not be convicted unless the jury found that the assault and battery was committed upon both persons. But in the case of *Com. v. O'Brien*, 107 Mass. 208, on an indictment for an assault and battery upon two persons, it was held that a conviction was supported by proof of an assault upon either. A variance between the indictment and proof, as to the name or names of the persons assaulted, would have been no ground for acquittal, unless the trial court found the variance to be material and prejudicial to the defense. Section 1820, Rev. St. 1879; *State v. Smith*, 80 Mo. 516; *State v. Sharp*, 71 Mo. 218. Perhaps that statute does not in terms apply to this case, but that and the subsequent section show that, in general, the variance ought to be prejudicial to the defense, to operate as an acquittal. Now, here an assault with intent to kill one or more of the named persons would be a crime, truly and accurately stated in the indictment; and the fact that the proof may not show that the appellant was guilty of all with which he is charged is no ground for acquittal, it appearing that he was guilty of a crime stated in the indictment. We think this conviction would be good, as a plea of former conviction, to a subsequent indictment for an assault upon either one of the named persons. Conceding, therefore, that defendant only intended to shoot Clark, still the conviction is supported by the evidence. We may add that, under our stat-

ute, one indicted for a felonious assault may be convicted of a common assault.

3. It does not appear that any exceptions were taken to the giving and refusing to give instructions at the time the court ruled upon them. It is not sufficient to except to instructions, for the first time, in the motion for new trial. *State v. Reed*, 89 Mo. 168, 1 S. W. Rep. 225. The objections made to the instructions will not therefore be considered in detail; we may say they appear to be fair, and cover the entire case, on both sides. The judgment is therefore affirmed.

All concur.

ISCHER v. ST. LOUIS BRIDGE Co. *et al.*

(*Supreme Court of Missouri. May 21, 1888.*)

MASTER AND SERVANT—NEGLIGENCE—VARIANCE.

In an action by an employe against a railroad company for personal injuries alleged to have been received by reason of the incompetency, recklessness, and brutal conduct of the defendant's foreman, of which defendant had, or might have had, knowledge, proof that the foreman cursed the plaintiff, and compelled him to take the position in which he was hurt, and that, in unloading iron pipes from a car, the accident by which plaintiff was injured was occasioned by a defect in the iron bar placed under the pipe, and the failure to place pieces of wood under the pipes to prevent them from slipping, varies from the petition, and will not sustain a judgment for plaintiff.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

Action by Edward Ischer against St. Louis Bridge Company and Tunnel Railroad Company.

S. M. Breckenridge and *M. F. Watts*, for appellant. *A. R. Taylor*, for respondent.

NORTON, C. J. This is an action for damages for personal injuries, in which plaintiff recovered judgment for \$5,000, from which defendants have appealed. The cause of action alleged in the petition is as follows: That plaintiff was in the employment of defendant unloading iron pipes from certain cars at the city of St. Louis, near the Union depot; that while so engaged one of the iron pipes rolled against him, and caught one of his legs, crushing the bones so that it had to be amputated. It is alleged "that said iron pipe was caused to roll upon and against and crush plaintiff's leg, as aforesaid, through the negligence and carelessness of defendant's agent, one Christian Schouv, defendant's foreman in directing and controlling the unloading of said iron pipes. That said foreman, at the time of said injury, was driving the plaintiff and his co-employees with such curses and threats that the said work could not be done with due safety to said employees; which said action of said foreman contributed directly to cause said injury. That said Schouv compelled plaintiff to take a place of great and unnecessary danger by threats and cursing him; and then, by his recklessness and negligence in hurrying plaintiff and his co-employees in said work, caused said iron pipe to roll upon and injure plaintiff as aforesaid. That said Christian Schouv was unfit and incompetent to discharge the duties of such foreman by reason of his reckless and brutal habit and disposition, of which defendant had knowledge at the time he was employed, or could by the exercise of ordinary care have known it." The answer was a general denial. The action of the trial court in refusing to sustain a demurrer to the evidence, and in giving and refusing instructions, is assigned for error. But two witnesses (the plaintiff being one of them) were examined as to what took place when plaintiff was injured, and their evidence tended to show the following state of facts: That in April, 1880, plaintiff was in the employ of defendants in unloading iron pipes from box car. These pipes were from 12 to 14 feet long, about 1 foot in diameter.

weighing 1,800 or 2,000 pounds, and were placed in both ends of the cars,—two tiers in each end; one tier on the other. That plaintiff had been in defendant's employ about eight days, and was one of a gang of six or seven men, of which Christian Schouv was foreman. That at the time of the accident plaintiff and others of the men were shoving one of said pipes out of the car door; that the pipes had all been removed out of one end of the car, and the upper row in the other end had also been removed, leaving the bottom row of pipes. In order to get the pipe out of the car, one of the workmen had inserted a wooden bar in one end of the pipe, just high enough to permit another workman to place a small iron bar under it, on which, acting as a pivot, the pipe was turned, in order to launch it out of the side door of the car. The custom had been to "chock" the pipes on the floor of the car with small blocks of wood provided for that purpose, to prevent them from rolling when one of the pipes was removed. The evidence showed that this was usually done by Schouv, and when not done by him was done by some of the men; but that at the time of the accident in which plaintiff was hurt this was not done.

It is further shown that plaintiff at first assisted the workmen at the end of the pipe near the car door; but of his own accord, and without directions from the foreman, went to the rear end of the pipe, when Schouv, the foreman, called to him, and said: "God damn you, you come here, and stay where I put you, and don't you go away from here either." Plaintiff returned as directed, but left his place again, and was again ordered back, and remained there till the iron bar gave way, and he was injured. During this time Schouv was swearing, and saying, "God damn you, hurry up there; I don't want to be all day unloading this car." When Schouv was cursing, the men seemed to be bewildered, or, in the language of plaintiff, "he used his authority in such a way as to bewilder the men in the work." "Schouv, the foreman, was in the habit of frequently swearing at the men, and would rush the gang with their work, and rushed it himself," when assisting in unloading the pipes. The evidence shows that, after plaintiff returned the second time to the forward end of the pipe, he attempted to guide it so that it might be launched out of the car door; and, while thus engaged, the bar, which had become bent from frequent use, and on which the pipe was supported, slipped, and the pipe rolled against another pipe, catching plaintiff's leg between the two pipes, and inflicting the injury for which he sues.

It is insisted by counsel that, by the averments of the petition, Schouv was only a fellow-servant of plaintiff, and that as there was no evidence tending to show that defendants either had knowledge of his incompetency, or might have known it by the exercise of ordinary care, therefore his demurrer to the evidence ought to have been sustained. In the case of *Moore v. Railway Co.*, 85 Mo. 588, it is held that a foreman who is intrusted with power to supervise, tend, and control workmen under his charge is not a fellow-servant of such workmen, but a vice-principal. This case was followed in the subsequent cases of *McDermott v. Railroad Co.*, 87 Mo. 298; *Stephens v. Railroad Co.*, 86 Mo. 228; *Dowling v. Allen*, 88 Mo. 293, and *Hoke v. Railway Co.*, Id. 360. The plaintiff, to have brought his case strictly within the rule laid down in *Moore v. Railway Co.*, *supra*, should have alleged that Schouv, as foreman, had sole charge and control of the men engaged in the work of unloading cars. It would seem from the averments in the petition that the pleader, while alleging that Schouv, as foreman, had control of the work, treated him as a fellow-servant, in averring that he was unfit and incompetent to discharge the duties of foreman by reason of his reckless and brutal habit, of which defendants had knowledge at the time he was employed, or might have had it by the exercise of ordinary care. But inasmuch as on the trial evidence was offered and received without objection showing that the said Schouv did have the entire control of the gang of men, we pass

from the above objection to the consideration of the question as to whether there was such failure of evidence to establish the averments of the petition as would have justified the court in taking the cause from the jury. The gist of action, as stated in the petition, is that Schouv, the foreman, was incompetent; and that by reason of his recklessness and carelessness, his brutal habit and disposition, plaintiff was compelled to take a position of unnecessary danger; and that the injury received by plaintiff was the direct result of Schouv's cursing, threatening, and driving the men under him so that they could not do the work with due safety. While it will be seen, from the statement of the evidence herein made, that it shows that Schouv was a profane man, and prefaced his orders to the men with an oath, and hurried them up with the work in hand, there seems to be a lack of evidence showing that he accompanied his orders with any threat either to punish or discharge the men, or that he compelled plaintiff to take a place of great and unnecessary danger. The evidence does show that plaintiff was ordered to take a position at the end of the pipe nearest the door from which the pipe was to be launched; but there is no evidence to show that this was an improper place for him to be, or any more hazardous than any other place necessary to be occupied. The cause of the accident, as shown by the evidence of plaintiff and witness Harty, was the giving away of the bar on which the end of the pipe rested. In his evidence plaintiff says: "I was guiding the pipe, and this bar gave away. When it gave way, the pipe came over on to me. * * * The lever that we were using was made of iron, which we had been using all the time for a purchase by putting it underneath, and that slipped and fell, and as it slipped it made the pipe roll." Harty, the other witness, testified that, when the crow-bar was put under the pipe, the other end of the pipe was on the floor of the car, and the men at the other end lifted it over so as to rest that end of it on the end of this pipe, and give the forward end a movement towards the door. It would naturally slant there; and Ischer was to hold it stiff at the head, to keep it from rolling away from the door. That was the object, and the way they tried to do it; and in doing that this bar slipped, and Ischer was then to keep it from rolling over, and was holding it stiff, so it would not roll over out of the door. The rear end of the pipe at the end of the car, which was on the floor, they lifted up to get this end raised on the bar, and in doing it they gave it a turn that threw the head of the pipe towards the door, and, when they shoved it around, the bar slipped, and it fell. That is what caused the accident. The whole evidence seems to point to the fact that the injury was the result of a defective bar, and a failure to "chock" the pipes to prevent them rolling. The case made by the evidence is not that made by the petition.

The judgment, for the reasons given, will be reversed, and cause remanded, so that plaintiff may amend his petition in conformity to the views expressed herein.

All concur; SHERWOOD, J., concurring only in the result.

In re WILSON.

(*Supreme Court of Missouri. May 21, 1888.*)

GUARDIAN AND WARD—CONTROL OF FUNDS—DISCRETION OF THE COURT.

Where the funds of a minor are in the hands of a curator in this state, it is not error in the probate court, in the exercise of discretion vested in it by Rev. St. Mo. §§ 2597, 2598, 2609, providing, in substance, that where a guardian and ward are non-residents, and the ward has property here, that the probate court may, on proper proof, order the property delivered to the non-resident guardian, to refuse to make such an order, where it appears that the non-resident guardian was appointed at the instance of the ward's father, who, as former guardian, had misappropriated the funds, and who was seeking to get control of them again.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

v.8s.w.no.5—24

J. L. Hornsby, for appellant. *Phillips & Stewart*, for respondent.

NORTON, C. J. On the 3d of March, 1885, W. B. Childers, the guardian in New Mexico of Fannie V. Wilson, a minor then residing there, made application to the probate court of the city of St. Louis, Mo., to require John Wickam, the curator of said Fannie V. Wilson in Missouri, where she had formerly resided, to deliver and turn over to said Childers, as such guardian, the property of said Ward. The probate court overruled the application, and Childers appealed to the circuit court of the city of St. Louis, where, upon a trial had, the court gave judgment for the petitioner, Childers, granting the application for removal of the fund. From this judgment said Wickam has appealed, and insists that the facts of the case show that, in granting said application, the court exercised its discretion unsoundly. On the trial the applicant offered in evidence a copy of the record of his appointment as guardian of Fannie V. Wilson, made at the instance of W. K. P. Wilson, the father of said minor, by the probate court of Bernalillo county, New Mexico; also of his bond as guardian. Evidence, by deposition, was also offered tending to show that the money belonging to the ward could be invested in New Mexico so as to yield a larger income than it brought in Missouri; some of the witnesses testifying that it could be made to realize 18 per cent., which portion of the evidence was objected to on the ground that the highest rate of interest allowed by the statute of New Mexico was 12 per cent. The applicant also introduced evidence to show that he was of good character, and a proper person to be guardian of a minor. Wickam, the appellant here, offered in evidence the records of the probate court of the city of St. Louis, showing that, in 1874, W. K. P. Wilson, the father of Fannie V. Wilson, was appointed her curator, and qualified as such; also the order of said court dated September 29, 1877, requiring further security of the curator; also the order of said court dated October 27, 1877, issuing attachment for said curator; also the order of said court revoking the said curator's letters, and the record of said court of March 26, 1878, appointing John Wickam curator of said Fannie V. Wilson. Said Wickam also offered in evidence the pleadings, judgment, and assignment of judgment of the St. Louis circuit court, from which it appeared that said Wickam, as curator, sued his predecessor in said trust, said W. K. P. Wilson, and the sureties on his bond as curator, and recovered judgment for the amount which said Wilson had received as curator. The affidavit of Mrs. V. F. C. Zane, the maternal grandmother of the minor, was put in evidence, from which it appeared, in addition to the facts appearing from the record, that the sureties of said Wilson paid said John Wickam the amount for which he had recovered judgment against them, and that said Wilson had never repaid any part of the money so paid by the sureties on his account. The affiant further stated that she believed said Childers was appointed guardian of said Fannie at the special instance and request of said W. K. P. Wilson, the father and former curator of said minor, and that said Childers is and will be under the influence and control of said Wilson, who is desirous of having the minor's property removed to New Mexico in order that he may indirectly control the same, with the same result as when he controlled it as curator, that the mother of said minor is dead, and her father has married the second time, and has a numerous family by said second wife. John Wickam also testified that he had obtained the money in his hands from the sureties on the bond of said Wilson. The former curator also stated the amount of funds in his hands, and the amount of income realized therefrom. The fact is also stated in the abstract that since the trial the said minor Fannie and her father have removed back to Missouri. As bearing upon the question involved in this case, the following sections of the Revised Statutes are referred to: Section 2597 provides that "in all cases where any guardian and his ward may both be non-residents of this state, and such ward may be entitled to property of any

description in this state, such guardian may, on producing proper proofs, demand, or sue for and remove, any such property," etc. Section 2598 provides that, in such case, on the production of the proofs indicated in the statute, the probate court may discharge any resident guardian, and authorize the delivery of any property of the ward, upon proper receipts. Notice is required to be given to the resident guardian; "and the court may reject the application, and refuse such order, whenever it is satisfied it is for the interest of the ward that such removal shall not take place." Section 2609 provides that if it appear to the court that a minor, having a guardian in this state, is not a resident of this state, and has a guardian in another state or territory, "the court may authorize or compel the guardian or curator of such minor to deliver over to such foreign guardian all the property," etc. Previous to the adoption of this statute a foreign guardian could resort only to a court of chancery to have the funds of his ward transferred and turned over to him, and whether such transfer should be made rested in the sound discretion of the chancellor. Since the adoption of the statute probate courts have been invested with the power to authorize the delivery of a ward's property to a foreign guardian. But, both at common law and under the statute, such removal is not granted of strict right, but is made to depend on the judgment of the court, in the exercise of a sound discretion, as to whether such removal would be to the interest of the ward. See statute above referred to, and *Earl v. Dresser*, 30 Ind. 11; *Marts v. Brown*, 56 Ind. 386.

That the erroneous exercise of judicial discretion is properly reviewable by an appellate court is established by the following authorities: *Walton v. Walton*, 19 Mo. 667; *Carr v. Moss*, 87 Mo. 447. In the light of the facts disclosed by this record, and the cardinal principle that, in dealing with the estates of minors, the chief object of courts is their preservation; and in view of the fact that the funds of the minor in the hands of Wickam were safely secured and yielding an income, and the further fact that, in the event of the removal of the fund, there was a strong probability that it would be controlled by the father of the minor who it appears wasted the estate, and was unfaithful to his trust when confided to him as the former guardian of said Fannie,—in view of these things, we are of the opinion that the probate court exercised its discretion soundly in refusing the application, and that the circuit court exercised its discretion unsoundly in granting it and ordering the removal.

The judgment is reversed; in which all concur.

GUENTHER v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri. May 21, 1888.*)

1. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS.

In an action against a railroad company for killing plaintiff's husband, it appeared that deceased was run over in the day-time while on defendant's track, within the limits of a city; that, at the place the accident occurred, there were two tracks, between which was a road-bed, and by the side of the track on which deceased was killed a dirt road used for a number of years by workmen employed near by; and that, owing to the road-bed being better and more level than the dirt road, the workmen and other pedestrians used the road-bed instead; that there was no evidence that deceased was killed at a crossing of any traveled road or street, or that any public crossing was within such a distance as to require the bell on the engine to be rung as required by statute; and that there was conflicting evidence as to whether either the bell or whistle was sounded. There was evidence of contributory negligence on the part of plaintiff. *Held*, that an instruction that if the jury believe the place where the injury occurred to deceased was a traveled public road or street, and had been used as a public road for 20 years prior thereto, then it was the duty of the servants of defendant to keep ringing the engine bell while the train was passing over said road or street, and for a distance of 80 rods before reaching the place of accident; and that, if it appeared that no bell was rung while passing said road or street at the time of and immediately before the accident, the jury might infer negligence on the part of the employee of defendant; and that deceased's death di-

rectly resulted from omission to sound the bell,—they should return a verdict for plaintiff,—was erroneous, as it completely ignored the fact of the contributory negligence of plaintiff.

2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for killing plaintiff's husband, it appeared that deceased was run over while on defendant's track; that, at the place where the accident occurred, the train could have been clearly seen approaching; that deceased, without reasonable care, walked upon the track in front of an approaching train, and was struck down and killed; and there was conflicting evidence as to any warning having been given of the approaching train. *Held*, that it was error to refuse to instruct the jury that if deceased, just before the accident, stepped upon the track in front of an approaching train, which he could have seen or heard had he looked or listened, and that he went on the track without looking or listening, and was struck by the train, then the verdict should be for the defendant, unless they found from the evidence that the train could have been stopped by those in charge, by the exercise of ordinary care, in time to prevent the injury, after they became aware, or might have become aware by the exercise of ordinary care, of the peril of deceased.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Elizabeth Guenther brought an action against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for negligently killing her husband. Verdict for plaintiff. Defendant appeals.

Bennett Pike, for appellant. *Leo Rausieur* and *Dexter Tiffany*, for respondent.

BRACE, J. This is an action in which plaintiff seeks to recover damages for the alleged negligence of defendant in running its locomotive and cars over her husband, Jacob Guenther, and killing him. The answer of the defendant contained a general denial and a plea of contributory negligence. The reply of plaintiff to the answer was a general denial. At the close of plaintiff's evidence in chief, a demurrer to the evidence was interposed, which being overruled the defendant then introduced its evidence, and the case was submitted to the jury under the instructions of the court, a verdict rendered for the plaintiff, and from the judgment entered thereon the defendant, after an unsuccessful effort for a new trial, appeals, and assigns for error the refusal of the court to sustain the demurrer to the evidence, the admission of improper evidence for the plaintiff, the giving of improper instructions for the plaintiff, and refusing proper instructions for the defendant.

The defendant is not in position to urge the overruling of the demurrer to the evidence as reversible error, having waived the same by putting in its own evidence; and the case will have to be examined and determined upon the whole evidence in the case. *Bowen v. Railway Co.*, ante, 230, (decided at this term.)

It appears from the evidence that about 7 o'clock on the morning of the 18th of August, 1884, the deceased, while walking southwardly on the defendant's track, at a point within the limits of the city of St. Louis about three miles south of the Union depot, was struck by the Carondelet accommodation train running south; that he was thrown from the track, and died the same day; that the train was about on time,—perhaps a few minutes late,—and running at the rate of from 15 to 20 miles an hour; that there is a plain and unobstructed view of the track for 500 yards or more north of the point where the collision took place. The evidence of the plaintiff tended to prove that, on the train, while moving over this distance, no bell was rung, and no whistle sounded, till at the moment when Guenther was struck. The evidence of the defendant tended to show that the bell was being continually rung on the engine during the whole time the train was moving to the moment when deceased was struck. At the point of collision the defendant has two tracks on its road-bed; the eastern track used by trains going north; the western track, by trains going south. The deceased was struck on the western track. Between these two tracks there is a space from five to eight feet.

The road-bed is located along the western bank of the Mississippi river, and in the bluff west of the road-bed, and adjacent to it, a number of quarries have for a number of years been operated. Between the road-bed and these quarries a dirt road, on the average about four feet lower than the railroad bed, has for a number of years been used by the quarry teams; and, for a like period, the workmen, in passing on foot to and from their work, as well as other pedestrians, used the road-bed,—the walk there being level, and better than the dirt road below; and about 7 o'clock in the morning it was customary to find quite a number of people passing along the road-bed at this point. Defendant's road-bed was constructed on a strip of land conveyed to it for a right of way in the year 1856, and originally sustained but one track. In 1859 the owners of the land over which the defendant's easement was granted, laid off that part of the tract lying west of the road-bed into lots and blocks divided by streets, and located on the plat a street 40 feet wide, running parallel with the west side of the railroad track, and filed and recorded a deed of dedication thereof to public uses. This street was afterwards recognized by the city on its plats, but was never improved or definitely located on the ground, so far as the evidence shows; nor was it built upon as a street, or used as such, except, as hereinbefore stated, in connection with the dirt road mentioned and the defendant's road-bed. This street, thus laid off, was the terminus of the streets running east and west on the plat; none of them crossing it. About the year 1873 the defendant laid the second track on its road-bed, and there was evidence tending to show that, in doing so, the western track was pushed west of its original location in some places along where the accident occurred to make room for the eastern track; and it is contended for the plaintiff that the collision took place within the limits of this platted street; and by the defendant, within the limits of its right of way. The evidence on this subject is very vague and unsatisfactory; nor, in the view we take of this case, do we think it very important to determine which is right. The negligence, if any, of either plaintiff or defendant, is to be measured by the condition of things at the place where the accident took place, as they were known to exist by each of them at the time the acts of each are complained of as being negligent, and those acts cannot be affected one way or the other by the existence of a fact which could be determined only by an accurate survey; and neither of the parties would have been a whit more or less negligent if, on such survey, the true line of division between the road-bed and street should happen to fall on the one or the other side of the exact spot where the deceased was struck, or, if it should turn out that the streetway and roadway lapped, and that that spot was both within the limits of defendant's right of way and also of the platted street. It further appeared from the evidence that there was no public crossing at or near the place where Guenther was struck, and no improved streets within two or three blocks thereof. The evidence of the plaintiff failed to show the place at which the deceased entered upon the track, but tended to show that he had been walking between the rails on the western track, without looking back or paying any attention to the approach of trains from the north, for a distance of 75 or 100 yards; and that he was thus walking when the train that struck him was approaching him at a distance of 500 yards upon the road, and continued to do so until he was struck. The evidence of the defendant tended to show that the deceased was walking in the space between the east and west tracks until the engine approached within 70 to 90 feet of him, when he stepped on the west track, and was almost immediately struck by the engine; that, as soon as he stepped on the track, everything was done that could be done to stop the train, but it could not be stopped in time to prevent striking him; that the train, running at the rate of 15 miles an hour, could not be stopped in less than 180 to 190 feet.

In view of the first instruction given by the court on its own motion, many of the objections urged to the action of the court in refusing instructions

asked for in behalf of the defendant are obviated, as it is not perceived how, in the light of that instruction, the refusal of the court to give them could have operated to the prejudice of defendant's case. A consideration of instructions numbered 1, 2, 3, and 5, given by the court on its own motion, in connection with defendant's instruction No. 13, will be sufficient for the disposition of the case. Those instructions are as follows: Instructions given: "(1) The court instructs you that the deceased, Jacob Guenther, was guilty of negligence in failing to take ordinary care to notice the train that struck him. Hence, your duty as jurors requires you to find a verdict for defendant, unless you find the other facts relating to this case to be as set forth in instructions two or three. (2) If the jury believe from the evidence that, at the time of the accident, the place where the injury occurred to Jacob Guenther was a traveled public road or street, and had been used as a public road, highway, or thoroughfare for twenty years prior thereto, then the court declares the law to be that it was the duty of the servants of the defendant to keep ringing the bell of the locomotive while the train was passing over said road or street, and for a distance of eighty rods before reaching the place of the accident; and if it appears from the evidence that no bell was rung while the locomotive was so passing over said street or road at the time of and immediately before the accident, then the jury may infer negligence or carelessness in the agents or employees of the defendant in the running and managing of said train; and, if you further find from the evidence that the death of said Jacob Guenther was directly occasioned by or directly resulted from said omission to so sound the bell as aforesaid, then you should return a verdict for the plaintiff. (3) If you find from the evidence that said train of defendant that struck deceased, could have been stopped by the employees of the defendant in charge of said train, by the exercise of ordinary care on their part, in the time to have prevented his injury after they (said employees) became aware, or might have become aware, by the exercise of ordinary care, of his imminent peril of being struck by said train, then you should return a verdict for the plaintiff. * * * (5) If you find, in view of the other instructions, that the place where Guenther was killed was not a part of the public street, or that defendants were not guilty of any such negligence as is described in instruction No. 2, (under the law as stated therein,) and further find that the agents of defendant in charge of said train exercised ordinary care in the management of said train, and did all they reasonably could, in the circumstances, to stop the train, and avoid the injury to deceased, (Guenther,) then you should return a verdict for defendant." Defendant's instruction, refused: "(13) If the jury find from the evidence that the deceased, Jacob Guenther, stepped upon the western track of the defendant's railway, just before the accident, in front of a passenger train approaching thereon from the north, and that he could have seen or heard said train if he had looked or listened, and that he went on said track without looking or listening for the same, and was struck by said train, then the verdict should be for the defendant, unless the jury further find from the evidence that said train could have been stopped by the employees of defendant in charge of said train, by the exercise of ordinary care and prudence, in time to prevent the injury, after they became aware, or might have become aware by the exercise of ordinary care, of the peril of said deceased while on said track."

The evidence fails to show that the deceased was struck at or near the crossing of any traveled public road or street, or that any such public crossing was within such a distance as to require that the bell on the engine should have been kept ringing, under the statute, as it approached the place where deceased was struck; and while the failure to ring the bell when a train is passing longitudinally along a public street, except on approaching a public crossing, and within the distance of 80 rods thereof, is not, in the absence of

any ordinance requiring it, negligence *per se*, it must be conceded, considering the long-continued and well known situation of affairs on defendant's road-bed at the place where deceased was struck, whether that point is within the limits of the street proper or not, the exercise of reasonable care and caution required that the bell should be continually rung on the engine of a train approaching that place, at that hour, at a speed of from 15 to 20 miles an hour, and the failure of defendant's servants to so keep the bell ringing, if found to be a fact, would be an act of negligence which may have been a cause, contributing directly to Guenther's death, for the injury to plaintiff resulting from which a recovery might be had, but for the further fact that the deceased, who the evidence shows was a man of mature years, in possession of all his faculties, and who for some time had been working in a quarry along-side the track, passing the point on the track, where he was struck, daily, at or about the time of day at which the accident occurred, going to his work, and who must have known that this train was due about that time, instead of walking between the two tracks, where the evidence shows there was ample space to walk with safety, even when trains were passing each other on these tracks, on a bright morning, in broad daylight, entered upon the track, the view of which was unobstructed for several hundred yards and continued to walk on it, without looking or listening for an approaching train, or paying any attention whatever to his situation, was also guilty of such negligence, contributing directly to his death, as would prevent a recovery; and the verdict of the jury must have been for the defendant, unless it further appeared that, after the deceased had by his negligence exposed himself to peril, the defendant's servants became aware of his perilous situation, or by the exercise of ordinary care might have discovered it, in time to have avoided injuring him, and thereafter, immediately before and up to the time of actual collision, failed to use the means within their power, with a proper degree of care, consistent with the safety of those on board the train, to avoid killing or injuring him, (*Donohue v. Railway Co.*, 91 Mo. 357, 2 S. W. Rep. 424, and 3 S. W. Rep. 848; *Donahoe v. Railway Co.*, 83 Mo. 543; *Bergman v. Railway Co.*, 88 Mo. 679, 1 S. W. Rep. 384; *Kelley v. Railroad Co.*, 75 Mo. 138; *Harlan v. Railway Co.*, 65 Mo. 22,) and what would be due care, under such circumstances, would necessarily be a question for the jury under proper instructions.

The plaintiff had no case on the evidence, unless the facts brought it within this qualification of the general rule on contributory negligence, and the court properly so declared in the first instruction; and if the case had been submitted to the jury on this instruction, in connection with the third and the defendant's refused instruction, the real and only issue in the case might be said to have been in a manner submitted to the jury; and while, in the first instruction, the jury were told, in effect, that although the deceased was guilty of such contributory negligence as would prevent a recovery, unless they found the facts to be as stated in the third instruction, they were also told, not only if they found the facts as stated in the third instruction to find for the plaintiff, but if they found them to be as stated in the second instruction to find for the plaintiff. By the use of the disjunctive conjunction in the first instruction, it is made possible to read the first and second instructions together as one instruction, or the first and third together as one instruction; but it is impossible to so read and understand the first, second, and third together as one instruction. Reading the first and second together, the jury were in effect told that, although the deceased had been guilty of negligence contributing directly to his death, yet if they found from the evidence that no bell was rung while the locomotive was passing over the street or road, immediately before the accident, and that the death of said Jacob Guenther directly resulted from the omission to sound the bell, they should find for the plaintiff. In other words, the jury were told: "Here are two acts of negli-

gence,—one of the plaintiff in being on the track, the other of defendant in not sounding the bell,—concurring at the same time and place, the result of which is death. Now, if you find that the death resulted directly from the failure to ring the bell, you must find for the plaintiff,”—practically ignoring deceased’s contributory negligence, without which no death could have happened, by leaving the jury at liberty to select out the defendant’s act of negligence, and say that was the direct cause of his death, and to render a verdict accordingly; and under it the jury had only to find that the bell was not being rung immediately before and at the time Guenther was struck, in a publicly traveled street, in order to find a verdict for the plaintiff, notwithstanding Guenther’s act of negligence contributed directly to his death. It is not necessary to quote authorities to show that this is not the law. The death of Guenther resulting from the concurrent acts of negligence of defendant in failing to ring the bell, and of himself in being on the track, paying no heed to his situation, or the approach of trains, nothing further appearing, the verdict must have been for the defendant. In order for plaintiff to recover notwithstanding deceased’s negligence, a state of facts must have been shown bringing the case within the principle which the court undertook to declare in the third instruction. This reading of the second instruction receives a sort of negative emphasis from the fifth, in which the jury are in effect told that if the servants of the defendant did ring the bell, and exercised ordinary care in the management of the train, and did all they reasonably could, in the circumstances, to stop the train, and avoid the injury, then they should return a verdict for the defendant. In the light of instructions 1, 2, and 5, the jury might well conclude that, in order to find for plaintiff, it was only necessary for them to find that the place where Guenther was struck was within the limits of the street, and that the bell was not being rung immediately before he was struck; but, in order to find for the defendant, they must find that its servants had been guilty of no act of negligence whatever. This was not a fair presentation of the case to the jury. Nor was the vice of the second instruction cured in any manner by the third. They each presented a separate and independent hypothesis of facts, upon either of which the jury were instructed to find a verdict for plaintiff regardless of the other.

The evidence of the defendant tended to prove the facts hypothetically stated in defendant’s refused instruction, and no good reason is perceived why it should not have been given. There would seem to be no difficulty in presenting the issue of fact to be tried in this case properly to the jury. The place where the accident occurred, and the defendant’s road-bed along there, cannot, in the common acceptation of the terms, be called a public street, road, or highway; nor are there any public crossings, properly speaking, such as are contemplated in the statute requiring a bell to be rung on approaching them. Nevertheless, for many years, a street has been dedicated to public use, running parallel with defendant’s track. It may and probably in some places is within the limits of that street. However that may be, for years the space along-side the track between it and the bluff has been used by quarry teams, and at places they have been in the habit of crossing the track to get to the river; while the road-bed, for years, has been made use of by pedestrians, and especially by the workmen in the adjacent quarries in going to and returning from their work. In the morning, about the time this train is passing the point of the accident, large numbers of them are to be found passing over this ground to their work. The track is straight, clear, and unobstructed, and a person on it in plain view to an approaching train from the north for several hundred yards. The servants of the defendant on this train, approaching this point, at this hour, at the rate of speed testified to, while such rate of speed is not unlawful, and while it may not have been their duty absolutely, under the law, to keep the bell ringing, ought to have been at their posts on the alert, watching the track before them, and if the deceased

was seen to be walking on the track, apparently unconscious of their approach, to give the alarm by both bell and whistle, and, if these were unheeded, to stop the train, if need be, in time, if possible, with safety to those on board, to prevent running over and killing him; and if his death by these means could have been avoided, and they were not used, the defendant is liable, although the deceased may have been guilty of negligence in entering and walking upon defendant's track, which contributed to his death; and the defendant is alike liable if its servants did not, but, by the exercise of such caution and care as the exigencies of the situation demanded of an ordinarily prudent man, could have discovered the perilous situation of the deceased, and could have made use of the means that would have prevented the injury after such discovery. The theory of the plaintiff, on the evidence, was that the deceased was and could have been seen on the track by the defendant's engineer and fireman, if they had been at their posts, on the watch, several hundred yards before the engine reached the place where he was struck; that they had plenty of time to give the alarm, observe its effect on the deceased, and, if it failed to alarm him, afterwards to have stopped the train before it reached him, and thus have prevented the tragedy, all of which they failed to do. The theory of the defendant was that the deceased stepped upon the track a short distance in front of the engine, was immediately discovered in his perilous situation, and every effort made to stop the train before it struck him, but that the train could not be stopped in time. That was the only issue on the evidence that should have been presented to the jury, and to which, if sharply presented, they could have responded intelligently.

For the error in giving the second instruction, and in refusing defendant's instruction No. 13, without discussing the other instructions, the judgment will be reversed, and the cause remanded for new trial.

All concur.

KEISER *et al.* v. GAMMON *et al.*

(Supreme Court of Missouri. May 21, 1888.)

1. MORTGAGES—SALE UNDER POWER—FRAUD OF PURCHASER—EVIDENCE.

In an action to set aside a trustee sale of land on the grounds of inadequacy of consideration and fraud in preventing bidding at the sale, \$2,211 being the amount realized, evidence that the land in question was sold at a trustee sale 17 months prior for \$1,396; at a private sale shortly thereafter for \$1,600; that plaintiff's ancestor purchased the land 16 months prior to the sale in question for \$1,771; and that there has been no subsequent increase in its value,—is admissible as bearing on the question of value.

2. SAME.

In an action to set aside a trustee sale of lands on the grounds of fraud in preventing bidding at the sale, and that the land, being in two separate parcels, should not have been sold *en masse*, the allegation of fraud being supported by the testimony of but a single witness, that he refrained from bidding at the sale because of an agreement by the purchaser to pay him a consideration therefor, the witness being impeached by a number of others, and the purchaser denying the alleged agreement; and it appearing that the method of sale was not prejudicial to the owners, and that the amount realized was not materially disproportionate to the value of the land: *held*, that the evidence of fraud was not so clear and convincing as to warrant a cancellation of the trust deed.

Appeal from circuit court, Saline county; JOHN R. STROTHER, Judge.

Action by Effie Keiser and others, heirs at law of William Keiser, against Elizabeth Gammon and William T. Gammon, to set aside a trustee sale at which defendants were purchasers. Judgment for plaintiffs. Defendants appeal.

Graves & Aull and Davis & Wills, for appellants. *John E. Burden and Wm. P. Bradshaw*, for respondents.

NORTON, C. J. On the 28th of February, 1878, William, the father and ancestor of the plaintiffs in this suit, executed and delivered to one John A.

S. Tutt, as trustee, a deed of trust conveying certain lands specifically described as containing 200 acres, more or less, to secure the payment of a certain note for \$1,530, payable to one Robert W. Cox. Said Keiser died on the 25th August, 1878, before the maturity of the said note. On the 30th of June, 1879, the said land was sold in mass at public auction in front of the court-house door in Lexington, for \$2,211, to the defendants, who received a deed therefor from the said trustee. On the 19th July, 1882, this suit was begun in the circuit court of La Fayette county, to set aside said sale and cancel said deed—*First*, on the ground that the land being in two parcels, was sold in mass, when it would have brought more had it been sold separately; *second*, that one Robert A. Hill, who was a competing bidder at said sale, was induced to refrain from bidding at the sale by the persuasion and promise of defendant William T. Gammon to pay him \$500 if he would not bid against him. The grounds relied upon in the petition to set aside the sale were specifically denied in the answer, and at the April term, 1883, of the La Fayette circuit court a trial of said cause was had, which resulted in a mistrial, whereupon the venue of the cause, at the instance of defendants, was changed to the circuit court of Saline county, where, at its October term, 1883, the following issues were framed, and submitted to the jury, who found as follows: "*First*. Was the land sold by Tutt, as trustee, to defendants of greater reasonable cash value at the time of such sale than \$2,211? and, if so, state what its reasonable cash value was at that time. Yes; \$3,088.44. S. D. PILE, Foreman. *Second*. Would the land have sold for more money, if sold in parcels, than sold in a body? If so, how much more in your opinion? *Answer*, (verdict.) It is the opinion of the jury it would not. S. D. PILE, Foreman. *Third*. Did said trustee, Tutt, negotiate or aid in procuring a loan for defendants, or either of them, to be used in buying this land? If so, did said Tutt have knowledge or information that such money was to be so used? *Answer*, (verdict.) It is the opinion of the jury he did. S. D. PILE, Foreman. *Fourth*. Did defendant William T. Gammon by any means prevent Robert A. H. Hill from bidding; or by persuasion, entreaty, or offer, or promise of compensation, induce said Hill not to bid on said land at said sale? If so, state what means were so used, or offers, or promise of compensation, and state whether said Hill would have bid on said land more than Gammon's bid, and how much more. *Answer*, (verdict.) We, the jury, believe that the said Robert A. H. Hill was, by persuasion or otherwise, stopped from bidding by Gammon. We think said Hill would have bid more. How much more we cannot say. S. D. PILE, Foreman. *Fifth*. You will find and state the fair rental value of the land since defendants have been in possession, and also the fair value of the permanent improvements, if any, put upon said lands by defendant. *Answer*, separately, (verdict.) We find total value of rents to be \$1,531.27. We find total value of permanent improvements to be \$1,827.04. *Sixth*. If any of the plaintiffs knew of the defendant's putting valuable and lasting improvements upon the lands, state when they so knew it or learned it, and which of plaintiffs so knew it; and whether the party so knowing it, at the same time knew of any of the alleged fraudulent acts of Gammon in the matter of the purchase; and, if so, whether such person gave notice to Gammon at the time of the claim that his title was not good, or that it would be contested. *Answer*, (verdict.) We find that Mrs. Burnside, Effie, Virgie, and Forest Keiser, all knew of improvements being made in the winter of 1879 and 1880. We don't think they knew of any of the alleged frauds of Gammon at that time. S. D. PILE, Foreman." The court adopted the findings, and entered a decree setting aside the sale, and defendant's appeal.

On the trial, defendants offered in evidence a deed showing that about 17 months before the sale in question was made, the land in controversy sold under a prior deed of trust for \$1,896; and also a deed showing that in the

same month defendants bought the said land sold at private sale for \$1,600; and that 16 months before defendants purchased the land at said sale the ancestor of plaintiffs bought it for \$1,771; and in connection therewith the evidence of three witnesses was offered, to the effect that since said sales up to July, 1879, there had been no increase in the value of the land. This evidence the court refused to receive, and its action in that respect is insisted upon as being erroneous. Ordinarily, it may be said that the price for which a thing actually sells in the market may be taken as evidence of its value; and that the evidence offered was admissible as bearing upon the question of value, we think is established by the following authorities: *State v. Scholl*, 47 Mo. 84; *Thornton v. Campton*, 18 N. H. 20; *Benham v. Dunbar*, 103 Mass. 365; *Croak v. Owens*, 121 Mass. 28; *Brigham v. Evans*, 113 Mass. 538; *Kent v. Whitney*, 9 Allen, 63.

It is next insisted that the decree is not sustained by the evidence, and we are asked to review it, as it is our province in chancery causes to do. *Morey v. Staley*, 54 Mo. 419. Plaintiffs seek to set aside the sale and deed on two distinct grounds: *First*, because the land was sold in mass; *second*, because one D. A. Hill was induced not to bid at the sale, by the persuasion and promise of defendant William T. Gammon, as alleged in the petition, to pay him \$500, if he would not bid against him. As to the first ground relied upon, it may be said that of the number of witnesses examined as to whether the sale of the land in mass was prejudicial to the owners there is a preponderance of evidence to the effect that such method of sale was not prejudicial. As to the second ground, it may be said that no principle is more firmly settled in equity jurisprudence than that a purchaser, either at a judicial sale or at such a sale as the one in question, who is guilty of any fraud, trick, or device, the object of which is to get the property at less than its value, and succeeds in doing so, will not be permitted to enjoy the fruits of his purchase on that ground; and the fact is made so to appear. In such cases the burden of showing the fraud is upon the party attacking the sale and deed; and to justify a cancellation of the deed the evidence adduced to establish the fraud must be clear and convincing. *Forrester v. Scoville*, 51 Mo. 268; *Jackson v. Wood*, 88 Mo. 77; *McNew v. Booth*, 42 Mo. 192; *Kennedy v. Kennedy*, 57 Mo. 76; *Forrester v. Moore*, 77 Mo. 651. Robert A. Hill was the only witness introduced by plaintiffs to establish the fraud alleged, and in his testimony stated as follows: "I was at the sale of the land. I had agreed with Creasy to buy it. Gammon was at the sale. Judge Tutt bid. Frank Tutt bid once, and I myself bid. Did not see any one else bid. After we had bid some time, Gammon called me, and took me back in the court-house, and said I ought not to bid against him. I asked him why. He said I had enough land. I said I had not enough money. I went back and began bidding on the land. He called me again, and we went back the second time. I proposed to buy the land with him. He said we ought not to do that, and said if I would not bid against him he would make it all right with me. I then said, 'All right,' and we went back, and I did not bid any more, and told the auctioneer I was done; and the land was knocked off on Judge Tutt's bid. I learned from Gammon that Judge Tutt was bidding for him. I went to see Gammon that evening, after the sale, but did not see him. I asked him several weeks afterwards what he was going to give me, and he said nothing. I said, 'You promised to give me something; and he said, 'If you had bid \$10 more you would have got the place.' I said, 'I would, if you had not fooled me.' I would have bid \$20 an acre for the 160 acres had not Gammon induced me to quit bidding. I would have bid \$3,200 for the 160 acres had not Gammon induced me to quit bidding. The land was sold in bulk as 200 acres." On cross-examination for the purpose of impeachment he was asked the following questions: "*Question No. 1.* State whether or not, at the town of Odessa, in La Fayette county, Mo., about six weeks after said trustee's sale at which said Gammon bought the said land in

question, did you not, in a conversation with Squire Robert T. Russell, tell him that said William T. Gammon was to give you, or that you were to get or expected to get, of said Gammon, \$200, by an agreement with him not to bid on the farm, [meaning the lands involved in this suit,] 'and if he does not do it I will squeal on him,' or words in substance to that effect? *Answer.* Have no recollection of any such conversation. Had no conversation with him until after this suit was brought. Did not tell Russell I was to get \$200.

Q. No. 2. Did you or not, on the road near Bates City, in La Fayette county, a short time after the date of said sale, in conversation with Robert Sanders, say to him that Gammon had agreed that, if you would not bid on said land against him, he would let you and Sam Creasy have an interest in the farm, and that afterwards Gammon refused to let you and Creasy have such share, and that it was damned uncertain whether Gammon would hold the farm, or words in substance to that effect? *A.* Know Rob't Sanders. Had a conversation with him in Bates City. Don't recollect any such conversation with him. Don't remember anything said about Creasy in that conversation. Don't recollect the conversation to be as stated in the question. I talked with Sanders about the sale.

Q. No. 3. During the summer of 1880, did you say, in a conversation had with one Benjamin Hammer, your brother-in-law, either in Lexington, or about half way, on the road between Lexington and Texas Prairie, that said lands had been sold by an order of the probate court, [of which said Gammon was judge,] and that Gammon not being allowed to bid at said sale, employed some person to bid for him, and that Gammon agreed with you that, if you would not bid at said sale, he would take you and Sam Creasy in as partners, or give you and said Creasy an interest in the land, and that Gammon afterwards refused to do so, and that you had a damned notion to sue him, or have a suit brought against him, to take the land away from him, or words in substance to that effect? *A.* Know Ben Hammer. Had no such conversation.

Q. No. 4. During May or June of 1882, when you and one Michael Strader were driving cattle in the public road by the land in this suit, upon said Strader's remarking to you that said Gammon had a pretty place, then did you not answer, 'Yes; and if it had not been for that damned old rascal [meaning defendant Gammon] I would have had an interest in it,' or words in substance to that effect? *A.* Know Michael Strader. Don't recollect any such conversation. Know I did not use any such language. I remember driving cattle, and likely talked with Strader, but did not tell him what is stated in the question. I have no interest in this suit.

Q. No. 5. In a conversation you had with Alfred Ferguson and Jonas T. Ferguson in the fall of the year 1880, and about the time of sowing wheat, sitting on or by the fence of stock-pens of the C. & A. R. R. at Bates City, in La Fayette county, Mo., did you not say you would spend \$1,000 of your own money to dispossess W. T. Gammon of the farm he had purchased, known as the 'Keiser Farm'? *A.* Know Alfred and Jonas T. Ferguson, and I talked with them, but not about the land at the stock-pens at Bates City. Did not have any such conversation. Did not say to them, 'I'd spend \$1,000 to dispossess Gammon.' Don't think I met the old man; I met Jonas at Bates City.

Q. No. 6. Did you not, shortly after the trustee's sale to Gammon, meet Nelson Rickstrew about 1½ miles north-east of your place in La Fayette county, Mo., on the public Greenton road, near the place known as the 'Dr. Hughes Place,' upon which Widow Roberts lives, and, in a conversation with him about the sale, tell him that you went down to bid on the farm; that you did not know how so many found out that you wanted to bid; but that you did not get the place because Gammon bid more for it than you were willing to pay for it, or words in substance to that effect? *A.* Know Nelson Rickstrew, but never had any such conversation with him. I never spoke to the man on earth about the matter. I had a conversation with Sanders. He was in favor of Gammon, and I was opposed to him. I spoke of the land. I said that

Gammon had beat me, or the Keiser heirs, out of the land. I have nothing to do with bringing this suit, and did not know it was to be brought until it was brought. The land I spoke of buying in partnership was 800 acres, sold at partition. I was one of the heirs. I live on part of the land. It was bought the money divided among the other heirs and myself; I bought the interest of in my name, by agreement. Part of it was afterwards sold at a profit, and the other heirs in the rest."

Defendants, for the purpose of contradicting Hill, put in the following evidence: Robert T. Russell testified: "I live in La Fayette county. I have several occupations; deal in real estate, principally; farm a little; am vice-president of Farmer's Bank at Odessa; and I am a magistrate. I know Robert A. H. Hill." *Question.* [Here defendants put the same question that was put to said Hill, and numbered question 1 in his cross-examination, and the witness, in response answered:] *Answer.* Yes, sir; that was the impression he left with me; that he expected to be remunerated about \$200. This was six weeks after the sale. *Cross-examined.* I was at the sale, and saw Hill, Gammon, and Tutt there. I saw Hill and Gammon, together, go back into the hall of the court-house. He did not say he was to get \$200 for not bidding; but that was my understanding he was to be remunerated." Robert Sanders testified: "I live in La Fayette county, Mo. Know R. A. H. Hill. *Question.* [Here defendants put the same question to the witness as was put to said Hill and numbered question 2 in his cross-examination, and witness, in response, answered as follows:] *Answer.* Yes, sir; [and witness further testified:] I know the place in suit. Know Gammon put some improvements on it, — a new plank fence in front, and also around the lots and yard. Don't know how much fence he put up. *Cross-Examined.* The conversation with Hill took place in the road between my house and Bates City, a very short while after the sale. The conversation was that Gammon agreed to divide with him (Hill) and Creasy. He told me this was to keep him (Hill) from bidding, and that he quit bidding because Gammon made the promise, as I understood it. He told this further on in the conversation." Benjamin Hammer testified: "I live near Wellington, La Fayette county. Have known Hill since 1880. *Question.* [Here defendants put the same question that was put to said Hill, and numbered question 3 in his cross-examination, and witness in response answered:] *Answer.* A part of that did not occur. He said he had proposed to Creasy to go in partnership and buy the land, and that he (Hill) was to do the bidding for both; and he went there and bid on the land, and Gammon came to him and told him he didn't want him to bid on the land for speculation; that he (Gammon) wanted it for a home; and that if he (Hill) would not bid against him, Gammon would divide with Hill; that Gammon was probate judge, and could not bid on the land himself, and he had to get some one else to bid for him, and Hill said he had a good mind to bring a suit against him to set the sale aside." Michael Strader testified: "I live in La Fayette county, Mo. Know Robert A. H. Hill. *Question.* [Here defendants put to witness the same question put to said Hill, and numbered 4 in Hill's cross-examination, and witness, in response, answered as follows:] I went with Hill to help drive some cattle. Part of the conversation occurred, and part not. Hill said if it had not been for the damned old rascal I would have owned the place or an interest in it. Had heard Hill say before that he had been at that sale. I reckon the conversation occurred in 1882. Hill said if it had not been for that damned old rascal, Gammon, I would have had that land or an interest in it; that was all that was said at that time." Jonas T. Ferguson testified: "I live in La Fayette county, Mo. Have known Hill ten years. *Question.* [Here defendants put the same question that was put to said Hill, and numbered question 5 in his cross-examination, and witness in response, answered as follows:] *Answer.* Yes, sir; Hill said that my father, Alfred Ferguson, was present. *Cross-Examined.* He never spent

\$1,000 to my knowledge. Alfred Ferguson testified: "I live in La Fayette county, Mo. Know Robert A. H. Hill. *Question*. [Here defendants put to the witness the same question that was put to said Hill, and numbered question 5 in his cross-examination, and witness, in response, answered as follows:] *Answer*. Yes, sir; he did. It was in September, 1880, I think. *Cross-Examined*. I am the father of the last witness, Jonas Ferguson." Nelson Richstrew testified: "I live in Odessa, La Fayette county, Mo., and know Robert A. H. Hill. *Question*. [Here defendants put to witness the same question put to said Robert A. H. Hill, and numbered 6 in his cross-examination; and witness, in response, answered as follows:] *Answer*. Yes, sir; that is what he said. *Cross-Examination*. Hill said he was at the sale, and went there to buy the land." The evidence of Hill is flatly contradicted by that of Gammon, who testified as follows: "We [alluding to his wife] made up our minds to buy a home, and concluded to buy this farm. I went to work to investigate the title, and found I would not have time, and employed Frank Tutt to investigate it and bid for me. I went to the sale and saw some bidding going on by one or two parties; Hill and others bidding. I was standing in the door of the court-house. Mr. Hill came by me, and said he wanted to have a talk with me. We went into the collector's office. He said no one else was bidding on the land, and said let us go into partnership. I told him it would not be right; he came out, and went to bidding; he bid several times and took me back again, and said he would bid against me if I did not go in with him. I told him I would not do it. He took me back the third time, and again I said it was not right, and he came back. I thought he was going to bid again. He did not bid again. There seemed to be some doubt whether my bid was last. The bid stood some time at \$2,210. I nodded to Frank Tutt to go on, and my bid through Tutt was the last, and it was knocked off to me at \$2,211; Judge Tutt made no bid for me. In October after the sale, while I was holding probate court, Hill came and beckoned to me and claimed that I had promised to pay him some money not to bid. I told him, 'You know I did not do any such thing. I told you it was wrong.' He said I told him that twice, but not the last time, and said, 'Yes, I see,' and left without saying more." The evidence of Gammon as to his having been asked back into the court by Hill is corroborated by one witness, and his evidence as to Frank Tutt having bid in the land for him is fully corroborated by Tutt. It was shown by the evidence of three or more witnesses that Gammon called or beckoned Hill, and that they went twice, and perhaps three times, back into the court-house. As to what occurred between Gammon and Hill with reference to the latter not bidding against Gammon at the sale, no corroboration of the story told either by Hill or Gammon as to what took place between them is to be found in the record. Hill, in his evidence, admits that in one of the interviews he proposed to buy the land in partnership with Gammon, and that Gammon declined the proposition; and in this respect, and to the above extent, corroborates the evidence of Gammon, but in all other respects the evidence of one contradicts that of the other. In view of the rule hereinbefore stated, that the burden of showing the fraud as charged in the petition in Gammon's purchase is on the plaintiff, and that the evidence to establish it must be clear and convincing, and in view of the evidence introduced bearing on that question, we are of the opinion that it does not justify the decree rendered, and the case made in the petition must fail for want of proof.

This view of the case renders it unnecessary to discuss the evidence in regard to the value of the land at the time of the sale further than to say that, according to the evidence of Longdon, he bid at the sale \$2,000 for the land, which was all, in his judgment, that it was worth, and in view of the evidence offered and improperly rejected, and which we may consider as if it had been received, that the land had been sold three times for less than \$2,000, a short time before the sale in question, and in view of what a majority of the wit-

nesses testified as to its value placing it at \$12 and \$13 per acre; in view of these things, and the fact that although the land was described in the deed of trust as being 200 acres more or less, that there in fact was only about 186 acres of it; and the further fact that the fences were in a dilapidated condition, the houses greatly out of repair, the front windows being nailed up with boards,—we are unwilling to say that the price of \$2,211 paid for it is so inadequate as to excite a suspicion of fraud in its purchase. For the reason above given the judgment will be reversed, in which all concur.

STATE v. WATSON.

(*Supreme Court of Missouri. May 21, 1888.*)

1. CRIMINAL LAW.—SENTENCE—WHEN RENDERED.

Rev. St. Mo. 1879, §§ 1922, 1923, providing that one accused of crime must be brought to trial within a specified time, otherwise he is entitled to be discharged, does not invalidate a sentence pronounced after such time on a verdict rendered within the time.

2. SAME.

The power to sentence one convicted of a crime is not confined to the term of court at which he was convicted.

3. HOMICIDE—MANSLAUGHTER—DESIGN.

On a trial for murder it appeared that defendant was attacked by deceased, who accused him of having lied about him; and that defendant, being knocked over against a window and repeatedly struck, drew a dirk-knife, and stabbed deceased twice, one of the wounds proving fatal. *Held*, not to be manslaughter in the third degree, under Rev. St. Mo. § 1244, providing that in such case the killing must be "without a design to effect death," as defendant evidently had such design.

Appeal from circuit court, Boone county; C. H. BURKHARTT, Judge.

S. C. Douglass and Smith, Silver & Brown, for appellant. *The Attorney General*, for respondent.

BLACK, J. The defendant was indicted for murder in the second degree. The trial took place at the November term, 1882, of the Boone county circuit court, and resulted in a verdict of manslaughter in the third degree. Motions for new trial and in arrest were filed and overruled at that term, and the defendant appealed to this court. The cause was stricken from the docket, on motion of the attorney general, because the record disclosed no final judgment. Thereafter, and at the June term, 1885, of the circuit court, the defendant, then out on bail, was brought before the court, and sentenced in accordance with the previous verdict, and he prosecutes this appeal, bringing up the whole record. The evidence shows that Watson, the defendant, and Mardical, the deceased, were attendants at a dance at the house of Mr. Barkwell. During the evening, deceased accused defendant of having lied about him on some former occasion. Defendant denied the charge. Further words and a scuffle took place between them in the house, and in the presence of the company, and in all of which the deceased was the constant aggressor. Deceased said: "We will go out and settle this," at the same time pulling the defendant, who declined to go out of the house. The scuffle continued; the defendant threatening to cut deceased loose if he did not let go. The deceased replied that he would be d—d if he would let go. Deceased then struck the accused with his right fist, holding defendant with his left hand. The blow knocked defendant over against the window, and deceased continued striking the defendant, whereupon the defendant drew from his coat pocket a dirk-knife four and a half inches in length of blade, and with it stabbed deceased twice in the left side, when both parties left the room. One of the wounds was four or five inches in depth, ranging upwards to the lower part of the lung, and proved fatal.

1. As will be seen, the sentence in this case was pronounced by the court more than two years after verdict, and after the motions for new trial and in

arrest had been overruled; and because of this delay the defendant insists that the sentence is void, and that he should be discharged, notwithstanding his appeal prosecuted during that time. Sections 1922, 1923, Rev. St. 1879, relied upon by appellant, have no direct application to the question thus presented. They provide that the accused must be brought to trial within a specified time after indictment found,—before the end of the second term of the court when confined, and before the end of the third term when on bail. If not thus brought to trial, he is entitled to be discharged, unless the delay be occasioned on his application, or from want of time to try the cause. Here the defendant had a trial, within the meaning of those sections, in due time. Many cases are also cited by the appellant in respect of *nunc pro tunc* entries, which may be made where the clerk has failed to enter the judgment pronounced by the court, or has made an entry different from that pronounced; but they are not in point, because the court passed no sentence at all upon the defendant. It would certainly be competent for the court, in a civil case, to render judgment at a term subsequent to that at which the verdict was received. There is no final disposition of the cause until there is a final judgment; and it is from that alone the aggrieved party can appeal. This is true in respect of criminal cases. Hence such premature appeals must be dismissed. *State v. Martindale*, 52 Mo. 81; *State v. Love*, Id. 107; *State v. Smith*, 42 Mo. 551; *State v. Mullix*, 53 Mo. 355. There seems to be no doubt but sentence may be postponed until a future day or term, to suit the convenience of the court, or for cause shown. 1 Bish. Crim. Proc. (3d Ed.) § 1291. In the case of *People v. Feltz*, 45 Cal. 163, the accused was not sentenced until the third term after conviction, yet the sentence was held to be valid; and that, too, though it does not appear from the report of the case that the cause was continued by any record entry. After the motion for new trial is overruled, the defendant should be brought before the court, and given an opportunity to show cause, if any he has, why sentence should not be pronounced. He may then present matters which will render it proper for the court to postpone a final disposition of the case until a future term of the court. It would be highly prejudicial to the administration of the criminal law, both as to the state and as to the defendant, to deny the court power to render final judgment at a term subsequent to conviction. The power to pass sentence is not confined to the term at which the defendant was convicted by any statute of this state, nor, we conclude, by the law, in the absence of any statute. The failure to pronounce sentence in this case at the term at which the cause was tried, was an omission on the part of the state; but the continued delay was evidently due to the appeal prosecuted by the defendant. But let the blame, whatever there is, rest where it may, it was competent for the trial court, when the appeal was out of the way, to pronounce sentence upon the defendant according to the verdict of the jury.

2. The court instructed as to murder in the second degree, self-defense, and manslaughter in the third degree, under section 1244, Rev. St. 1879, but not as to manslaughter in the fourth degree. It has been repeatedly held that there can be no manslaughter in the third degree where the killing is willful or intentional. *State v. Edwards*, 70 Mo. 480; *State v. Curtis*, Id. 600; *State v. Dunn*, 80 Mo. 689. All the evidence in this case tends to show that the killing was intentional; and, under the cases just cited, this case is one of murder in the second degree, manslaughter in the fourth degree coming under section 1250, or justifiable homicide. See, also, *State v. Umfried*, 76 Mo. 407. For this error the judgment is reversed, and the cause remanded for new trial.

All concur.

GODSEY *et al.* v. WEATHERFORD.

(Supreme Court of Tennessee. May 24, 1888.)

JUSTICES OF THE PEACE—JURISDICTION IN REPLEVIN—CODE TENN. §§ 4130, 4138.

Under Code Tenn. § 4130, limiting the jurisdiction of justices in replevin to cases in which the property sought to be recovered does not exceed \$500 in value; and section 4138, providing that if the justice adjudge the property to belong to defendant, and plaintiff fails or refuses to deliver it up to defendant, the justice shall render judgment against plaintiff and his sureties for double its value,—a justice may render judgment against a plaintiff in replevin for the value of the property as established on the trial, in any amount not exceeding \$1,000, where plaintiff, in his affidavit for the writ, has laid the value of the property at \$500, and defendant claims judgment only for such actual value of the property, and not for double the value, as provided in the statute.

Appeal from circuit court, Shelby county; L. H. ESTES, Judge.
J. P. Sykes, for appellants. *T. W. & R. G. Brown*, for appellee.

CALDWELL, J. This is an action of replevin brought by Weatherford against Godsey and Keel before a justice of the peace of Shelby county, to recover the possession of certain timber trees and cord-wood. The judgment of that tribunal being for the plaintiff, Godsey and Keel appealed to the circuit court, where the case was tried by the circuit judge without the intervention of a jury, and judgment was again rendered against the defendants. From that judgment they appealed in error to this court. The case was heard by this court at a former day of the present term, when the judgment below was reversed, and judgment was here pronounced in favor of the appellants for \$905.13, subject to satisfaction by a return of the property. Motion is now made by the appellee for a modification and reduction of that judgment, for the reason, as contended, that it is above the jurisdiction of a justice of the peace in amount, and to that extent excessive.

In actions of replevin, the jurisdiction of justices of the peace is by statute expressly limited to cases in which the property sought to be recovered does not exceed \$500 in value. Code M. & V. § 4130. But it does not follow from this limitation with respect to the value of the property that the jurisdiction to render a money judgment against the unsuccessful plaintiff, in an action of replevin, is also limited to \$500. On the contrary, it is provided by another statute that such judgment shall be for double the value of the property. That statute is in these words: "If the justice adjudge the property to belong to the defendant, and the plaintiff fail or refuse to deliver it up to the defendant, the justice shall render judgment against the plaintiff and his sureties for double the value of the property replevied, and execution shall forthwith issue for the same, and the cost of suit." Code, § 4138. If, in such a case, the justice find the value of the property to be up to the maximum of his jurisdiction, namely, \$500, he is then authorized and required by the very terms of the statute to give the defendant judgment for \$1,000. Such a judgment for such a sum might lawfully have been rendered by the justice in the present case; for the value of the property sought to be recovered, and actually taken into the possession of the plaintiff, was by him estimated, in his affidavit for the writ, at \$500; the penalty of his bond was properly made \$1,000, and the property is shown to have been worth more than the estimate he placed upon it. So that, under the strict law, the judgment of this court might well have been for at least \$1,000 and interest. But the appellants sought judgment for only \$905.13, the established value of their property wrongfully detained under the plaintiff's writ, and for that sum only did this court pronounce judgment. In this there is nothing of which the plaintiff can rightfully complain. The objects of the statutes mentioned are very clear, and they are not in conflict with each other in any sense. The former was intended to limit the jurisdiction of the justice to property not of greater value than \$500,

while the latter was intended to meet certain cases therein provided for, and to authorize him, in such cases, to render judgment against the unsuccessful plaintiff for double the value of the property, so as to compel its return to the defendant. It may be that the latter statute might operate as a hardship upon a plaintiff who could not restore the property, and thereby avoid the payment of twice its value; but such suggestion can have no sort of force here, for, as already seen, the judgment pronounced is for only the actual value of the property. The construction we give to section 4133 of the Code is suggested, in note thereto, by the learned editors. It is also suggested *arguendo* in *Jacobs v. Parker*, 7 Baxt. 436; and the justice of the result reached is strongly intimated in *Gray v. Jones*, 1 Head, 545. Let the motion be disallowed.

PICKETT v. FERGUSON *et al.*

(*Supreme Court of Tennessee. May 19, 1888.*)

COURTS—JURISDICTION—ACTION TO ESTABLISH TRUST IN LAND IN ANOTHER STATE.

A bill was filed in a court of Tennessee by a landlord against tenants holding land in Arkansas, to establish a trust in favor of complainant in said land purchased by defendants at a judicial sale, on the ground that it was fraudulent for a tenant to purchase his landlord's property at such sale, but no actual fraud was proved. *Held*, that such purchase, if fraudulent at all, was only a constructive or legal, and not an actual, fraud, and that said court had no jurisdiction thereof.

Appeal from chancery court, Shelby county; H. T. ELLETT, Special Chancellor.

Suit in chancery by Mary E. Pickett against D. L. Ferguson and others to set aside a sale of real estate in Arkansas to defendants, made under decree of court. The decree of the chancellor was for complainant, from which decree this appeal was taken by defendants Ferguson and Hampson. An opinion was pronounced in this cause at the May term, 1887, but as a petition for a rehearing was allowed before its publication, and the court having to some extent modified the views therein expressed, the former opinion has not been published. The modifications referred to sufficiently appear in this opinion.

Poston & Poston, for appellants. *Metcalfe & Walker*, for appellee.

ESTES, Special Judge. This case was heard at the last term by the court as now constituted, the writer of this opinion sitting without commission, at the request and by consent of parties, in the place of Judge FOLKES, who was incompetent, when a decree was pronounced in favor of the defendants upon the leading questions involved. Upon a petition of great force and power, a rehearing was ordered, and at the present term the case has been reargued by counsel, who, with much research and learning, have afforded the court the aid that the importance of the questions involved demanded. The litigation grew out of a lease of lands situated in Mississippi county, Ark., for the term of five years, from the 1st day of January, 1878, made by the complainant to the defendants Ferguson and Hampson. At the date of the lease there was a suit pending in the supreme court of Arkansas, on appeal from the circuit court of Mississippi county, in which the land thus leased was sought to be subjected to the payment of large incumbrances thereon. The lessees were fully aware of the pendency of this suit. They took the lease, went into possession, and were thus in possession when a decree for the sale of the land to satisfy the incumbrances was rendered by the supreme court of Arkansas, and when it was sold under the decree on the 28th of February, 1879. At this sale the defendant Hanauer became the purchaser, but both the chancellor and commission of referees have found the fact to be that the purchase was for the benefit of Ferguson and Hampson, and in fact their purchase. In this conclusion we think they were justified by the

evidence. After the purchase under the decree, Hanauer conveyed the land to Ferguson and Hampson, and they remained in possession as before, and were thus in possession when this bill was filed in the chancery court of Shelby county, on the 18th day of February, 1881, claiming that under the facts alleged, and especially by reason of the fiduciary relations of landlord and tenant, subsisting between the complainant and the defendants Ferguson and Hampson at the date of their purchase of the land, the complainant was the equitable owner thereof, and that the said defendants held the legal title as trustees for her, under the equitable doctrine of constructive trusts. The complainant sought by the bill to establish the trust, to redeem the land, and prayed that the defendants be required to convey it to her. Process was duly served upon the defendants Hanauer and Hampson, but no service was ever had on defendant Ferguson, and he has never entered an appearance. After the fact of his non-residence, or of his being beyond the reach of the process of the court, was developed, publication to him as a non-resident was duly made, and an order *pro confesso* taken against him. He has steadfastly held himself aloof from the case, and one of the chief contentions in argument has been whether a valid decree could be pronounced against him, based upon this publication and order *pro confesso*. At the threshold, the defendants Hanauer and Hampson filed a plea to the jurisdiction of the court, alleging the ground that the subject-matter of the litigation was land situated in another state; and also that Ferguson was not before the court, under the publication to him. The chancellor held the plea insufficient, and overruled it. The supplemental bill afterwards filed, and the proceedings thereon, need not be considered, inasmuch as it was dismissed by the complainant herself. Subsequently, on bill, answer, and voluminous evidence, the case was heard before Special Chancellor ELLERT, who pronounced an able and learned opinion, in which he held that, by reason of the fiduciary relation of landlord and tenant, existing between complainant and Ferguson and Hampson, the conduct of the latter, in purchasing the land at the judicial sale, made them trustees, under a constructive trust, and that complainant was entitled to redeem the land.

After the hearing by the chancellor, but before the decree was pronounced, the complainant filed her bill in the circuit court of Mississippi county, Ark., in which she repeated, in substance, the statements and allegations of her bill in this case, and prayed that, "in the event of a failure of jurisdiction in the Tennessee court, in whole or in part, she might to that extent be allowed to prosecute this bill, as an independent, original bill, upon the facts and equities therein averred; but if the jurisdiction of the Tennessee court should be sustained, and the cause determined in that court upon its merits, and in complainant's favor, this bill might be treated as auxiliary to that, and that complainant might be permitted, upon supplemental proceedings, to enforce such decree as she might thus obtain." To this bill in the Arkansas court all the defendants, including Ferguson, promptly filed an answer and cross-bill. In their cross-bill they set up their title to the land, claiming that the Tennessee court had no jurisdiction of the case, asked that Mrs. Pickett's claim of title be removed as a cloud on their title, and that she and her solicitors be enjoined from prosecuting her suit in Tennessee. In obedience to the prayer of the cross-bill, an injunction was granted against the complainant and her solicitors, and its purport made known to them in Tennessee. Notwithstanding this injunction, the complainant, by her solicitors, prepared and caused to be entered the decree which the chancellor had ordered in her favor, and subsequently obtained from the chancellor an injunction against the defendants and their solicitors, prohibiting them from the further prosecution of their suit in Arkansas. In disobedience of this writ, the defendants still prosecuted their cross-bill in the courts of Arkansas, and the record in this case embraces contempt proceedings against them for breach of the injunc-

tion. The complainant and her counsel were duly adjudged guilty of contempt by the circuit court of Mississippi county, Ark., and, as a penalty for their contumacy, that court ordered that, unless the complainant purged herself of the contempt by setting aside the decree entered in her favor in the Tennessee court, she would not be allowed to prosecute her bill in that court. The complainant, refusing to comply with the order of the court, made sundry ineffectual efforts to plead to and defend the cross-bill.

The defendants filed all the evidence taken on both sides in the chancery court of Shelby county, and on this they went to trial. The court still refusing to hear the complainant in the suit, pronounced a decree dismissing her bill for want of equity, and perpetuating the temporary injunction granted on the cross-bill. The case was carried to the supreme court of Arkansas, and there Mrs. Pickett appeared by her counsel, and the case was fully argued on both sides. That court, in 1885, affirmed the decrees of the lower court, and in an opinion reported in 45 Ark. 177, held that the relation of landlord and tenant between Mrs. Pickett and Ferguson & Hampson did not forbid the purchase of the land by the latter; that there was no constructive trust; and that Mrs. Pickett was not the equitable owner of the land. The record of that suit is a part of the record here, and the report of the opinion of the supreme court of Arkansas has been produced on the argument of the case. It will then be seen that the circuit and supreme courts of Arkansas have, upon the record substantially the same as this, reached a conclusion upon the merits of the controversy in direct antithesis to that reached by the chancellor, and that, while the complainant's right to the Arkansas land is established by a decree of the chancery court of Tennessee, entered by her counsel in disobedience of the injunction in the Arkansas court, the defendants are in possession of the land, with a decree of the supreme court of Arkansas establishing their title, but rendered at their instance, in violation of the injunction of the Tennessee court.

The decree of this court at the last term was based exclusively upon the ground that the courts of Tennessee could not, under the authorities, entertain jurisdiction of the case by reason of the fact that the subject-matter of the litigation was land situated in another state. The principles of the decision, very briefly stated, were these: The court left out of view, as the chancellor did, the claim that the defendants Ferguson and Hampson were guilty of actual fraud in refusing to give their notes in advance for the annual rents of the land, for the reason that it was not satisfied from the evidence that the claim was well founded, or that the fraud, if any was in fact practiced, was effected to produce the alleged injury to the complainant. There being in the opinion of the court no actual effective fraud, the case was treated, like the chancellor treated it, as one involving a constructive trust predicated alone on the supposed fiduciary relation of landlord and tenant, which, under the doctrine of some of the authorities, forbade the purchase of the leased land by the tenant while the relation existed. The court assumed, without discussion, that, under the Tennessee cases, the tenant could not thus purchase and hold for himself, and proceeded with this assumption to decide that the trust imposed in this case was a constructive trust, arising from constructive fraud only. 1 Perry, Trusts, § 168.

The limitation of the jurisdiction of courts of equity to make decrees respecting lands situated in other states or countries than that of the forum, to cases of contract, trust, and fraud, as settled in *Massie v. Watts*, 6 Cranch, 148, and uniformly followed by the other courts, was announced, and the doctrine evolved from the authorities that its fundamental principle was an avoidance of the disturbance of the comity which ought to exist between the courts of different nations of bringing the decisions of foreign tribunals into conflict with those of the *locus rei sitæ*; that the *rationale* of the limitation required that the contract, trust, and fraud intended by the courts in establishing the

Limitations should be understood to be an express contract, a direct trust, and actual fraud; that the constructive trust arising from actual fraud should be classed under the head of "fraud" in the statement of the limitation; that because the legal and equitable principles governing express contracts, direct trusts, and actual frauds were substantially the same, to use the expression of Lord HARDWICK, "in every place," there was but little danger in such cases of disturbing the comity between the courts of different countries by making a decree touching land in a foreign country; that the liabilities in such cases of contract, trust, and fraud were for the most part "purely personal," and therefore within another principle of the doctrine of the jurisdiction, but that cases of constructive trust, arising from mere constructive fraud, and involving doubtful and disputed equities, that were not generally accepted by the courts of all states and countries, were not within the jurisdiction; for in such cases the danger existed of violating the fundamental principle of the doctrine, by the risk of disturbing the comity between the courts of different countries, in bringing the decisions of foreign tribunals into conflict with those of the *locus rei sitæ*; and, finally, it was said that, because the supreme court of Arkansas had in this very case held that a constructive trust did not arise from the relation of landlord and tenant, the exercise of the jurisdiction here, upon the theory that it did, would make a signal case of the disturbance of the comity that ought to exist between the courts of sister states, and in effect operated to impress upon the lands of Arkansas "a metaphorical trust," arising under the notion or doctrine of the Tennessee courts, in direct antagonism to the doctrine of the courts of the *locus rei sitæ*. It was shown that, in *Massey v. Watts*, the fraud was actual, although not so expressly characterized, and that "perhaps in no well-considered case has the jurisdiction been extended to rights founded on doubtful equities, or mere constructive fraud, or upon legal principles that are not recognized and enforced generally by the jurisprudence of enlightened nations." The authorities cited were: *Penn. v. Lord Baltimore*, 1 Ves. Sr. 444; *Angus v. Angus*, West, Ch. 23; *Lord Cranstown v. Johnston*, 3 Ves. 170; *Massey v. Watts*, 6 Cranch, 148; *Gardner v. Ogden*, 22 N. Y. 327; *Pickett v. Ferguson*, 45 Ark. 178; 2 Lead. Cas. Eq. pt. 2, pp. 1832, 1833; Whart. Conf. Law, (Ed. 1881,) § 288; *Miller v. Birdsong*, 7 Baxt. 531, 537, *et seq.*; 2 Pom. Eq. Jur. § 1044 *et seq.*

Upon the reconsideration of the case now, the court has concluded that its decision ought to be placed on another ground, which is fundamental, and it follows that the opinion of the last term is not to be followed as a precedent. This ground will be presently stated. The petition and argument for the complainant earnestly insist that the court was in error in concluding on the former hearing that the charge of actual fraud against the defendants Ferguson and Hampson, in promising and then refusing to give their notes for the five-years rent, was not sustained by the evidence. We have again carefully examined and considered the evidence on this point, and find ourselves unable to agree with the learned counsel. The charge is substantially that these defendants, as lessees, by the terms of the contract of lease, agreed to give their notes for the five-years rent to the complainant, and fraudulently refused to do so; whereby the complainant was unable to raise the money with which to pay off the incumbrance on the property, and prevent the sale under the decree of the Arkansas court. It appears from the evidence, and the result showed, that complainant had no other adequate resource from which to raise this money, and thereby prevent the sale. She claims that her main object in making the lease was to secure the notes of the lessees with which to raise this money. The written lease, as executed in duplicate, contains no such promise on the part of the lessees to give notes, but an original covenant to pay the rents in annual installments. Waiving the question of the competency of parol evidence to enlarge or add to the written contract this important promise, it is clear that, in the face of the denials of the answer and the omis-

sion of the promise from the writing, the complainant was required to make full and satisfactory proof that the promise was in fact made. Without entering upon a discussion of the questions of fact, we think the complainant has wholly failed to do this. In the first place, the weight of the direct testimony on this point is against her, and the undisputed circumstances of the case abundantly negative the contention. Some of these circumstances are the following: (1) The claim is that the main inducement of the contract of lease was to enable the complainant to get the notes, and yet she and her husband formally executed the contract without this feature in it. (2) She claims that it was omitted in order that the land might be surveyed, and yet it was surveyed a short time thereafter, and she did not then demand the notes. (3) The lease was made in November, and yet on the 1st of the succeeding January she surrendered the possession of the land to the lessees, according to the terms of the lease, without demanding the notes. (4) The defendants Ferguson and Hampson were shrewd business men, who knew that the land leased was subject to an incumbrance under a decree of court which might defeat the lessor's title within a short time after the transaction, and it is not at all probable that they, in disregard of the danger incurred, agreed to give their negotiable notes for five years' rent in advance, amounting to about \$17,000. (5) It is shown that, understandingly and purposely, anything like a covenant for quiet enjoyment was omitted from the contract, under the impression that an express covenant was necessary to bind the lessor to keep the tenant in possession during the term. It would seem to be extremely improbable that the lessees, if otherwise inclined to give the notes for the five-years rent in advance, would agree to do so, and at the same time release the lessor from the legal obligation to keep them in possession during the entire term.

Without enlarging this discussion, our conclusion is again that the complainant has not only failed to establish this verbal contract on the part of the lessees to give rent notes, but that it is disproved. If the contract to give the rent notes is disproved, there could be no fraudulent refusal to give them, and no fraud effective to produce the failure of the complainant to pay off the incumbrances. It might be conceded that the conduct of these defendants, in other respects mentioned in the petition, was subject to criticism and censure, and yet it is quite clear that the essential element to constitute the effective fraud charged in the bill is not established.

The only remaining question is whether the ground upon which the chancellor based his decree is sustainable, and justifies a decree for the complainant. He held that the relation of landlord and tenant creates such influences of trust and confidence that courts of equity will construe a trust to arise out of a purchase by the tenant of the leased property at judicial sale for the satisfaction of an incumbrance thereon. This is a vexed and disputed question, as shown by the arguments and briefs of counsel. While Judge Story and Mr. Perry, in their discussion of this doctrine, mention "landlord and tenant" in their enumeration of the fiduciary relations from which the trust may be construed, neither Mr. Pomeroy, Mr. Sugden, nor White and Tudor in their notes, do. 2 Pom. Eq. Jur. §§ 958, 963; 2 Sugd. Vend. 362 *et seq.*; 1 Lead. Cas. Eq. pt. 1, p. 237 *et seq.*

But this court is saved the labor of a full discussion of this question by reason of the fact that it has been authoritatively settled in the case of *Bumpass v. Alexander*, 10 Heisk. 542, and we feel that we are bound to follow that precedent, even if we doubted the soundness of the doctrine there announced, which we do not. We understand the opinion in that case, on its facts, to be decisive of this, and to settle the doctrine in Tennessee that courts of equity will not ordinarily construe a trust to arise from the purchase by the tenant, at a trust or judicial sale, of the property held under the tenancy. We are satisfied with this doctrine, and are content to adhere to it. The statement of the judge who delivered the opinion in *Scott v. Levy*, 6 Lea, 667, we regard

as a *dictum*, and not a decision overruling the case of *Bumpass v. Alexander*. See *Casey v. Gregory*, 13 B. Mon. 505.

From all this, it results that the decree here should be for the defendants, both on the question of jurisdiction (for if there is not even a constructive trust arising from the fiduciary relation, the courts of Tennessee can have no conceivable ground of jurisdiction of this case affecting land in Arkansas) and on the merits.

The petition for rehearing must be dismissed, and the decree entered at the last term, including the judgment for the complainant, as shown, enforced. The report of the referees is set aside. It may be proper to remodel in some respects the decree, as entered at the last term, so as to make it conform in full to the principles of this opinion.

PARKER v. WALKER.

(*Supreme Court of Tennessee.* May 5, 1888.)

FACTORS AND BROKERS—REAL-ESTATE BROKERS—RIGHT TO COMMISSIONS.

Plaintiff, a real-estate broker, agreed to procure a purchaser for certain land of defendant at a price named, for which he was to receive an agreed sum as commission. He found such purchaser, and a written agreement was entered into by both defendant and the proposed purchaser, by which the latter was to take the land at the price named, and was to have time to examine the title. Within the time fixed, the purchaser made a groundless objection to the title, which was in fact good, and refused to take the land; but defendant did not sue for specific performance. *Held*, that plaintiff was entitled to the full amount of his commission.¹ FOLKES and SNODGRASS, JJ., dissenting.

Error to circuit court, Shelby county; L. H. ESTES, Judge.

Action by Minter Parker, a real-estate broker, against J. F. Walker, to recover commission for making a sale of land. The action was tried in the circuit court upon an agreed statement of facts, and judgment was rendered for defendant, and plaintiff brought error.

John D. Martin, for plaintiff in error. *Poston & Poston*, for defendant in error.

LURTON, J. This case was heard upon an agreed state of facts, from which it appears that the plaintiff, a real-estate broker, agreed to procure a purchaser for certain property at \$12,300, and take \$300 for his commissions as compensation. In pursuance of this agreement, Parker did find a number of gentlemen who agreed to take the property together at the price the owner was willing to take. A written agreement of purchase was drawn up, at the suggestion of Parker, by the attorney of Walker, and signed by Mr. Walker, and the purchasers so secured by the broker. Twenty days was given within which the purchasers should examine the title, and reject same if unsatisfactory. This agreement was a definite agreement to consummate the sale if title was sound; and, being signed by the parties was valid under the statute of frauds, and enforceable in equity by a bill for specific performance, by either party. The purchaser, within the time allowed by the contract, consulted counsel as to the title, and, being advised that it was defective, declined to carry out their agreement. Walker caused a bill to be prepared to enforce performance, and notified the purchaser that it was his purpose to compel a performance of their agreement; but for reasons not stated did not file his bill, and abandoned his purpose to hold the purchasers to their bargain. Parker, under this state of facts, insists that he has done all he was obligated to do

¹ Respecting the rights of real-estate brokers, and when their commissions are earned, see *Jarvis v. Schaefer*, (N. Y.) 11 N. E. Rep. 634; *Robinson v. Kindley*, (Kan.) 12 Pac. Rep. 537; *Ratts v. Shepherd*, (Kan.) 14 Pac. Rep. 496; *Zeimer v. Antisell*, (Cal.) 17 Pac. Rep. 642; *Henderson v. Vincent*, (Ala.) 4 South. Rep. 180; *Dreisback v. Rollins*, (Kan.) 18 Pac. Rep. 187.

by his employment; but that he is entitled to his commissions. Walker, upon the other hand, resists payment upon the ground that no sale has been made, and that the refusal of the purchasers to complete the purchase has caused the failure of the negotiations, and that he is not bound to compel a specific performance, but may drop the matter as an unsuccessful effort to make a sale, for which he owes nothing to the broker. This view of the matter was taken by the circuit judge to whom the issues of law and fact were submitted, who rendered a judgment for the defendant. The controversy turns upon the extent of the obligation undertaken by one who assumes to act as a broker, and the duty which he agrees to perform.

"A broker," says Judge Story, "is an agent who is employed to negotiate sales between the parties for a compensation in the form of a commission. In the proper exercise of his functions, he does not act in his own name, but only as middle-man." Story, Cont. § 344. In his work on Agency, he defines a broker as "one who makes a bargain for another, and receives a commission for so doing. Properly speaking, a broker is a mere negotiator between the other parties." Story, Ag. § 28. In the substantial correctness of this definition all the authorities concur. The office he undertakes, is to bring the buyer and seller to an agreement, or, as some of the cases put it, he undertakes to procure a purchaser willing and able to enter into an agreement of purchase upon the terms of the seller. This general obligation which he assumes or undertakes may, of course, be varied by contingencies, and broadened or narrowed by specific contract. In the case now under consideration, the very terms of the agreement between the owner of the property and his agent only required the latter to "procure a purchaser," and the particular agreement conforms to the very definition of a broker's general contract and undertaking. "To procure a purchaser" of real estate, not only implies that the purchaser shall be one able to comply, but the further idea that the seller and the purchaser must be bound to each other in a valid contract. To this must we agree. An oral agreement upon the part of the purchaser would not be a valid agreement; and if he refused to complete the sale after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions. If, on the other hand, the purchaser was not only able but willing to complete the sale, and the vendor then refused to sell, or is unable to fulfill the terms upon his part, or make a good title, or the trade falls through for any other default upon the part of the seller, the commissions are nevertheless earned. 2 Add. Cont. (Morgan's Ed.) § 931; *Cook v. Fiske*, 12 Gray, 491; *Tombs v. Alexander*, 101 Mass. 255, 3 Amer. Rep. 349; *Mooney v. Elder*, 56 N. Y. 238. But if a valid and enforceable agreement be entered into by the purchaser, and he decline to complete the sale for insufficient reasons, the seller ought not to be allowed to deprive the broker of his commissions by his refusal to compel the performance of a valid contract of purchase. The broker, in such case, has done all he can do, and all he undertakes to do. He has produced a purchaser able to comply, or one satisfactory to the seller, for he has accepted him as a purchaser; and willing to purchase, for he has freely bound himself by a valid agreement to buy the property. The subsequent unwillingness to carry out his purchase cannot affect the validity of the agreement by which he has bound himself to take the property. This assent of the contracting parties, and this valid agreement, having been brought about through the intervention of the agent, completes his obligation, and is all he undertook to do, and just what his principal employed him to do. If such a purchaser, being thus bound, undertakes to avoid his agreement upon insufficient legal grounds, the vendor may, if he choose, compel a specific performance; but if he elect to release him, rather than incur the expense or annoyance or delay of a litigation, he ought not, in equity and justice, make such election at the expense of his broker. Under the particular engagement entered into be-

tween the plaintiff and defendant, and under the general and usual agreement implied from the very definition of the term "broker," the plaintiff in this case has accomplished just what he undertook to do, and just what the defendant agreed to pay him for doing. No objection is made, or can be made in this case, as to the ability of the purchaser procured by defendant to comply with the terms of the contract of purchase. Such an objection should have been made before Walker accepted them as purchasers, and bound himself to sell to them. *Royster v. Mageveney*, 9 Lea, 151. The willingness of Walker to accept the purchasers as such, and his satisfaction with the trade, is shown by an extract from the agreed statement of facts: "After their introduction as would-be purchasers, they either would not or could not pay the \$12,300 cash, which Walker had authorized Parker to sell the property for, but offered to buy it upon the terms specified in Exhibit A. [part cash, balance on time.] * * * Walker agreed to those terms; and thereupon Parker, being present at said interview, suggested that said agreement be reduced to writing, and signed by the parties, both buyers and seller, whereupon the written contract, Exhibit A, was drafted by Walker's lawyer, and executed by all the parties." Upon the execution of this agreement of sale, nothing more remained that the broker could do, or that he was bound to do. It was for his principal to elect whether he would hold the purchasers to their bargain or release them. If he had chosen to have enforced the agreement, it must be conceded that the broker could have recovered his commissions. Can it be, then, that if, on the other hand, his principal preferred to release them, that he can thereby defeat their claim to their reward? The question as to whether the title of Walker was or was not good is wholly immaterial. If it was bad, and the sale defeated on that account, the broker, by all the authorities, is entitled to his commissions, unless he was apprised of the defective title, and undertook, with such knowledge, to find a purchaser. The title does, however, from the abstract in the record, appear to have been good, and the objection of the purchasers captious. The liability of the seller to his broker, under such a state of facts, seems clear upon a fair interpretation of the agreement between them.

The conclusion which we entertain is supported by considerations of equity and justice to an energetic and useful class of middlemen. That, in some cases, a hardship will result to would-be vendors, who may, in order to avoid paying commissions, be forced to compel the unwilling purchaser to comply with his contract, is not a matter so serious as to determine that the law must therefore be otherwise. If a seller prefers to release a purchaser who is morally and legally bound to comply with his bargain, he ought not to complain if the law holds that he cannot do so at the expense of his broker, whose labors and ability have brought about a binding agreement. The weight of authority seems to support the view we have taken. *Coleman v. Meade*, 13 Bush, 358; *Tombs v. Alexander*, 101 Mass. 255, 3 Amer. Rep. 349; *Love v. Miller*, 53 Ind. 294, 21 Amer. Rep. 192. This last is a well-reasoned case, and the learned judge refers to a large number of cases, as supporting the view here announced, to which we have not had access.

The judgment will be reversed, and judgment rendered here for \$300 and costs.

FOLKES, J., (*dissenting*.) I regret that I cannot concur in the opinion of the majority of the court in the disposition of this cause. I have always understood that, to entitle a real-estate agent to his commissions, he must effect a sale, or bring the seller a party ready, willing, and able to buy; and when he has done this, and the sale is defeated by defective title of seller, or by the wrongful refusal of seller to comply, or some default on his part which results to defeat the sale, he can recover. But in the case at bar the seller has a good and perfect title, and is ready and willing, anxious and able, to com-

ply with his contract. The sale is defeated by the captious, and not to say frivolous, objection of the purchasers to the title. It is, indeed, not denied that the terms of the deed which were seized upon as an excuse for non-performance on the part of the proposed purchasers, created an estate tail, which, under the statute, vested title in fee in Mrs. Botts. Moreover, there was a decree of the chancery court, unappealed from, years ago, construing this to be a good title in fee. Again, the seller asked for an extension of the 20 days within which purchaser was to approve the title, promising to try to obtain quitclaim deeds from the parties who, it was assumed, might have an interest in the property, so as to remove the objection made to the title. This was declined by the proposed purchasers. All of which shows that this trade has fallen through for no possible wrong or default on part of the seller, but by the wrongful act of the proposed buyer. Under this state of facts, we are to determine whether the real-estate broker is to onerate the seller with full commissions as for a consummated sale.

It affords us but little light to read the definition of a broker, as given in the books. We might as well undertake to determine the liability of a banker in failing to protest a note made payable at his office on a day "fixed," when the maker had removed his residence, by looking to the definition in the books of a banker. There is no trouble in defining either the one or the other, but definition does not determine the rights and duties under complicated or exceptional state of facts. To determine what the liability of the parties is, we must see what their contract was in terms; then ascertain the meaning and intention of the parties. At the time the contract was entered into, and where incomplete in expression, we must learn what equity and good conscience requires, under the circumstances, between the parties. How would definition help us, and what would become of the broker, if his right to compensation in a case where he had called the attention of a purchaser to land in his hands for sale, and without ever having brought him to the seller, the seller should seek the party, with knowledge that the broker was engaged in trying to sell to him, and then himself make the sale direct, was made to depend on definition as "one who makes a bargain for another, and receives a commission for so doing?" He has made no bargain, but is honestly trying to do so, when the owner makes the sale in person to the same man. Under the definition, he would be entitled to no compensation; but in equity and good conscience, and under all the authorities, he is entitled to his commissions in just such case. *Sussdorff v. Schmidt*, 55 N. Y. 319; *Earp v. Cummins*, 54 Pa. St. 394; *Lincoln v. McClatchie*, 36 Conn. 136; *Royster v. Maveveney*, 9 Lea, 148. Let us apply this lesson to the case at bar.

We find from the agreed statements of facts that the broker sought the owner, and informed him that he thought he could sell his land, and would do so for \$300 compensation. The owner replied that he must have \$12,000 net for his land. Thereupon the broker agreed to procure a purchaser at \$12,300, and to take the \$300 surplus for his commissions. Has the broker done this in fact and in truth, and as contemplated by the parties to the contract? Confessedly not. He has brought him parties who agreed, in writing though it be, to become purchasers, but who have in fact not become so. Is the property sold? Has the owner the \$12,300, or any part thereof, out of which the agent can "take" his commissions? He was to take his compensation out of the bread he was to bring him; but, having brought him stone instead, the agent must have bread for his share of the stone. It is said that he has brought him a "valid agreement" of sale. This is not what was stipulated for. He was to bring him a sale; a purchaser, not a proposed purchaser, nor an agreement of sale. Can any one suppose that it was contemplated by the parties, when the contract between the owner and agent was made, or when the contract between the owner and the proposed purchaser was made, providing for 20 days within which the latter were to determine whether the

title was satisfactory, that it was then the intention of the parties that if the title should be captiously refused, so that the owner would get no purchase money, that the owner should not only lose the sale, but have to pay out of his pocket the \$300; or that, to save himself from a positive loss of \$300, he must incur a much larger loss by filing a bill or bills in equity for a specific performance of the contract of sale, against non-resident parties or insolvent parties? So that, in any event, he will not receive what he had notified the broker was his main and most anxious care, to-wit, \$12,000 net. But it is said that, if he had not been willing to sell to non-residents, he should have refused to sign the contract of sale. He could not have refused to sign on any such ground. If he had declined to sign the contract, he would have then been the cause of the failure of sale, and would have been liable for the broker's commissions on that ground alone. So that, under well-established authority, he is bound to sign contract of sale, or become liable for fees if his failure to sign defeats sale; and, if he signs, he is bound to sue, at whatever cost or inconvenience, or pay the commissions. Such a holding, to my mind, is contrary to equity and good conscience; is contrary to the manifest intention and terms of the contract; and virtually makes a contract for the parties which it is manifest the owner never would have made in this case. Under such a rule, the broker gathers figs, while the owner is made to gather thistles from the same tree.

But it is said, with apparent plausibility, that, if the owner elects to abandon the contract, "he must not make his election at the expense of the broker." But in thus putting it we lose sight of the fact that the owner has not elected to abandon his contract of sale, to the injury of the broker. He has not abandoned his contract at all. If so, he is liable; but he is, on the contrary, ready and willing to perform his contract of sale. He has merely concluded not to voluntarily incur the expense and trouble of a suit; never having agreed or promised, directly or indirectly, to bring such suit. So, to assume that he has elected to abandon any duty or contract obligation he was under, at the expense of the broker, is to reason in a circle, or to assume as granted the very point in issue. Such holding is not only imposing an unexpected hardship upon owners of real estate, who have yielded to the importunities of brokers to allow them to sell their lands, but will react upon the business of the broker himself. A man of prudence will regard it unsafe to hold a conversation with a broker, for fear of incurring some new and unexpected liability; and the result would be calamitous in the extreme if an owner, with a good title, must litigate with every party whom a broker can introduce as a purchaser, where the latter interposes some captious or frivolous objection to the title, if one more frivolous than the present can be found. But, while there are cases to be found supporting the views of the majority, the case at bar, by reason of its special features, does not fall within them; and, if it did, these cases from other states are not binding on us, and are persuasive only so far as they seem to be supported by principle; and for the reasons stated, we do not think they should be adopted in this state.

We are by no means without authority for the principles upon which our conclusions are based. Thus it has been held that "the broker is never entitled to commissions for unsuccessful efforts. He may devote his time and labor and expend his money with ever so much devotion to the interest of his employer, and yet, if he fails without the default of his principal, he gains no right to commissions." *Sibbald v. Iron Co.*, 83 N. Y. 378. The broker must find a purchaser in a situation and able and willing to complete the purchase on the terms agreed on before he is entitled to his commissions. He must produce a person who is capable, and willing to buy the property on the terms named by the seller. This is illustrated by the case of *McGavock v. Woodlief*, 20 How. 221. In Louisiana and Maryland it is held that the making of the contract of sale is not enough, but the sale must actually be made

before the broker may claim commissions. *De Santos v. Taney*, 18 La. Ann. 151; *Kimberly v. Henderson*, 29 Md. 512. See, also, *Blankenship v. Byerson*, 50 Ala. 426; *Hyams v. Miller*, 71 Ga. 608. Successful sale must be the criterion of broker's right to commissions, however meritorious his service, unless the want of success is due to the owner of the land, in failing to do something necessary and proper to the performance of his part of the contract of sale. It is no part of the obligation of his contract of sale to file a bill for specific performance. It is a privilege, not a duty or an obligation; and, if the broker intends to convert this privilege into an obligation, good faith requires that the proposed seller should be apprised thereof. I apprehend no well-considered case can be found where, under a contract such as the one disclosed here, the owner is compelled to pay. It is not difficult to conceive of a special contract where the owner may move the broker to find for him, or bring him a party with whom the owner may trade, that by the terms, or circumstances attending the transaction, the broker may be well held to have earned his compensation when he has brought the parties together. Such, however, is not this case. Can we close our eyes to every-day experience and observation, which tells us that a man may be willing to sell his property for a specified price, and yet not willing to incur the expense and annoyance of a suit for specific performance, which exposes him to all the hazards of the proposed purchaser becoming insolvent, and of the depreciation of the market value of the property pending the litigation, when he could avoid all this by selling to some one else so as to "net him" according to his expectations, and in this case, in accordance with express terms of his contract. It needs no surmise to say that, in the case at bar, if the broker had asked for a contract in terms placing the obligations upon the owner to pursue these purchasers with a bill for specific performance, there would have been no contract made. Of course, it is clearly competent for parties to make such contract; but I submit that, before such a burden is placed upon the unwary owner, the energetic, active, and skilled broker should be required to make provision therefor in terms that may convey to the other party some intimation as to the nature of the obligation he is assuming when he consents to permit a broker to undertake the sale of his property. That innumerable efforts at sale by brokers, which the unreasonable refusal of the proposed purchaser have defeated, have occurred in the county from which this case comes, and in this state, and yet this is the first case of which we have any knowledge where the broker has made demand for compensation, furnishes some evidence of the fact that it has never before been supposed that such compensation was contemplated by the parties.

Believing, as I do, that the holding of the majority is violative of the contract as made by the parties, that it is unsupported by reason and authority, and contrary to public policy, as calculated to force an unwilling party into litigation, I am reluctantly compelled to dissent from the opinion of my much-esteemed brethren of the majority. In my opinion, the judgment of the circuit court should be affirmed.

SNODGRASS, J., also dissents from the opinion of the majority.

MALLORY *et al.* v. HANANER OIL-WORKS.

(Supreme Court of Tennessee. May 8, 1888.)

1. PARTNERSHIP—WHAT IS—AGREEMENT BETWEEN CORPORATIONS.

An agreement among a number of corporations engaged in manufacturing cotton-seed oil, to select a committee composed of representatives from each corporation, and to turn over to such committee the properties and machinery of each company,

to be managed and operated by the committee for the common benefit, the profits and losses to be shared in agreed proportions, and the arrangement to last for a specified time, is a contract of partnership.¹

2. CORPORATIONS—POWERS—ULTRA VIRES—CONTRACT OF PARTNERSHIP.

A corporation created under the Tennessee incorporation act of 1875, for the manufacture of cotton-seed oil, has no implied power to enter into a partnership with other similar corporations, by which the business of all the contracting companies is to be managed by a committee; and such contract, whether made by the directors or by all the stockholders, is *ultra vires* and void, as far as unexecuted.

3. SAME—ULTRA VIRES—CONTRACT OF PARTNERSHIP—WHEN UNEXECUTED.

Where, by the contract of partnership, the committee was to have possession of the properties of all the contracting companies for the space of three years, and an action of unlawful detainer was brought by one of the companies to recover its property at the end of two years, *held*, that the contract was as to the remainder of the term unexecuted, and could be repudiated as *ultra vires*.

4. SAME—VOID CONTRACT OF PARTNERSHIP—EFFECT OF PLACING CORPORATE PROPERTY IN THE HANDS OF MANAGERS.

The contract being void, it could not operate to convert the managers of the combination into tenants from year to year, and entitle them to the statutory notice to quit.

5. FORCIBLE ENTRY AND DETAINER—PROCEDURE—NOTICE.

Where the action of unlawful detainer will lie under the Tennessee statutes, no other notice than the suing out of the writ is necessary.

Appeal from circuit court, Shelby county; L. H. ESTES, Judge.

Metcalf & Walker, for appellants. *L. & B. Lehman*, and *Turley & Wright*, for appellee.

LURTON, J. This is an action of unlawful detainer, brought by the Hananer Oil-Works, a corporation created under the general incorporation act of 1875, and engaged in the manufacture of cotton-seed oil at Memphis, Tenn. The facts which raise the question to be determined are these: In July, 1884, a contract was entered into by and between four corporations engaged in manufacturing cotton-seed oil at Memphis, for the formation of what is designated in the agreement as a "combination," "syndicate," and partnership. The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents, and employees selected by them, for the common benefit; the profits and losses of such operation to be shared in proportions agreed upon. This arrangement was to last one year, but, with consent of all, might be renewed for two additional years; and, as appears, was at the end of the first year renewed for two other years, terminating August 1, 1887. The facts clearly establish that the possession of the several mills was turned over to this executive committee, and they were operated by these managers thenceforward under the name of the "Independent Cotton-Seed Association." There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hananer Oil-Works was one of these contracting corporations; the contract being authorized by both shareholders and directors. In July, 1886, the business of the second year having been about concluded, the board of directors of the Hananer Oil-Works passed a resolution declaring this contract void, as being an agreement *ultra vires*, and their president was instructed to take possession of their mill. There is some proof tending to show that, upon demand of the president of the defendant in error, the general superintendent of the "Independent Cotton-Seed Association" surrendered possession of the Hananer mill to him, and agreed to hold for him, and that he afterwards repudiated this agreement, by surrendering possession to Mr. Mallory, one of

¹As to what constitutes a partnership, see *Clift v. Barrow*, (N. Y.) 15 N. E. Rep. 827, and note; *Railway Co. v. Johnson*, (Tex.) 7 S. W. Rep. 888, and note; *Dame v. Kempster*, (Mass.) 15 N. E. Rep. 927; *Hendy v. March*, (Cal.) 17 Pac. Rep. 703.

the executive committee, who thereupon locked up the mill, and gave instructions to a watchman, in employ of the committee, not to admit the Hananer officers. In the view we take of the case, it is not material to determine the legal effect of the evidence upon this question as to what passed between Mr. Camp, the superintendent, and Mr. Cochran, the president. The fact is that, at the time the writ of unlawful detainer was sued out, the mill of the Hananer Company was in the exclusive possession of the officers of the "Independent Cotton-Seed Association," and the officers of the Hananer Company were excluded therefrom. There was a judgment in favor of the Hananer Oil-Works, and from this an appeal has been prosecuted.

The argument here has largely turned upon the correctness of the charge of the circuit judge, who distinctly instructed the jury that the contract between the Hananer Company and the other four corporations was a contract for a partnership between corporations, and that, under the charter of the Hananer Oil-Works, it had no power to make such a contract, and that it was therefore void, and that it had a right to recover possession of its property, it being withheld solely under and by virtue of an agreement *ultra vires*. "A partnership," says Judge Story, "is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Pothier says that a partnership is a contract whereby two or more persons put, or contract to put, something in common, to make a lawful profit in common, and reciprocally engage with each other to render an account thereof." Story, Partn. § 2.

A careful examination of this agreement discloses every essential element to a contract of partnership. The absolute ownership of the corporate property, the mills, machinery, etc., is not conveyed to the partnership, nor is this necessary. The beneficial use of all such property is surrendered to the common purpose. The provisions for the complete possession, control, and use of the properties of the several corporations by the partnership or syndicate is perfect. Nothing is left to the several copartners but the right to receive a share of the profits, and participate in the management and control of the consolidated interest as one of the new associations. The contract is both technically and in its essential character a partnership, in so far as it is possible for corporations to form such an association.

It is, however, argued by the learned counsel for appellants, that if it be a partnership, that it does not therefore follow that it is *ultra vires*; that such a contract, not being prohibited by law, or the charter of the defendant in error, or against public policy, is not void even if in excess of powers expressly conferred; that the business proposed by the contract being within the purposes of the charter, is therefore within the implied powers of the corporation, and not *ultra vires*. In other words, "that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes forbidden to do it." In this doctrine we do not concur. There is, however, respectable authority for the position. A corporation, being an artificial creation, is the very thing it is made by the statute which brings it into being, and nothing more. The extent of its powers are those enumerated in its charter, or implied by fair and natural construction of powers expressly conferred. The charter is the measure of its powers, and the enumeration thereof implies the exclusion of all others. We are not to look to the charter to see whether the thing done be prohibited, but whether there is authority to do it. These principles we understand to have the support of the great weight of authority in this country, and to have the sanction of the supreme court of the United States. *Thomas v. Railroad Co.*, 101 U. S. 71. This view of the law has been the one entertained by this court, and clearly and distinctly

enforced, in an opinion by the present chief justice in the case of *Elevator Co. v. Railroad Co.*, 1 Pickle, 703, 5 S. W. Rep. 52. The power to enter into a partnership is not expressly or impliedly conferred by our act of 1875, under which the Hananer Oil-Works is incorporated. Neither is such authority within the implied powers of corporations. A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation, or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation. Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act, not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts. The decided weight of authority is that a corporation has not the power to enter a partnership, either with other corporations, or with individuals. Says Mr. Morawitz: "It seems clear that corporations are not impliedly authorized to enter into partnership with other corporations or individuals. The existence of a partnership not only would interfere with the management of the corporation by its regularly appointed officers, but would impair the authority of the shareholders themselves, and involve the company in new responsibility, through agents over whom it had no control." 1 Mor. Priv. Corp. § 421; *Whittenton Mills v. Upton*, 10 Gray, 582, 71 Amer. Dec. 681; Ang. & A. Corp. § 272.

It is unnecessary to consider this contract as constituting a mere traffic arrangement, for the conclusion already announced, that it was an effort to form a partnership, determines that in its scope and effect it sought to accomplish much more than would be understood by the phrase "traffic arrangement." The next assignment is that this contract, if *ultra vires* at all, was so only as to the power of the officers, and not as to the powers of the corporation; that the thing to be done being within the purposes and scope of the franchise of the corporation, and the contract being satisfied by the shareholders became valid and binding. There may be acts *ultra vires* as to the officers, and yet not so as to shareholders. But the contract here entered into we have already held to be beyond the power of the corporation, and such an act cannot be made valid by the assent of every stockholder.

It is next argued that if the contract be *ultra vires*, that it is an executed contract, and that the courts will not in such cases interfere. This contract had yet a little over one year to run. The possession of the Hananer mills had been obtained under it, and was withheld under a claim of right by reason of the supposed validity of the partnership. As to the unexpired time, during which the defendant in error might be deprived of the use of its property, and subjected to the hazards of another year's operations, it was not an executed contract. The possession obtained under this contract was illegal, and it was the duty of the officers of the Hananer company to renounce the arrangement and recover possession. There are cases where, an invalid contract being fully executed, the courts will not entertain a suit to recover money or property transferred under such agreement, or, if they do interfere, will do so only upon equitable terms.

But the defense here made would result, if successful, in enforcing the performance of the unexecuted part of a void contract. It is not a case of contract fully executed. The part remaining to be executed is a material part, and is beyond the power of defendant in error to make or sanction. Having entered into it, it was its duty to rescind or abandon it. In a case where a lease had been made by a railway company for a term of twenty years of its road and franchises, and which, after a lapse of five years, it rescinded, and was thereupon sued for damages under a clause in the lease which authorized rescission, and provided for compensation for unexpired term, the supreme court of the United States said: "It is not a case of a contract fully executed. The very nature of the suit is to recover damages for non-performance. As to this it is not an executed contract. Not only so, but it is a contract forbidden by public policy, and beyond the power of defendant to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause which gave them the right to do it. Though they delayed its performance several years, it was nevertheless a rightful act when done. Can this performance of a legal duty—a duty both to stockholders and to the public—give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts." *Thomas v. Railroad Co.*, 101 U. S. 86.

That the defendant in error has submitted to a void contract by which it has been deprived of the use of its property for two years, furnishes no sound reason why it shall submit for three years. To hold that it did would be to apply the doctrine of part performance in a way to perfect and legalize illegal contracts which were partly performed. We have not deemed it necessary to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for the ground upon which we place the case needs no additional proof. The question of the validity of such an arrangement is a very grave one, but need not now be considered. The suggestion that, if this contract was void, yet nevertheless it operated to convert the managers of the combination into tenants from year to year, and that such tenancy could only be terminated at the end of a year, and upon six months' notice, is not tenable. The relation of landlord and tenant never existed under the contract if it be considered as valid, and could not spring from its illegality. The Hananer Mill Company had a right to repudiate the arrangement at any time, and it was the duty of plaintiffs in error to have at once surrendered possession.

The service of a writ in a suit of unlawful detainer was the only notice they could legally demand. When the action of unlawful detainer will lie under our statutes, no other notice than the suing out of a writ is necessary. Code Mill & V. § 4082. The result is that we hold that there was no error in the charge of the circuit judge, or his refusal to charge, and the judgment must be affirmed with costs.

FOLKES, J., having been of counsel, did not sit in this case.

COX *et al.* v. LEE.

(*Supreme Court of Arkansas. May 19, 1883.*)

JUSTICE OF THE PEACE—SUPERSEDEAS TO STAY EXECUTION—REMEDY OF EXECUTION CREDITOR.

After a justice has issued a *supersedeas* staying an execution against property claimed as exempt, he has no power to recall it, and the execution plaintiff, if aggrieved, must appeal to the circuit court, as provided by Mansf. Dig. Ark. § 3006.

Appeal from circuit court, Logan county; JOHN S. LITTLE, Judge.

W. P. Cox & Co. sued J. R. Lee in justice's court for a debt of \$120, and recovered judgment. Defendant filed his bond for appeal to the circuit court, but was afterwards permitted to withdraw his appeal. Execution issued, but before its return defendant filed his schedule of property exempt from execution, and obtained a *supersedeas*, which plaintiffs, however, procured to be recalled, when they proceeded with their execution, and at the sale bought the property themselves. Lee then instituted an action of replevin before another justice, and from a judgment against them Cox & Co. appealed to the Logan circuit court; and, its judgment being also adverse to them, they bring this appeal.

Davis & Bullock and *Hall & Lewers*, for appellants. *Clendenning & Read*, for appellees.

COCKRILL, C. J. When a plaintiff in execution feels aggrieved at the action of a justice of the peace in ordering the issuance of a *supersedeas* to prevent the sale of his judgment debtor's property, as exempt from sale under execution, his remedy is by appeal to the circuit court. Mansf. Dig. 8006; *Winter v. Simpson*, 42 Ark. 411; *Cason v. Bone*, 43 Ark. 17; *Garrett v. Wade*, 46 Ark. 493. The justice has no power to revoke the order, and recall the *supersedeas*. *Dunnagan v. Shaffer*, 48 Ark. 476, 3 S. W. Rep. 522. If he undertakes to do so, and the officer sells the property, under the execution, to the plaintiff, the defendant may recover it in replevin. Affirmed.

STATE, to Use of MOORE *et al.*, v. HILL *et al.*

(Supreme Court of Arkansas. May 19, 1888.)

1. INJUNCTION—WHEN LIES—TO RESTRAIN PROCEEDINGS AGAINST ADMINISTRATOR'S SURETIES.

Proceedings on a judgment against the sureties on an administrator's bond should not be restrained for an alleged want of due service, without a meritorious defense having first been shown, as equity will relieve from real and not from mere technical wrongs.

2. PRINCIPAL AND SURETY—SURETY'S SIGNATURE TO ADMINISTRATOR'S BOND—ESTOPPEL TO DENY.

When the name of a person is signed to an administrator's bond without his knowledge, and afterwards, and before its approval by the probate court, he is informed thereof, and does not object, it is too late to demand relief from liability after the administrator has committed waste.

Appeal from circuit court, Johnson county; G. L. CUNNINGHAM, Judge.

On 25th day of February, 1882, Emma T. Hill was appointed administratrix of the estate of her husband, John F. Hill, deceased, by the probate court of Johnson county, and executed a bond with the following persons as her sureties, to-wit, Marcus Hill, E. C. Estep, W. P. Earnest, W. M. Banks, W. E. Casey, M. W. Earnest, John R. Hill, Z. T. Hill, H. L. W. Hill, and R. J. Gray. In August, 1883, she tendered her resignation, and an administrator *de bonis non* was appointed. The court ordered her to turn over to him the sum of \$1,734.89, together with notes and accounts amounting to about \$18,000. She failed to pay over all the money mentioned in said order, and suit was brought on this order for the balance of the money at the May term, 1884, of the Johnson circuit court. All the summons were issued on the 16th day of April, 1884. One was directed to the sheriff of Johnson county, commanding him to summon W. P. Earnest, W. M. Banks, W. E. Casey, M. W. Earnest, Z. T. Hill, and H. L. W. Hill, and was served on all them, as shown by sheriff's return, on 24th, 25th, and 26th days of April, 1884. The second summons was directed to the sheriff of Madison county, commanding him to summon John R. Hill and E. C. Estep, and was served on the 28th day of April, 1884. The third summons was directed to the sheriff of Carroll county,

and was served on the 30th day of April, 1884, on R. J. Gray and Emma T. Hill. At the May term, 1885, judgment was obtained against all the defendants, as sureties on the bond, except Marcus Hill, who was not sued. Execution was issued in December, 1885, and levied on the property of appellees. On 16th day of January, 1886, the defendants sued out a writ of injunction, and a temporary restraining order in vacation. At the May term, 1886, the appellants filed an answer alleging that appellees had been duly served with process, and had appeared by counsel and demurred, and consented to a continuance. At the December term, 1886, the court made the temporary restraining order perpetual, and from this order the present appeal is taken. *F. R. McKennon*, for appellants. *J. N. Sarber*, for appellees.

COCKRILL, C. J. The doctrine announced in *Ryan v. Boyd*, 33 Ark. 778, that an officer's false return of service of process shall not preclude the defendant from showing the truth in a proper proceeding to be relieved from the burden of a judgment based thereon, is, we think, sustained by reason and the weight of authority. *Gregory v. Ford*, 14 Cal. 138, 73 Amer. Dec. 639, and note; *Taylor v. Lewis*, 19 Amer. Dec., note p. 137; 2 Lead. Cas. Eq. pt. 2, p. 370; *Duncan v. Gerdine*, 59 Miss. 550; *Owens v. Ranstead*, 22 Ill. 161; *Colson v. Lettich*, 110 Ill. 504; *Chambers v. Manufactory*, 16 Kan. 270; *Blakeslee v. Murphy*, 44 Conn. 188. The consideration of public policy which requires that a record shall be taken as bearing uncontrovertible truth upon its face (*Boyd v. Roane*, 49 Ark. 397, 5 S. W. Rep. 704; *Newton v. Bank*, 14 Ark. 12) yields to the equitable principle that one who is guilty of no laches shall not be held to pay the penalty of another's fraud or mistake, if he takes prompt and proper steps to be relieved from the danger of impending injury. Evidence tending to contradict the record is heard, in such cases, not for the purpose of nullifying the officer's return, but to show that the judgment defendant has been deprived of the opportunity of asserting his legal rights without fault of his, and that it would be unfair to allow the judgment to stand without affording him the chance to do so. The principle that affords relief to one who has been actually summoned, but who has been prevented through unavoidable casualty from attending the trial, governs. Relief is not granted merely because the court assumed jurisdiction of the defendant's person upon a false return of service of process. 2 Story, Eq. Jur. § 898, and note. To warrant interference, the false return must have resulted in an injury to the defendant under such circumstances as would render it unconscionable to permit the judgment to be executed. *Gibson v. Armstrong*, 32 Ark. 438; *Secor v. Woodward*, 8 Ala. 500; *Fowler v. Lee*, 10 Gill & J. 358; *Johnson v. Branch*, 48 Ark. 585, 3 S. W. Rep. 819. One who is aggrieved by a judgment rendered in his absence can have relief only upon showing that he was not summoned, and did not know of the proceeding, in time to make defense. 2 Lead. Cas. Eq., *supra*; *Bently v. Dillard*, 6 Ark. 79; *Conway v. Ellison*, 14 Ark. 360. This principle is not in conflict with the rule which precludes a defendant from traversing the truth of the officer's return, in the cause in which it is made, before judgment, (see *Ex parte Railway Co.*, 40 Ark. 141; Herm. Estop. § 452, p. 540,) because he is then put upon his guard in time to prevent an unjust judgment by making his defense to the action; and, if he fails to do so, he will be taken as making his election to look to the officer who made the false return for indemnity. We therefore reaffirm the principle of *Ryan v. Boyd* to the extent above stated. But we cannot accede to the doctrine, there announced, that a judgment at law will be vacated in equity where the judgment defendant has no meritorious defense to the action in which the judgment was rendered. Such a rule is contrary to the principle upon which equity interferes in such cases; that is, to prevent an unconscionable advantage. If the court ought to have compelled the payment of the demand upon which suit was brought, only a technical and not a real wrong is done the defendant

in entering the judgment against him; and, by affording him the opportunity of offering his defense before the judgment can be enforced, he is not deprived of any constitutional or other right. The rule requiring a showing of merits before relieving against a judgment obtained through unavoidable casualty or misfortune has always been enforced by this court, both before and since the decision in the case of *Ryan v. Boyd*. It holds good, it seems, even in cases where the judgment is obtained through fraud. *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. Rep. 71; *Lawson v. Bettison*, 12 Ark. 401. When equity ventures to interfere with a judgment at law because of an officer's false return of service of process, it is upon one of these well-established heads of equity jurisdiction; and the reason which demands the rule in the one instance applies also in the other. "In analogy to its usual course of procedure," say the supreme court of California in *Gregory v. Ford*, *supra*, "it would seem that the judgment plaintiff, having acquired, without any fraud on his part, a legal advantage, would be permitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense. It would certainly seem that it would be quite as equitable to turn the defendant in execution over to his remedy against the sheriff for a false return, under such circumstances, as to relieve him from judgment, and turn the plaintiff for redress to the sheriff; for the effect of vacating the judgment now would be to release the defendant from the debt, as the statute of limitations has intervened." The better established rule unquestionably is that, before a court of equity will relieve against a judgment for want of service on the defendant, the latter must aver and prove that, if the relief is granted, a result will be attained different from that reached by the judgment complained of. *Freem. Judgm.* § 498; 8 Pom. Eq. Jur. § 1364, note 1; *Colson v. Lettch*, 110 Ill. 504; *Gregory v. Ford*, 14 Cal. 138, 73 Amer. Dec., note 644; *Taggart v. Wood*, 20 Iowa, 236; *Secor v. Wood*, 8 Ala. 500; *Saunders v. Albritton*, 37 Ala. 716; *Fowler v. Lee*, 10 Gill & J. 358. The statute expressly requires a defense to be shown in all cases in which the proceeding to vacate may be had in the court which rendered the judgment. *Manuf. Dig.* 3912; *Boyd v. Roans*, 49 Ark. 397, 5 S. W. Rep. 704. And, whether this case comes within the statute or not, the rule is applicable. *Ryan v. Boyd* is overruled upon that point.

No question is made on the mode of procedure in this case. The court vacated the judgment which had been rendered against the parties who are plaintiffs here, and counsel present the cause on its merits. We are constrained to reverse the decree. Passing over the requirements of strict proof from the judgment, defendant to overcome the effect of the officer's return of service, sustained, as it was in this case, by his affirmative testimony that the service was had as returned on one of the appellees at least, and conceding that it is proved that the attorney who appeared for the defendants in that action did so without the authority or knowledge of the plaintiffs in this cause, and that his appearance therein does not conclude them now, and that they had no knowledge of the suit against them until judgment had been rendered and the term had elapsed, the rule that a defense to the action at law is not now satisfactorily shown, is fatal to the decree. If it appeared from the record that the plaintiffs had failed to disclose their defense in this proceeding, in reliance upon *Ryan v. Boyd*, *supra*, we would remand the cause, to give them the opportunity, in the absence of other reason for reversal. But the bill alleges their pretended defense, and they undertook to support it by proof. In both instances they overshot the mark. They alleged and proved too much. An administrator's bond upon which the names of the plaintiffs in this suit appear as sureties was the foundation of the action in which the judgment now complained of was rendered. The plaintiffs here say that their defense to the action was that they did not sign the bond, or authorize any one to do it for

them. The bond was executed, apparently, as a sort of family or friendly arrangement; the names of these plaintiffs being signed, in their absence, by one of the sureties, at the suggestion of John R. Hill, another surety. John R. afterwards informed the plaintiffs (now the appellees) that they had been made sureties in the bond. According to the testimony of Z. T. Hill, one of the appellees, this may have been before the bond was approved by the probate court. According to that of H. L. W. Hill it was certainly while the administratrix was acting under the authority of the bond. The allegation of the bill upon this point is that they did not know that they appeared as sureties in the bond until after the same had been filed and approved in the probate court. Construing this allegation most strongly against the parties making it, we cannot say that any considerable time elapsed between the filing and approval of the bond and the occasion of John R. Hill's communication to them of the fact that they had been put in as sureties to the bond. They made no protest or objection when informed of the fact, or at any other time until their property was seized under the judgment. The first intimation of disapproval of what had been done and communicated to them by the other bondsmen was the filing of the complaint in this cause. They knew that the administratrix had qualified, and was acting by virtue of the bond upon which they appeared as sureties. They stood by, and permitted her to proceed under the bond; thereby leading the creditors and others in interest to believe that they were sureties for the faithful execution of the trust. After it was believed that the administratrix was guilty of waste, when the liability of the bondsmen was discussed with one of the plaintiffs, and in the presence of the other, neither of them intimated that the bond was not his own. Their silence through all this period indicates acquiescence in the act of their friends in signing their name to the bond, and was an adoption of their acts. "It is a very clear and salutary rule in relation to agencies that when a principal, with the knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them, under the pretense that they were done without authority, or even contrary to instructions. *Omnis ratihabito mandato equiparatur.*" *Kelsey v. Bank*, 69 Pa. St. 426; Whart. Ag. § 86. If these plaintiffs did not intend to take this liability upon themselves, they should have repudiated the act, so that the creditors might not have been misled to their prejudice. It was too late after the injury was done. The showing made by the plaintiffs induces us to believe that they had no meritorious defense to the demand upon which the judgment was rendered. The decree granting them relief is therefore reversed, and their bill is dismissed.

MOLINE PLOW CO. v. WENGER et al.

(Supreme Court of Missouri. May 21, 1888.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION TO SET ASIDE.

Where a creditor corporation procured from its debtor a trust deed to secure its claim, and, on this being discovered by other creditors, they threatened proceedings in bankruptcy unless such trust deed was released, and thereupon, by consent of all parties, the creditor and the debtor conveyed all the latter's assets to an assignee, who was to act for the creditors, and who gave bonds for the faithful performance of the trust, and who afterwards made distribution of all assets realized, but who was not able to dispose of the land for nearly three years, a suit by such creditor to set aside the said conveyance, and the release of its trust deed, on the ground that the same were obtained on false and fraudulent representation, should be dismissed.

Error to circuit court, Morgan county; E. L. EDWARDS, Judge.

Suit by the Moline Plow Company against John C. Wenger and Martin Good. The bill was dismissed at the hearing, and plaintiff brings error.

J. E. Hazell and Draffen & Williams, for plaintiff in error. B. R. Richardson and Edmund Burke, for defendants in error.

NORTON, C. J. This suit was commenced in the Morgan county circuit court on the 25th of December, 1875, against defendant Wenger and Martin Good, who has since died, and his heirs have been made parties. The averments in the petition are substantially as follows: That said Good, for the purpose of securing to plaintiff the payment of two promissory notes, executed two deeds of trust on land situated in Morgan and Moniteau counties, dated, respectively, on the 7th and 10th of February, 1873, conveying said land to John P. Carr, as trustee; that subsequently defendant Good, for the purpose of defrauding the plaintiff, falsely and fraudulently represented to the plaintiff that he was indebted to other parties, and desired to make a *pro rata* distribution of his property among all his creditors, and, by fraudulent means, induced plaintiff to execute deeds of release upon the property conveyed by the said deeds of trust, and thus surrender its security; that said Wenger was a party to the fraud of said Good, and that said false representations were made by Good, and concurred in by Wenger, so that they could enjoy said premises free from said trust lien; that by reason of said false representations plaintiff released, by quitclaim deeds, its deeds of trust, and said Good conveyed said lands to Wenger, who holds the same for his own benefit, and has neither attempted nor intends to dispose of said lands for the purpose of distributing the proceeds among creditors. The petition prays that the said deeds of release, as well as the deeds from Good to Wenger, be set aside, and that the lands be sold, and the proceeds applied to the payment of the debt secured by said deed of trust. The answer of Wenger, after specifically denying all the allegations of fraud set forth in the petition, avers, substantially, as follows: That Good had numerous creditors, including Wenger, besides the plaintiff; that the creditors of Good were about to put him into bankruptcy unless plaintiff would release its security, to which plaintiff consented; that at a meeting of the creditors of Good the plaintiff was represented by John P. Carr, an attorney at law; that, at the request of said Carr, Wenger consented to assume the responsibility of distributing such assets of Good as would be transferred to him *pro rata* among the creditors of Good; that in all of his actions respecting said assets he was guided by said Carr, plaintiff's attorney, to whom he paid various dividends on plaintiff's claim, and also paid various dividends to the other creditors of Good, setting forth the names of Good's creditors, the amount of their respective debts, the dividends paid them, expenses incurred in collecting the assets, and in defending litigation. The answer admits that the land conveyed to him by Good was held in trust by him for Good's creditors. Wenger then asks the court to relieve him from any further duties respecting said trust, and prays for the appointment of a new trustee to carry out said trust. This answer was denied by replication. The evidence in the record abundantly establishes the following facts: That Good, who was indebted to plaintiff and various other persons in February, 1873, executed the two deeds of trust mentioned in the petition to secure to plaintiff the payment of his indebtedness to it; that other creditors of Good, becoming acquainted with the fact that plaintiff had thus obtained a preference, became dissatisfied, and informed Carr, the trustee, and plaintiff's representative that they would put Good in bankruptcy unless plaintiff would release the deeds of trust; that plaintiff, after being consulted by Carr, agreed to release its security; that, at a meeting of the creditors held at Tipton, plaintiff was represented by said Carr and another agent, and it was agreed by plaintiff, as well as by the other creditors of Good, that one C. C. McClay be appointed assignee, to whom Good would assign his assets for distribution among all his creditors; that McClay declined to act as assignee, and, at the suggestion of said Carr, plaintiff's agent and attorney, and other creditors, defendant Wenger was induced to act. The evidence satisfactorily shows that, in pursuance of this arrangement, Good transferred his assets to Wenger. That Carr, as attorney, prepared the deeds of release from plaintiff

to Good, and also the deeds from Good and wife to Wenger, to the lands in controversy. That Wenger, as assignee, gave bond in the sum of \$3,000. That the deed of assignment was not filed for record; said Carr, plaintiff's attorney, having informed Wenger that it was not necessary to file it for record. That Wenger collected some of the assets, and placed said lands in the hands of agents, to be disposed of for the benefit of Good's creditors, and also placed in the hands of said Carr a considerable portion of the assets for collection. That said Wenger, in pursuance of his authority and duty, on the 31st of May, 1878, distributed among the creditors \$776.34, \$214.60 of which was received by said Carr as the attorney of plaintiff; and that on the 3d of September, 1878, he made another distribution among the creditors of \$283.29, \$82.50 of which was also paid to said Carr for plaintiff. That neither of defendant's agents in whose hands he had placed said lands was able to dispose of the same at a fair price, when, in December, 1875, plaintiff, by filing for record in the office of the recorder for Morgan and Moniteau counties notices of the present suit, rendered a sale of the land impracticable. It also appears from the evidence that Wenger never claimed any of the assets assigned by Good, only to the extent of his distributive share as a creditor; and that, in the management of said assets, he relied upon the advice of said Carr up to the time of his death. In view of the evidence, and the admission in defendant's answer that the land in controversy was only held by him in trust for the benefit of Good's creditors, under the arrangement made with them, the decree of the court in dismissing the bill, and entering judgment for defendants, was fully justified, and the judgment is hereby affirmed.

All concur.

BARTLETT v. SPARKMAN.

(Supreme Court of Missouri. May 21, 1888.)

PRINCIPAL AND AGENT—EXTENT OF AGENT'S AUTHORITY—PHYSICIANS.

The evidence in an action to recover for medical services showed that defendant, whose wife was sick, ordered his brother to procure a certain physician to attend her. The brother could not get the physician required, and so engaged plaintiff. Plaintiff testified that when he reached defendant's house the latter told him the trouble was over, and his services not needed. *Held*, that the evidence did not show that the brother so exceeded his authority, or such a repudiation of his act by defendant, as to warrant taking the case from the jury.

Appeal from circuit court, Butler county; R. P. OWEN, Judge.

Suit for medical services by George S. Bartlett against Thad Sparkman. Judgment for defendant, and plaintiff appeals.

L. D. Grove, for appellant. *S. A. Standard*, for respondent.

NORTON, C. J. This action was commenced before a justice of the peace on an account for professional services of plaintiff as a physician. The account sued upon is as follows: "*Thad Sparkman, Dr., To G. T. Bartlett: 1881. April 12th. To one visit, \$10.00.*" At the May term, 1884, of the Butler county circuit court, to which the cause had been taken by appeal, a jury was impaneled, and at the close of the evidence the court instructed the jury "that, under the proof, plaintiff is not entitled to recover;" whereupon the jury returned a verdict for defendant, and judgment was entered against plaintiff, from which he has appealed, and assigns for error the action of the court in giving the aforesaid instruction. The following is all the evidence introduced on the trial: John Sparkman testified as follows: "I am a brother of the defendant. In April, 1881, the defendant told me his wife was sick, and sent me after the doctor. He told me to get Dr. McCowen. I went, and could not get him. Dr. Bartlett was then my next choice, and I went and saw Dr. Bartlett, and got him. He and I rode out together. I went to within about three miles of defendant's house. I then turned off, and the doctor went

on. It is about fourteen miles from Poplar Bluff to defendant's house. I told the doctor that the defendant wanted him, as his wife was sick." On his cross-examination, witness said: "The doctor acted as if he was drunk. I went to the saloon, and each drank one glass of beer, and, on the way up, the doctor took out a bottle and drank once. I drank out of the same bottle. It was whisky and something else. It tasted sweet." B. C. Jones testified: "I am a physician. To go out in the country on a professional call, it is worth \$10.00 to go a distance of twelve or fourteen miles. The plaintiff is a practicing physician." Plaintiff, in his own behalf, testified as follows: "John Sparkman, the brother of defendant, came to me to go and see the defendant's wife, whom he said was sick. I went with him, and drove up in the lawn near the house, where we usually get out to go in; and the defendant came out and said to me, 'Doctor, we don't need your services now, for the trouble is all over.' I then drove off."

The action of the court in giving the instruction complained of was doubtless based on the well-established general doctrine that the acts of a special agent with special authority, not done in pursuance of the authority, or done in excess of it, are not binding upon his principal unless ratified by him with full knowledge of the facts and circumstances. The rule, however, is not of universal application. In 1 Wait, Act. & Def. 232, § 12, it is said: "Although, as a general rule, an agent is required to conform to his instructions or authority, yet there may be instances in which a strict and literal adherence to their terms would defeat the object of the agency. There may arise such new and unexpected emergencies and necessities as will justify the agent in assuming extraordinary powers, which, if done in good faith and with sound discretion, will bind the principal." So it is said in section 141, Story, Ag., "that, although the powers of agents are ordinarily limited to particular acts, yet extraordinary emergencies may arise in which a person, who is an agent, may, from the very necessities of the case, be justified in assuming extraordinary powers; and his acts, when fairly done, under such circumstances, will be binding on his principal." See sections 85, 193, 237, Story, Ag. The facts in evidence bring this case within the operation of the principle above enunciated. The object of the agency was to procure a physician for the sick wife of defendant, and, while the agent was directed to get Dr. McCowen, his inability to procure him created an emergency which required him either to ride 14 miles back for further instructions, or procure the services of some other physician. Besides this, defendant, when plaintiff reached his house, did not repudiate the act of his agent by saying, "Your services are not wanted, because I never authorized you to be employed;" but, on the contrary, virtually ratified the act by saying, "Your services are not required now, because the trouble is over with."

We think the court erred in taking the case from the jury, and that it should have been submitted to them under proper instructions. Judgment reversed, and cause remanded; in which all concur.

STATE v. SABONY.

(Supreme Court of Missouri. May 21, 1883.)

1. FALSE PRETENSES—INDICTMENT—SUFFICIENCY.

In a prosecution under Rev. St. Mo. 1879, § 1561, relating to cheats and frauds, which provides that in the indictment it shall be sufficient to charge the unlawful and felonious obtaining of the money "by means and by use of a cheat or fraud or trick or deception, or false and fraudulent representation or statement, or false pretense, as the case may be," an indictment charging that defendant "did then and there unlawfully, willfully, and feloniously obtain from D. * * * his money, by means and by use of a cheat and fraud and trick and deception, and fraudulent representation and statement, and false pretense, contrary," etc., is sufficient.

2. SAME—EVIDENCE.

In a prosecution under Rev. St. Mo. 1879, § 1561, relating to cheats and frauds, for selling plaintiff tickets to a lecture which was not delivered, evidence that defendant sold such tickets to others at about the same time, and printed, posted, and circulated hand-bills advertising the delivery of such lecture, is to be considered by the jury as bearing on the question of fraudulent intent.

Appeal from circuit court, Greene county; W. D. HUBBARD, Judge.

J. S. Sarony was indicted and convicted for obtaining money by means of a trick, etc., and appeals. Rev. St. Mo. 1879, § 1561, provides that whoever, with intent to cheat and defraud, shall obtain money by means of any trick, etc., shall be deemed guilty of a felony, and that it shall be sufficient to charge in the indictment the unlawful and felonious obtaining of the money "by means and by use of a cheat or fraud or trick or deception, or false and fraudulent representation or statement, or false pretense," etc., "as the case may be, contrary," etc.

Budlong & Campbell, for appellant. *B. G. Boone*, Atty. Gen., for the State.

NORTON, C. J. Defendant was indicted in the Greene county circuit court at its May term, 1887, under section 1561, Rev. St., for obtaining money by means of a trick, cheat, fraud, and deception. After an unsuccessful motion to quash the indictment, he was tried, convicted, and sentenced to imprisonment for two years in the penitentiary. Omitting the formal portion, the indictment is as follows: That one J. S. Sarony, at, on, or about the 26th day of February, 1887, at the county of Greene, in the state of Missouri, with the intent to cheat and defraud one Cyrus L. Dooms, did then and there unlawfully, willfully, and feloniously obtain from Cyrus L. Dooms 70 cents, lawful money of the United States, of the value of 70 cents, his money, by means and by use of a cheat and fraud and trick and deception, and fraudulent representation and statement, and false pretense; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state. To this are appended the proper signatures, and the attestation of the foreman of the grand jury. The motion to quash the indictment was properly overruled, on the authority of the following cases: *State v. Facher*, 71 Mo. 460; *State v. Van Zant*, Id. 543. The evidence tended to show that defendant advertised to give an exhibition as a mesmerist on the night of the 26th of February, 1887, and to this end distributed hand-bills advertising his proposed exhibition, rented a hall, and at the time appointed stood in the box or ticket office, sold tickets of admission, and collected the money therefor about half past 8 o'clock P. M., the time when the exhibition was to begin, when he absconded, or, in the language of some of the witnesses, "skipped out" with the money. Cyrus L. Dooms, mentioned in the indictment as his victim, paid defendant 70 cents for 7 tickets. He was admitted to the auditorium, where he waited, with a large number of others, until it became evident that defendant did not intend to appear and perform as he had advertised, when the audience dispersed, and he went out. Defendant did not appear and give the performance, but absconded. He was arrested the next morning at the junction, and brought back and charged with obtaining money of said Dooms as set forth in the indictment. Evidence was received, over defendant's objections, of his action in having hand-bills printed, circulating and posting them in the city of Springfield, advertising his contemplated mesmeric performance, and in selling tickets and procuring money from others to the amount of about \$30, about and at the time he procured the money from Dooms. The evidence was properly received, under the rulings made in the following cases: *State v. Cooper*, 85 Mo. 256, and *State v. Bayne*, 88 Mo. 604. In these cases it is held that, under a prosecution based on section 1561, acts of a defendant similar to the one for which he is being tried, done about the same time and in the same city, are admissible for the purpose of showing the intent with which the act charged

was done. The only exception saved to the action of the court in giving instruction was to the first, second, third, and fourth given in behalf of the state. These instructions, in effect, told the jury that before they could convict the defendant they must believe, beyond a reasonable doubt, that he obtained the money of Dooks with the intent to cheat and defraud him, by inducing him to believe that he would give a lecture on mesmerism, and also a mesmeric performance, which he in fact did not give or intend to give, and as bearing on the question of intent they should take into consideration all the facts in evidence. The objections to the instructions are not well taken, and, finding no error in the record, the judgment is affirmed.

All concur.

STATE v. SHEA.

(Supreme Court of Missouri. May 21, 1883.)

1. CRIMINAL LAW—TRIAL—JURISDICTION—SENTENCE.

Under Rev. St. Mo. §§ 1877, 1878, 1881, providing that no judge of a circuit or criminal court shall be competent to try any indictment or criminal prosecution when he shall have been counsel in the cause; and that, in case of such disqualification of the regular judge, a special judge may be elected; but that if a competent special judge cannot be elected, or will not serve, such disqualified judge may "notify and request the judge of some other circuit to try the cause; and it shall be the duty of the judge so requested to appear * * * for the trial of said cause; and he shall, during said trial, and in relation to said cause, possess all the powers and perform all the duties of a circuit judge,"—a sentence on a trial and conviction for murder, passed by a circuit judge who had not tried the cause, at the request of the regular judge of the court in which the cause was pending, the latter having been prosecuting attorney on the trial, is unauthorized and *coram non jure*, the regular judge not being disqualified from passing sentence by having acted as prosecuting attorney, and the only purpose, under the statute, for which a judge of another court may be called in being for the trial of a cause when the regular judge is disqualified, and a special judge cannot be elected or will not serve.

2. CRIMINAL LAW—CHANGE OF VENUE—PRESUMPTION AS TO REGULARITY OF PETITION.

Where, on appeal from a conviction for murder, the bill of exceptions recited that defendant's petition for change of venue "was regularly, in due form, and complied with all the requirements of law," and that the court refused to permit counsel to file the same, and refused to entertain the same, on the ground that it had no jurisdiction to pass on the petition, it must be presumed that such petition was sufficient and regular in all respects, although it was not preserved by the bill of exceptions, and that such change of venue should have been granted.

Appeal from St. Louis criminal court; J. C. NORMILE, Judge.

Thos. B. Harvey and *Cornellus McBride*, for appellant. *The Attorney General*, *A. C. Clover*, and *C. O. Bishop*, for the State.

SHERWOOD, J. At the November term, 1881, the defendant was indicted for the murder of Patrick Doran. He was arraigned, and pleaded not guilty, and counsel were assigned him. The cause was continued, and specially set for trial on February 6, 1882. On that day defendant moved the court to continue the cause until "defendant's application for a change of venue should be disposed of in the St. Louis circuit court," which motion was granted. On February 15, 1882, defendant filed a petition and a motion for a special *venue* of persons residing outside the city of St. Louis, and within the county of St. Louis, which, being taken under advisement, was granted on February 20, 1882. On that day the cause was continued "for want of time to try," to the March term, 1882, and specially set for trial on March 14, 1882, and a special *venue* of citizens of the county of St. Louis ordered for that day to try the cause, as prayed for by the defendant. On February 23, 1883, the circuit attorney moved the court to vacate the order for a special *venue*, which motion was overruled, and such steps were taken by the circuit attorney as resulted in a writ of prohibition issuing from this court forbidding the judge of the St. Louis criminal court to do or permit to be done anything under said order for a special *venue*. *State v. Laughlin*, 75 Mo. 147. On March 8, 1882,

being the last day of the January term, 1882, defendant filed a bill of exceptions, which was signed by the judge of the court, setting forth that "on the 15th day of February, 1882, the defendant, in his own proper person, and by his attorney, in open court, tendered and requested to be permitted to file a petition addressed to the court, and subscribed and in due form of law, sworn to by the defendant, John David Shea, praying for a change of venue from the city of St. Louis on the ground of the prejudice of the inhabitants of the Eighth judicial circuit against the defendant, which said petition was regularly in due form, and complied with all the requirements of law." The petition does not appear in the bill of exceptions, so that it may be seen. The bill further sets forth that "the said court refused to permit counsel to file said petition for a change of venue, and refused to entertain the same in any way whatever, on the ground that said court had no jurisdiction to hear or pass upon said petition." Said bill contains an affidavit of counsel, filed on said February 15, 1882, which states that on February 2, 1882, "defendant made in proper form and filed in the circuit court of St. Louis his petition for a change of venue from the city of St. Louis, on the ground of the prejudice of the inhabitants of said city," and that "said application was heard by said circuit court, and decided this day, [February 15, 1882,] and was refused by said court; and, in view of said proceedings before the circuit court, defendant could not consistently make in the St. Louis criminal court application for a change of venue on the ground of the prejudice of the inhabitants of the city of St. Louis, or a motion for a special *venire* of persons from St. Louis county outside of the said city to try the cause; which said application and motion they herewith make and present to the St. Louis criminal court this day, and in due form as required by law." At the March term, 1882, (on April 10th,) the criminal court, in obedience to the mandate of this court, set aside the order of February 20th, granting a special *venire* from the county. On the next day (April 11th) appellant filed another petition for a special *venire* from the county, which was overruled, and on April 19th the cause was continued to the May term, 1882, "for want of time to try." At the May term, 1882, (or May 16th,) appellant again filed a motion for a special *venire* from the county, which was overruled as before. This last motion is the only one of all those so far mentioned which is preserved in the record, and sets forth that "your petitioner would respectfully show and state that an indictment charging him with murder in the first degree * * * was preferred and filed in the St. Louis criminal court * * * at the November term, 1881, and is now pending and is set down for a hearing and trial on the 22d day of May, 1882. And petitioner would further state that he is informed, and does verily believe, that the minds of the inhabitants of the city of St. Louis are so prejudiced against him that he cannot have a fair and impartial trial therein, and would pray that the court order a special *venire*, to consist of persons who reside outside of the city of St. Louis and within the county of St. Louis, to try said cause." On May 29, 1882, a jury was impaneled to try the cause, and on June 2d the verdict was rendered. On June 5th a motion for a new trial was filed, and on June 7th an amended motion for new trial was filed. On July 17th these motions were submitted to the court. On November 7, 1882, defendant escaped from the jail. On November 13, 1882, the motions for new trial were overruled, and on December 11, 1882, a bill of exceptions was signed by Judge LAUGHLIN and filed. On July 20, 1887, defendant, being in custody, was brought into court for sentence; but on its appearing that Hon. JAMES C. NORMILE, the judge of the St. Louis criminal court, had been circuit attorney, representing the state at the trial of the cause, and had prosecuted the indictment against defendant, the court made an order calling upon Hon. W. W. EDWARDS, the judge of the Nineteenth judicial circuit, to pronounce the sentence of the court; and on July 22, 1887, Judge EDWARDS appeared in the St. Louis criminal court in pursuance of said order, and pronounced the judgment and

sentence of the court upon the defendant. Exceptions were saved as to the action of the court in relation to calling in Judge EDWARDS to enter final judgment and to sentence the defendant. Two questions are thus presented by the record: *First*, whether the judge of the St. Louis criminal court had any authority to call in Judge EDWARDS simply to pass sentence upon the defendant; and, *second*, whether a change of venue should have been awarded the defendant. Of these in their order.

1. The act of passing sentence upon a prisoner, like the mere entering of judgment upon a verdict, is purely a ministerial duty. There is nothing discretionary about it, and its performance may therefore be compelled by *mandamus*; and such writ may as well issue to the successor of the judge before whom the cause was tried as to his immediate predecessor, since the duty is perfunctory, containing no element or ingredient of discretion. High, Extr. Rem. (2d Ed.) § 235, and cases cited. And, although the authorities cited are not directly in point, the principle they enunciate fully applies to the case at bar. And no difference is perceived between the case here and where an attorney for the plaintiff, for whom a verdict is obtained upon a promissory note, should, in consequence of being appointed as successor of the judge before whom the cause was tried, be required to see that judgment was entered upon the verdict thus obtained. If these premises be correct, then the calling in of Judge EDWARDS to pass sentence was altogether unnecessary, to say the least of it. But was it unauthorized? I think an affirmative answer must be returned to this question. In *Gale v. Michie*, 47 Mo. 326, the plaintiff was the judge of the Gasconade circuit court, and had recovered judgment against the defendants, and thereupon execution issued, to quash which, for certain reasons, the defendants moved. The plaintiff, then being the judge of that court, called upon Judge RICE, who happened to be present, to preside and hear the motion; to which the defendants objected upon the ground that the judge of the Gasconade circuit court was present, in good health, and no reason existed authorizing him to call upon the judge of the First circuit to preside; and they also demanded a change of venue, etc. Judge RICE thereupon presided, and the motion to quash, as well as the application for a change of venue, was denied; and, when the cause came to this court, BLISS, J., in delivering the opinion of the court, said: "The question, then, arises whether the judge of the Gasconade circuit court, being himself interested in the cause, had a right to call upon a judge of a neighboring circuit, who was present, to sit and determine said cause. If he had such right, he must have obtained it either from the constitution or the statute; for it will not be pretended that considerations of convenience or of fairness, merely, will control the jurisdiction of a court, or point out a judge who is entitled to hold it. Reliance, doubtless, was had upon section 17 of article 6 of the constitution, which reads as follows: 'If there be a vacancy in the office of judge of any circuit, or if he be sick, absent, or from any cause unable to hold any term of court of any county of his circuit, such term of court may be held by a judge of any other circuit.' In this case both the judges evidently construed the authority given a judge of another circuit to hold one of the terms of the Gasconade circuit court, at the request of its judge, as also giving authority to sit in a particular cause at his request, the term being held by himself. But no such authority is contained in the section, either directly or by implication. The judge of a circuit may procure another judge to hold a particular term of court, giving up to him the whole business of the term; but he is not authorized, in order to prevent a change of venue in a particular case, or for any other reason, to call in a neighboring judge to try that cause; and if he does so call him in, though he try it never so fairly, it is a trial without authority of law, and his decision has no binding force."

Section 29 of article 6 of our present constitution contains these provisions: "If there be a vacancy in the office of judge of any circuit, or if the judge be

sick, absent, or from any term, or part of term, of court, in any county in his circuit, such term, or part of term, of court, may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court, or part of term, in his circuit, may be held by the judge of any other circuit; and in all such cases, or in any case where the judge cannot preside, the general assembly shall make such additional provision for holding court as may be necessary." These provisions have been enacted by the legislature into a law in pretty much the same language as that employed by the constitution. 1 Rev St §§ 1106, 1107. And since such enactment it has been ruled that the judge of a circuit court cannot call in the judge of another circuit to preside while the acknowledgment of a sheriff's deed to which the first judge is a party is being taken, since the statute makes no provision for such a case. *Levits v. Curry*, 74 Mo. 50. And it has also been ruled in another case that the judge of a neighboring circuit who had been called in to preside in a particular cause, and was presiding therein, was not authorized to receive the verdict of a jury in another cause, or to give them verbal instructions, and for his action in the premises the judgment was reversed. *Allen v. Snyder*, 82 Mo. 256. These cases, though of a civil nature, serve to show how strictly the statute in such cases has been applied by this court. Section 1877, Rev. St., reads as follows: "When any indictment or criminal prosecution shall be pending in any circuit or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: * * * Or, *third*, when the judge is in anywise interested, or prejudiced, or shall have been counsel in the cause," etc. Section 1878 provides for the election of a special judge in event of the disqualification of the regular judge for any of the reasons specified in section 1877. Section 1881 is a new section, and reads as follows: "If the case in which the judge shall be incompetent to sit, for any of the causes mentioned in section one thousand eight hundred and eighty-seven, be a felony, and no suitable person to try the case will serve when elected as such special judge, or if in the opinion of the judge of said court no competent or suitable person can or will be elected as such special judge, he need not order such election, but may, in either case, set the cause down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request the judge of some other circuit to try the cause; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said cause; and he shall, during said trial, and in relation to said cause, possess all the powers and perform all the duties of a circuit judge at a regular term of such court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require." Section 1882 reads: "When any cause is set down for trial in vacation, as directed in the next preceding section, * * * the court shall notify or recognize the witnesses in the cause to appear at the time set for the trial thereof," etc.

The only object and purpose for which the judge of another circuit may be called in is for the purpose, and the sole purpose, of trying a cause; and only then in the event that a competent special judge cannot be elected, or, if elected, will not serve. In the case at bar there was no indictment or criminal prosecution pending. The trial was over. All the usual intermediate steps which precede the judgment had been taken, and the record closed. The formal entry of judgment and the formality of passing sentence alone remained; and these formalities were unchangeable, no matter at whose command they were entered and observed. These were but the pronouncing of a mere legal formula, based upon an unalterable conclusion of the law, which followed the premises upon which it was based with all the certainty of mathematical deduction. There was therefore no manner of necessity for calling in the judge of a neighboring circuit to sit and enter judgment, and pass sentence, and, if there had been, the all-sufficient answer to the plea of such ne-

cessity is that the law is not so written; for nowhere in the sections I have quoted is there the slightest intimation of an intention to confer the authority here claimed. And this conclusion is not affected by section 1041, called to our attention by counsel for the state. That section reads: "No judge of any court of record, who is interested or related to either party, or who shall have been of counsel in any suit or proceeding pending before him, shall, without the express consent of the parties thereto, sit on the trial or determination thereof." As before said, the trial was over; the motion for new trial denied; the bill of exceptions signed and filed; and, consequently, there was nothing upon which that section could attach,—granting, always, that section would apply in a criminal case, where a judge could scarcely be said to be related to the state, and, even if he were, granting that a defendant in a criminal case could expressly consent that a judge so situated should try him. Considering all these things, there is no room left to doubt that the judgment entered against, and the sentence passed upon, the defendant, are *coram non judice*. But this error will not invalidate or overthrow the steps antecedent to the judgment and sentence. So far as this particular point is concerned, the ruling thereon is confined to a reversal of the judgment and sentence, and goes no further. 1 Bish. Crim. Proc. § 1293; *McCus v. Com.*, 78 Pa. St. 185; and other cases cited.

2. Passing, now, to the second question heretofore propounded, should a change of venue have been granted the defendant? That such a change should have been granted, upon proper application, is conclusively determined by *Haye's Case*, 81 Mo. 574. The only point, then, to determine, is whether the application for the change was sufficient. It is contended on behalf of the state that the sufficiency of the petition cannot be passed upon, because of not having been preserved in the bill of exceptions. Ordinarily it is true that where a paper is to be preserved by the bill, and this is not done, the sufficiency of the paper will not be looked at; and, the trial court having passed upon its sufficiency, and holding it insufficient, the presumption will be indulged, absent the paper, that the lower court ruled correctly. Here, however, a widely different state of case is presented; the bill of exceptions expressly reciting that "the petition was regularly in due form, and complied with all the requirements of law;" and it is further expressly recited by the bill that the said court refused to permit counsel to file said petition for a change of venue, and refused to entertain the same in any way whatsoever, on the ground that said court had no jurisdiction to hear or pass upon such said petition." Unless we reverse the rule which presumes in favor of the correctness of judicial action, it must be held that the defendant had done what the bill of exceptions recites he did do, and that the rejection of his petition was based solely upon the ground stated in the bill, and not because of any insufficiency either as to time of presentation, notice, or in any other particular.

These views require that the judgment be reversed, and the cause remanded, and it is so ordered.

All concur.

STATE v. DAVIDSON.

(Supreme Court of Missouri. May 21, 1888.)

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

On a trial for murder, evidence that defendant, in a quarrel with deceased, put his hand against or in front of him, bidding deceased go away; whereupon the latter struck defendant, threw him in a ditch, and fell upon him; whereupon defendant fired the fatal shot,—is a sufficient showing of defendant's having provoked the contest to warrant an instruction that, if defendant brought on or voluntarily entered into the fight, he cannot avail himself of the law of self-defense, however great the danger to which he may have thought himself exposed.

2. SAME—MANSLAUGHTER.

Where the evidence shows defendant guilty of manslaughter, having himself provoked the contest in which deceased was killed, he is deprived of the benefits of the law of self-defense, although he may not have provoked the conflict with the design of killing deceased or doing him great bodily harm.

3. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

On a trial for a crime, the use of the word "real" in an instruction stating that a doubt, to authorize an acquittal, must be a real, substantial doubt, does not constitute reversible error.

SHERWOOD, J., dissenting.

Appeal from circuit court, Shannon county; J. R. WOODSIDE, Judge.

Livingston & Pitts and *W. N. Evans*, for appellant. *B. G. Boone*, Atty. Gen., for respondent.

BLACK, J. The defendant, upon an indictment for murder in the second degree for killing Langston, was convicted of manslaughter in the fourth degree. The accused relied upon the plea of self-defense. Instructions were given by the court at his request upon that subject. The court, at the instance of the state, gave two instructions upon the same subject; and of these defendant complains. These two instructions are as follows: "The law of self-defense does not imply the right of attack; nor does it permit of acts done in retaliation, or for revenge. Therefore, if you believe from the evidence that the defendant sought, or brought on, or voluntarily entered into, a difficulty with deceased, and a fight ensued; or if you find and believe that he shot and killed at a time when defendant had, because of the acts of the deceased, no reasonable cause to apprehend the approach of immediate and impending injury to himself, and did so in the heat of passion, or from a spirit of utter disregard for human life,—then the defendant cannot avail himself of the law of self-defense, and you cannot acquit on that ground. You are further instructed that, in case you find that the defendant sought, brought on, or voluntarily entered into the difficulty with deceased, it does not matter, in the application of the law of self-defense, how great the danger or imminent the peril to which defendant may have believed himself to have been exposed during such difficulty."

1. The first objection is that there is no evidence that defendant, by act or word, sought, brought on, or voluntarily entered into the difficulty. The evidence for the state, which was all the evidence offered in the case, is to the effect that defendant, Langston, one Chapin, and others were at a saloon on the night of the 10th November, 1883. All the parties had evidently been drinking to excess. Chapin was intoxicated. Defendant and the deceased got into an extended controversy as to which of them should take charge of Chapin. The witness Bacon relates what then took place, as follows: 'Davidson put out his left hand, and either put it against Langston, or up in front of him, and said: 'Go away. Chapin will go with me; I will put him to bed.' Langston said he did not like to be drove off, and Davidson said he was a cripple, and could not drive a ten-year-old boy. Langston either slapped Davidson or hit him, and then they clinched. Langston threw Davidson down in a ditch in front of the saloon, falling on top. Davidson said: 'Take your fingers out of my eyes.' Thereupon defendant shot Langston with a pistol. At that time deceased was lying on the defendant's left arm and leg." Chapin says he was drunk, and did not remember much about what was said and done; that defendant and the deceased got into a fight about the question as to which of them he should go home with, and defendant shot Langston. It is manifest from this evidence that, while the parties were quarreling, the defendant put his hand either against or in front of the deceased; and it may be fairly inferred, from what is said to have immediately preceded, that he used his hand in a threatening and provoking manner. There is abundant evidence from which the jury could have concluded that deceased provoked

the affray. The evidence seems to show a common case in which two persons, upon a sudden quarrel, engage in mutual combat, and one is killed in the heat of the conflict. In such cases, the offense is, at least, manslaughter. 2 Bish. Crim. Law, (5th Ed.) § 701: There was sufficient evidence upon which to base the two instructions of which complaint is made.

2. The further objection to these instructions is that they say the defendant cannot be acquitted if he sought or brought on, or voluntarily entered into, the difficulty, and a fight ensued. The contention is that the defendant could not be deprived of his right of self-defense unless he provoked or brought on the fight with some felonious design. Counsel, in making this contention, forget that the evidence tends to show a lower grade of homicide than murder. The evidence tends to show him guilty of manslaughter, and instructions were given upon that subject; and it is for that offense that he now stands convicted. While he would not be deprived of his right of self-defense as to the charge of murder unless he brought on or provoked the affray for the purpose of killing or doing deceased some great bodily harm, still he may be guilty of manslaughter though he provoked the combat entertaining no such design. Thus it is said in *Horr. & T. Cas.* 227: "If he [defendant] provoked the combat, or produced the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat. But if he provoked the combat, or produced the occasion, without any felonious intent, intending, for instance, an ordinary battery merely, the final killing in self-defense will be manslaughter only." This is the doctrine of the recent case of *State v. Partlow*, 90 Mo. 608, 48 W. Rep. 14. That case cannot be construed to mean or hold that one who provokes or brings on a difficulty, resulting in the death of one of the combatants, is to go free of all punishment, unless he entered into the fight with a felonious purpose. The distinction above stated is clearly asserted in the case of *Adams v. People*, 47 Ill. 376, so often cited. A party who will enter into an affray voluntarily, though without any felonious design, and, when hard pressed, kill his adversary, is not wholly without criminal blame. But we need pursue this question no further. The authorities cited are sufficient.

3. The court, among other things, declared that a doubt, to authorize an acquittal, must be a real, substantial doubt, etc. The use of the word "real" does not constitute reversible error. *State v. Blunt*, 91 Mo. 506, 4 S. W. Rep. 394, and cases cited.

The defendant was clearly guilty of manslaughter; and, there being no error in the record, the judgment is affirmed.

All concur, except SHERWOOD, J., who dissents.

STATE *ex rel.* HAMMERSTEIN v. WILLIAMS, Recorder of Voters, *et al.*

(*Supreme Court of Missouri.* May 21, 1888.)

ELECTIONS—COUNTING VOTE—MISNUMBER—MANDAMUS.

Where, in an election, votes were given for Matthew Ryan, Mattias Ryan, and M. Ryan, and the recorder counted them as for one person, Matthew Ryan, *mandamus* to compel him to count the votes as given for separate persons will not lie, there being no averment that Matthew Ryan, Mattias Ryan, and M. Ryan are not the same person.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

Berry & Richey, for appellant. *Hough, Overall & Judson*, for respondents.

NORTON, C. J. This is a proceeding by *mandamus*, in which it is alleged in the alternative writ that, at an election held in the city of St. Louis, the relator, Hammerstein, was a candidate for the office of member of the house of delegates. That at said election he received the highest number of votes

cast for any one person at said election. That the returns of the judges and clerks of the election showed that he did receive the highest number of votes for the said office, as follows: For this relator, 476 votes; for Matthew Ryan, 374 votes; for ——— Ehrman, 254 votes; for J. A. Lynch, 213 votes; for M. Ryan, 68 votes; and for Mattias Ryan, 35 votes. That the respondents were the duly-qualified board of election canvassers. That, in fraud of the rights of this relator, the respondents were proceeding to count, and, unless prevented from so doing, would add the votes returned for M. Ryan and Mattias Ryan, respectively, to the votes returned for Matthew Ryan, and would certify, contrary to the returns, that Matthew Ryan had received 477 votes, when the said returns showed that he had received but 374 votes. The writ directs the respondents to count and certify the votes cast for Ryan as being cast for different persons, or show cause why it should not be done. The respondents moved to quash for the following reasons: *First*, the facts therein stated are not sufficient to authorize this court to compel the defendants to obey the commands of the writ; *second*, it does not appear from the writ that M. Ryan, Mattias Ryan, and Matthew Ryan are not one and the same person. The motion was sustained, and relator has appealed.

It needs no citation of authorities to establish the proposition that the duty of respondents, in canvassing the returns of said election, are purely ministerial, and that words readily distinguishable in sound are not *idem sonans*; but it does not follow from this that Mattias was not intended for Matthew, or that initials prefixed to a surname may not identify the person. The rule governing in canvassing returns is stated by Cooley as follows: "The action of such boards is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom, in the light of such facts of public notoriety connected with the election as every one takes notice of, and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or officers for which they are intended, provided the intent is sufficiently indicated by the ballot, in connection with such facts, so that extraneous evidence is not necessary for this purpose." Cooley, Const. Lim. 623. In the case of *State v. Foster*, 38 Ohio St. 599, the above rule is quoted, and was acted upon, and it is there held "that when the returns showed that votes were cast for H. L. Morey, and were counted by the canvassers for Henry L. Morey, it not being averred that H. L. and Henry L. are not the same persons, *mandamus* will not issue to compel such votes to be counted for two persons." This ruling was made in view of the authorities (they having been cited in that case) to which counsel for relator have cited us. It will be found, upon examination of the cases cited, that none of them were proceedings by *mandamus*, but by *quo warranto*. It will be observed that in this case it is not alleged either that M. Ryan, Mattias Ryan, and Matthew Ryan are different persons, or that the vote was cast for different persons. Had these allegations been made, the trial court would, under our ruling in the case of *State v. Garesche*, 65 Mo. 480, have investigated the question, and ascertained the specific legal duty of respondents in the premises. It is there held that, before issuing a writ of *mandamus* to a ministerial officer, the court must ascertain what is his specific duty in the premises. Judgment affirmed; in which all concur.

STATE v. HARDY.

(Supreme Court of Missouri. May 31, 1888.)

1. HOMICIDE—MURDER—EVIDENCE.

On a trial for murder, it appeared that defendant, after provoking the difficulty with deceased, prepared himself with a pair of scissors, and in the encounter which ensued backed the deceased, who was unarmed, against a building, and stabbed

him three times. The court instructed the jury as to murder in the first and second degrees. *Held*, that the evidence justified the instructions, and there was no error in omitting to instruct as to any lower grade of homicide.

2. **SAME—SELF-DEFENSE.**

One who voluntarily provokes or enters into a difficulty brought on by any willful act of his, resulting in the death of another, cannot justify on the ground of self-defense.¹

3. **SAME—INSTRUCTIONS—CHARACTER OF DECEASED.**

In a trial for murder, an instruction which charges that, "in law, it is the same offense to kill a bad man as it is to kill a good man, and although the jury may believe from the evidence that deceased, when intoxicated, was a bad or quarrelsome man, this fact alone will not justify or excuse the defendant for the killing of deceased," is proper.

Appeal from circuit court, Morgan county; E. L. EDWARDS, Judge.

Charles Hardy was indicted for the murder of William Arnold. He was convicted, and appeals.

D. E. Wray and Draffen & Williams, for appellant. *The Attorney General*, for the State.

NORTON, C. J. Defendant was indicted in the Morgan county circuit court for murder in the first degree for killing William Arnold, in August, 1885, and, being put upon his trial, was convicted of murder in the second degree, and he was sentenced to imprisonment in the penitentiary for 10 years. He has appealed from this judgment, and it is insisted that the court erred in giving the following instruction: "The right of self-defense does not imply the right of attack, and it will not avail in any case where the defendant voluntarily enters into or brings on the difficulty by any willful act of his. Therefore, if the jury believe from the evidence that defendant voluntarily provoked and entered into the difficulty resulting in the death of Arnold, then he cannot justify on the ground of self-defense." Nothing further need be said of this instruction than that it has received the repeated sanction of this court. *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 40; *State v. Hudson*, 59 Mo. 135; *State v. Rose*, 92 Mo. 201, 4 S. W. Rep. 733. It is also insisted that the court erred in giving the following instructions, viz.: "The jury are instructed that in law it is the same offense to kill a bad man as it is to kill a good man, and although the jury may believe from the evidence that deceased, when intoxicated, was a bad or quarrelsome man, this fact alone will not justify or excuse the defendant for the killing of deceased." This instruction enunciates a correct principle, which doubtless would have suggested itself to the jury had the instruction not been given, and we cannot see how defendant was or could have been injured by it.

The court instructed the jury as to murder in the first and second degrees. No complaint is made as to these instructions, but it is claimed that the court erred in not giving instructions as to some lower grade of homicide. It ap-

¹ On trial of an indictment for murder, the defendant cannot invoke the plea of self-defense if he provoked or brought on the difficulty, or is not reasonably free from fault. *Baker v. State*, (Ala.) 1 South. Rep. 127; *State v. Perigo*, (Iowa,) 28 N. W. Rep. 452; *Allen v. State*, (Tex.) 6 S. W. Rep. 187; *State v. Rose*, (Mo.) 4 S. W. Rep. 733. The acts provoking the combat must be clearly calculated to have such effect. *White v. State*, (Tex.) 38 S. W. Rep. 710. If one provokes a combat, and in the affray has to kill his adversary in order to save his own life, the killing is not murder, but manslaughter only, if the intent with which the combat was provoked was not a felonious one. *State v. Partlow*, (Mo.) 4 S. W. Rep. 14; *State v. Gilmore*, (Mo.) *ante*, 359; *State v. Davidson*, (Mo.) *ante*, 413.

See, also, on the general subject as to when a homicide is justifiable, *People v. Robertson*, (Cal.) 8 Pac. Rep. 600, and note; *State v. Donnelly*, (Iowa,) 27 N. W. Rep. 369, and note; *Darby v. State*, (Ga.) 3 S. E. Rep. 668; *Lynch v. State*, (Tex.) 6 S. W. Rep. 190; *Stanley v. Com.*, (Ky.) Id. 155; *Duncan v. State*, (Ark.) Id. 164; *Fallin v. State*, (Ala.) 8 South. Rep. 525; *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758; *Thumm v. State*, (Tex.) 7 S. W. Rep. 286; *Bonnard v. State*, Id. 862; *Humphries v. State*, Id. 663; *U. S. v. King*, 84 Fed. Rep. 302.

pears that defendant, Hardy, and Arnold, the deceased, lived in the town of Syracuse, and in the afternoon preceding the difficulty went out to Otterville, a neighboring village, to arrange about getting ground upon which to put a swing at a picnic. Upon their return to Syracuse about half past 9 o'clock p. m., somewhat under the influence of liquor, they went to a shoemaker's shop, where George Sullivan Hubbard and one Kiess were taking care of a man by the name of Hendricks, who was lying on the floor in a drunken stupor. Near 12 o'clock Arnold went out, lighted his pipe, and came back into the shop smoking. Hardy wanted Arnold to give him the pipe, which Arnold refused to do. This made Hardy mad, and he began to step back and forth over the body of Hendricks lying at full length on the floor, and made motions at the wall with his fists. All parties soon after left the shop, and Arnold and Hardy began talking about putting up the swing at Otterville. Arnold said he had the ground rented, and Hardy said he would put the swing up on that ground. Arnold replied that if he (H.) did, he (A.) would have half the swing took in. Nothing more was then said. After a while Hardy commenced on Arnold again about the swing, when John Sullivan remarked to Hardy that it was useless for him (H.) and Bill (meaning Arnold) to have a row about such a thing. Then Hardy turned upon Sullivan, saying: "You d—d s—n of a b—h, this is the second row of mine that you have interfered with." Sullivan then slapped him, and told him not to use such words. Repenting almost immediately of his action, Sullivan said to Hardy: "Charley, I am your friend; come and I will go home with you." Very soon afterwards, however, Hardy, after a few words with Sullivan, drew his (H.'s) knife on him, (S.) Sullivan caught him, and, finding he could not get the knife, called on the others to help. Arnold tried, but could not take the knife from Hardy. Sullivan, still holding Hardy's arm, asked Arnold to go and get T. Huff, who lived near, to come and take the knife from Hardy. Huff came, took the knife, and went away. It was then about half past 1 or 2 o'clock a. m. Soon afterwards Sullivan went home, Kiess and Arnold went away, and Hubbard and Hardy walked down to the railroad depot, talked awhile, then walked up the track, and upon returning to the depot they sat down at the east end of the platform. After they had been sitting there for a half hour, Arnold and Kiess came up. Kiess laid down on the platform and went to sleep, while Arnold sat down on one side of Hubbard, Hardy being on the other, and the three sat and talked quietly and pleasantly for some time. Then Hardy got up on the platform behind the others, and, after standing there a few minutes, he began unrolling a pair of scissors from his handkerchief which he had taken out of his inside pocket. He was still slightly intoxicated, but not near so much as in the early part of the night. He seemed mad, and when he had unrolled the scissors he said: "You thought you had got all I had from me when you took my knife, but you were mistaken." He referred to the taking of his knife when he drew it on Sullivan an hour or more before. Hardy, in an angry tone, as though mad, kept saying that he had no friends. No words indicating a quarrel had passed between Arnold and him from the time Arnold came up, and even while Hardy stood with open scissors in his hand Arnold still sat on the platform and had said nothing. Hubbard, when he saw Hardy unrolling the scissors, got up beside him and tried to quiet him. He paid no attention to Hubbard, and continued to express himself in an angry manner, when Arnold jumped up and said, "Charley, [meaning Hardy,] there is not a d—m bit of use of you talking that way; I am your friend." Hubbard then says: "As soon as Arnold got up, knowing Hardy's disposition, I knew if I did not keep them apart there would be a fight. I took hold of Hardy, and tried to get him away, talked to him, and tried to drown Arnold's voice. I kept talking to Hardy, and trying to get him away. There was a sidling (inclined) place by the platform, and Hardy was standing about three feet from it, near the middle of the platform. I

took Hardy by the arm, and told him to come and go home. I got him down to the bottom of the sidling place, and saw that I could not get him any further. He was talking to Arnold all the time. If he had his scissors out at this time I did not notice them. He was not trying to get to Arnold. Arnold then came down where we were. I saw I could do nothing with Hardy, so I went to Arnold, and told him to come away, and I would get him out of trouble. I would have got him away if he had been in his senses. I mean by not being in his senses, that he had been drinking. I took hold of Arnold, and he stood still. I saw they [H. and A.] were getting warm with words, and I was talking to Arnold trying to get him away. He [A.] said he had left town once for one man, and he would not do it again. Then the conversation between Hardy and Arnold about stopped. However, Arnold went back to where Hardy was. I do not know who opened the conversation. I saw I could do nothing with Arnold, so I went back to Hardy, got hold of him, and told him to come on and go with me. About this time Arnold said to Hardy: 'Charley, G—d d—m you, if you want to fight, come on; I am ready for you.' These are the first words that I remember. Hardy then said something, and Arnold got up on the platform. They were about six feet apart when Hardy made his reply to Arnold. I had hold of Hardy at the time. Words grew hot between him and Arnold. He advanced on Arnold, and they advanced on each other. When they got together I still had hold of Hardy, and got between him and Arnold. Hardy pushed me out of the way, and they commenced scuffling, and Hardy backed or pushed Arnold up against the depot. While this was going on I stood down near the edge of the platform, as I saw a train coming, and was afraid the boys would get on the track and be run over. As soon as Hardy got Arnold up against the depot the latter hallooed: 'Take him off, George, take him off; he has cut me three times; he will kill me. Run for a doctor.' Hardy said: 'Yes, take me off or I will kill him.' I ran up, pulled Hardy off, and seeing that Arnold was about to fall, caught him, and eased him down on the platform, and ran for a doctor. I saw no more of Hardy. Arnold had no weapons in his hands. There were none on the platform where he fell, or around him, nor on his body when the *post mortem* was held. I was gone for the doctor but a few minutes. When I came back Arnold was lying where I had eased him down, dead."

One of the wounds was inflicted upon the left breast of deceased, between the shoulder and the middle of the breast, penetrating the large artery which carries the blood out of the heart, and would cause death, according to the evidence, in from one to five minutes. After the killing Hardy disappeared, and, on learning the next morning that Arnold was dead, said, "I will hang," and three days afterwards was captured in the woods by parties out in search of him.

The facts in evidence characterize the crime as murder. Defendant, after having provoked the difficulty before entering into it, prepared himself with a deadly weapon, which, in the encounter which ensued, he used with such fatal effect upon the deceased, who, according to the evidence, at the time the fatal blow was struck, he had backed up against the depot and completely in his power. Under the circumstances, the court did not err in confining the instructions to murder in the first and second degrees. *State v. Palmer*, 88 Mo. 568, 572; *State v. Parlow*, 90 Mo. 608, 4 S. W. Rep. 14; *State v. Ramsey*, 82 Mo. 138; *State v. Jones*, 79 Mo. 441.

Finding no error in the record, the judgment is hereby affirmed.

All concur; SHERWOOD and BLACK, JJ., in the result.

SHERWOOD, J., (*concurring*.) My concurrence is based solely on the ground that it is a case of murder in the first degree, and no self-defense in the case.

KELLY v. UNION RY. & T. CO.

(Supreme Court of Missouri. April 6, 1888.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for personal injuries, instructions are properly given authorizing a recovery for plaintiff, notwithstanding his contributory negligence, if defendant knew of the danger, and by the exercise of ordinary care could have averted the injury to plaintiff, or if through the carelessness of its employes it failed to discover the danger in time to avert the injury.¹

2. SAME—EVIDENCE.

In an action against a railroad company for negligently backing a train against a track-repairer, causing personal injuries, where the evidence is conflicting as to whether the bell was rung, or a man was stationed on the car furthest from the engine to give danger signals, the question is for the jury, and an instruction by defendant in the nature of a demurrer to the evidence is properly overruled.

3. SAME—CITY ORDINANCE.

In an action for injuries, by defendant's train, to plaintiff while repairing the track between the Union depot and Eighth street, in St. Louis, an ordinance of the city regulating the rate of speed of trains within its limits, and providing for the giving of danger signals, is properly admitted in evidence.

Case certified from St. Louis court of appeals; SHEPARD BARCLAY, Judge.

Action for damages for personal injuries by James Kelly against the Union Railway & Transit Company. The plaintiff, an employe of the Missouri Pacific Railway Company, was injured while making a connection between the tracks of that company and one of the tracks of defendant. He obtained a judgment for \$2,000, and the cause was certified to this court.

A. R. Taylor, for appellant. S. M. Breckenridge and M. F. Watts, for respondent.

NORTON, C. J. This cause was tried in the circuit court of the city of St. Louis, and defendant took an appeal from a judgment rendered in plaintiff's favor for \$2,000 to the St. Louis court of appeals, which court rendered a majority opinion affirming the judgment. Judge ROMBAUER rendered a dissenting opinion, in which he took the grounds that the majority opinion was in conflict with a decision of this court, whereupon the cause was certified to this court, as required by section 6 of the constitutional amendment adopted in 1884. Defendant interposed an instruction in the nature of a demurrer to the evidence, which was overruled, and this action of the court is assigned for error. As stated by the court of appeals, the evidence of plaintiff shows the following state of facts: "That plaintiff, who was an experienced track-repairer, was engaged, about noon of a cold winter day, in screwing, by means of bolts, a fish-plate to a T rail for the purpose of making a connection between a track of the Missouri Pacific Railway Company and that of the defendant company; that, for the purpose of prosecuting the work more conveniently, he took a position astride of a rail of the defendant's track, with his back towards the north-east; that the place where he was at work was between the Union depot, at Twelfth street, in St. Louis, and the mouth of the tunnel at Eighth street; that there were many tracks in the vicinity, and trains were constantly being made up in that vicinity, and cars and locomotives were frequently passing over the track when he was at work; that, while he was in a stooping position, a train of defendant, containing five or six cars, came backing along out of the mouth of the tunnel from the north-east at a lawful rate of speed, about four miles an hour, but without observ-

¹ The mere negligence of deceased will not prevent recovery unless it were such that but for that negligence the misfortune would not have happened; nor if defendant might, by the exercise of care on its part, have avoided the consequences of the plaintiff's negligence. *Ayers v. Railroad Co.*, (Va.) 5 S. E. Rep. 582; *Railway Co. v. Lee*, Id. 579.

ing the precaution of ringing the bell of the locomotive, and of having a man posted on the car furthest from the locomotive to give danger signals, as required by an ordinance of the city; that the plaintiff, absorbed in his work, and relying upon hearing the bell or a danger signal from the man so stationed, did not hear the train, as it thus approached him from behind, until the foremost car had almost reached him; that he turned and looked up, but not in time to avoid being struck by the car on the head, and knocked over in such a position that one of his feet was run over by one or more wheels of the car, and crushed so that his leg had to be amputated below the knee." The evidence shows that plaintiff was not a trespasser on defendant's track, but was rightfully there, in the performance of a duty assigned to him as track-repairer.

The evidence as to whether the bell was rung or a man was stationed on the car furthest from the engine to give danger signals was conflicting; but it was for the jury, and is not for us, to reconcile this conflict, or to say whether the evidence preponderated one way or the other. This is especially so in passing upon the demurrer to the evidence; the rule being, in such cases, that it admits the truth of the facts in evidence, and all reasonable inferences in plaintiff's favor which can be drawn therefrom. Giving effect to this rule, the action of the trial court in refusing to take the case from the jury was proper.

It is next insisted that the court erred in the matter of instructions. The court gave five of its own motion, one at the instance of defendant, and refused fourteen. The following show the theory upon which the case was tried, the correctness of which is challenged by counsel for defendant: "(1) The jury are instructed that, at the time and immediately before plaintiff was injured, (as shown by the evidence,) he was negligent in failing to exercise ordinary care to observe the approach of the train that struck him; consequently the jury should return a verdict in favor of the defendant, unless they find the facts to be as set forth in the instruction number two or instruction number three. (2) It will be the duty of the jury to return a verdict in favor of the plaintiff if they find from the evidence that no man was stationed on defendant's said train on the car furthest from the engine; that, in consequence of such omission, plaintiff was not warned of the approach of said train in season to escape injury; and that, notwithstanding the said negligence of plaintiff in the premises, said injury would not have occurred if such a man had been so stationed on defendant's said train, and had exercised ordinary care to warn plaintiff of danger after he discovered (or by the exercise of ordinary care on his part could have discovered) the plaintiff was not observing the near approach of said train, and was in imminent danger of being struck by it. (3) If the jury find from the evidence that a man was stationed on defendant's said train on the car furthest from the engine; that he failed to make any outcry or warning of danger after he could have discovered, by the exercise of ordinary care on his part, that plaintiff was not observing the near approach of said train, and was in imminent danger of being struck by it; and that, in consequence of such failure, the plaintiff was injured,—then it will be the duty of the jury to return a verdict for plaintiff. (4) The jury are instructed that 'ordinary care,' as mentioned in these instructions, depends on the circumstances and facts of each particular case or situation with reference to which that term is used. It is such care as a person of ordinary prudence and caution would usually exercise in the same situation and circumstances. The jury are further cautioned that all the instructions given to them in this cause are to be considered together, and as explanatory of each other, excepting No. six, (6,) which is only to be considered in event the jury decide to render a verdict for the plaintiff under the other instructions given." It is argued that said instructions are erroneous, because they authorize a recovery for plaintiff, notwithstanding his negligence, if the defendant either knew, or by

the exercise of ordinary care could have known, the danger in which plaintiff had placed himself in time to have avoided injuring him, and failed to exercise such care. This contention is not well founded. When a plaintiff is guilty of contributory negligence, the company is nevertheless liable if, by the exercise of ordinary care, after a discovery by defendant of the danger in which plaintiff stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger, and averted the calamity or injury. The principle here stated has been distinctly announced in the following cases: *Maher v. Railroad Co.*, 64 Mo. 267; *Kelley v. Railroad Co.*, 75 Mo. 138; *Frick v. Railway Co.*, Id. 595; *Harlan v. Railroad Co.*, 65 Mo. 22; *Scoville v. Railroad Co.*, 81 Mo. 434, 440; *Welsh v. Railroad Co.*, Id. 466; *Bergman v. Railroad Co.*, 88 Mo. 678, 1 S. W. Rep. 384; *Donohue v. Railroad Co.*, 91 Mo. 357, 3 S. W. Rep. 835; *Rine v. Railroad Co.*, 88 Mo. 392. This last case expressly recognizes the correctness of the rule announced in the cases of *Kelley v. Railroad Co.*, *supra*, and *Frick v. Railroad Co.*, *supra*. As said by the court of appeals: "The above rule is humane, conservative of human life, and consonant with public policy. It is based upon the recognition of the fact that human beings may be and frequently are lawfully upon railway tracks, not only on highway crossings, but at other places; that in such situations they may remain unmindful of an approaching train, and thus lose their lives, or sustain great bodily injury, if those in charge of the train do not give some warning of its approach. It also proceeds upon a recognition of the fact that a railway train or locomotive is an instrument of danger to those who may happen to be on the track when its wheels are in motion; that those in charge of this instrument of danger ought, not only for the safety of persons who may happen to be on the track, but also for the safety of persons who may be on the train, to keep a constant lookout in front of the train when in motion; that this is a constant and continuing duty of an imperative character, especially when it is imposed, as in this case it is, by an ordinance of the city; and that, if a discharge of this duty would have prevented the injury to a person negligently on the track, the company is liable in damages for hurting such person, notwithstanding his negligence."

The court properly admitted in evidence an ordinance of the city of St. Louis to the effect that the speed of railroads in the city should be limited to six miles an hour; that the bell of the locomotive should be rung continuously while moving a train; and that, in backing a train, a man should be stationed on the car furthest from the locomotive to give danger signals. *Merz v. Railroad Co.*, 13 Mo. App. 589, 88 Mo. 672, 1 S. W. Rep. 382, and 14 Mo. App. 459.

We see nothing in the record justifying an interference with the judgment, and it is hereby affirmed.

All concur.

STATE v. CROOKER.

(Supreme Court of Missouri. June 4, 1888.)

FALSE PRETENSES—INDICTMENT—DESCRIPTION OF PROPERTY OBTAINED.

Under Rev. St. Mo. § 1561, defining certain offenses as felonies, and providing that an indictment for such offenses shall be sufficient if charging that "the accused did unlawfully and feloniously obtain from — his or her money or property by means and by use of a cheat," etc., an indictment charging that defendant "did obtain of and from E. and P. her, his, and their property, to-wit, certain real estate and personal property, the exact description of which is unknown to these grand jurors, of the value of \$6,076, by means," etc., is fatally defective, as not stating what particular property defendant was charged with having feloniously obtained.

Appeal from criminal court, Jackson county; HENRY P. WHITE, Judge.

Peak, Yeager & Ball and *G. F. Ballingall*, for appellant. *The Attorney General*, for respondent.

BRACE, J. The defendant was indicted in the criminal court of Jackson county at Kansas City at its November term, 1885. The indictment contained two counts, one under section 1835, and the other under section 1561, Rev. St. 1879. During the progress of the trial, the state dismissed the first and elected to proceed under the second count. Its sufficiency was called in question by an objection to the introduction of any testimony under the indictment, and by the motion in arrest of judgment. The trial court held it sufficient, and its so holding is assigned for error, and on the record here the first question presented for consideration is the sufficiency of the second count of the indictment, which is as follows: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge that H. D. Crooker, whose Christian name in full is unknown to these grand jurors, at Jackson county, in the state of Missouri, on the ——— day of December, 1884, unlawfully, feloniously, and with intent to cheat and defraud, did obtain of and from Mary Eskens and Peter Eskens, her, his, and their property, to-wit, certain real estate and personal property, the exact description of which is unknown to these grand jurors, of the value of \$6,075, by means and by use of a cheat and a fraud and a trick and a deception, and false and fraudulent representation, and a false and fraudulent statement, and a false pretense, and a confidence game, and a false and bogus instrument, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." Section 1561, under which it is drawn, is as follows: "Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain, from any other person or persons any money, property, or valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent representation or statement or pretense, or by any other means, or instrument or device, commonly called the 'Confidence Game,' or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction be punished by imprisonment in the penitentiary for a term not less than two years. In every indictment under this section, it shall be deemed and held a sufficient description of the offense to charge that the accused did, on ———, unlawfully and feloniously obtain, or attempt to obtain, (as the case may be,) from A. B., (here insert the name of the person defrauded,) his or her money or property by means and by use of a cheat or fraud or trick or deception, or false and fraudulent representation or statement, or false pretense or confidence game, or false and bogus check or instrument or coin or metal, (as the case may be,) contrary to the form of the statute," etc.

It will be observed that this count in the indictment is drawn in terms as general as the statute itself, except in two particulars,—the insertion of the name of the defendant, and of the parties from whom it is charged he obtained property. It is a fundamental rule of criminal pleading, of such importance to the rights of a citizen as to have received the guaranty of constitutional protection, that no one shall be held to answer a criminal charge, unless the crime with which it is intended to charge him is set forth in the indictment with such precision and fullness as to inform him of the nature of the offense, and the cause of his accusation. Const. Mo. art. 2, § 22. Within this limit, the legislature has power to prescribe a form of indictment,—a power which they have exercised with much liberality in the enactment of the section in question, declaring the terms that shall be sufficient to describe the offense in an indictment under that section; and it must be conceded that in it they have certainly gone to the verge of that limit. In *State v. Fancher*, 71 Mo. 460, an indictment under this section charging the offense in the form therein pre-

scribed was sustained, on the ground that the statement in the indictment conformed to the requirements of the statute, that the statute did not transcend the bounds of the constitutional limit stated, that its terms sufficiently informed the defendant of the nature of the offense with which he was charged, and that the insertion of the name of the party from whom the property was obtained sufficiently identified and informed the defendant of the cause of his accusation. This ruling was followed in *State v. McChesney*, 90 Mo. 120, 1 S. W. Rep. 841, and in *State v. Horn*, 93 Mo. 190, 6 S. W. Rep. 96, in both of which cases, however, the indictment was held to be insufficient, for the reason that the true name of the person from whom the property was obtained was not correctly charged in the indictment. This ruling was also followed in *State v. Beauchleigh*, 92 Mo. 490, 4 S. W. Rep. 666, and in *State v. Sarony, ante*, 407, (decided at this term,) in which the indictments were sustained, and these are all the cases in which this court has directly passed upon indictments drawn under this section; and in every one of them the indictment contained a particular description of the property obtained in such terms as, taken in connection with the name of the person from whom it was obtained, that it might be said the accusation was so identified as to prevent a second prosecution for the same offense, and to sufficiently inform the defendant of the particular cause of his accusation so as to enable him to prepare for, and defend himself against, the charge. We are now asked to go further in sustaining this indictment, which fails to give the defendant any information as to the particular act or acts of the nature of those contained in the form prescribed, that is complained of, or of any fact by which he could find out what act of his life, in connection with that of the injured party, he must prepare to defend. He may have had a hundred transactions with him or her, prepare to defend one, and be confronted with evidence tending to prove him guilty of fraud in any one of the other ninety-nine. He may have prepared himself to defend a transaction in which he received money, and be confronted on the trial with evidence tending to prove that he had fraudulently obtained a farm, a horse, a boat, or a buggy; or if, perchance, he hit the right transaction, and succeeded in his defense, the judgment on the indictment would not show that he had been acquitted of guilt in that particular transaction, and a second prosecution might be more successful for the same offense. This indictment cannot be sustained upon any known principle of criminal pleading. The general rule that it is sufficient, in a statutory offense, to charge the crime in the language of the statute, does not mean that it is sufficient to copy the statute into the indictment, and, even when a form is prescribed, it will not do to simply fill the blanks. The statute, as also the form, in the very nature of things, must be, in general terms, suitable to be adapted to all cases. The office of the indictment is to make a specific application of those terms to the case in hand. It must charge a particular person with a particular offense, within those terms, and "should be so far extended into detail, beyond the mere definition of the law on which it is drawn, as to render the particular instance of offending certain," (1 Bish. Crim. Proc. § 566;) and, in mentioning things connected with the substance of the offense, the indictment should employ the words which denote the species, not the generic term. For example, "property" is too general; "the kind, the species, of property must be stated." *Id.* § 568. It is not sufficient to charge that the defendant obtained certain property; the indictment ought to state what property he obtained. *State v. Rocheforde*, 52 Mo. 199. And this is the more essential in an indictment under a statute in which the nature of the offense is so vaguely defined that nothing is provided for by which the accusation can be identified, except a description of the property, and the name of the party from whom obtained. The fact that the legislature has in some instances provided what shall be a sufficient description of certain species of property, (sections 1814, 1817, Rev. St. 1879,) is persuasive evidence that they did not intend, in the form

prescribed in this statute, to dispense with a definite description necessary in all indictments, but particularly so in one drawn on that form. If this indictment was founded on any evidence at all to warrant it, it is inconceivable that it could be unknown to the jurors what property that evidence tended to show was obtained by the defendant; and, when they preferred a felonious charge against the defendant for obtaining it, they ought to have stated, in plain, certain, and unambiguous language, what property it was that he was charged with having feloniously obtained. To sustain such an indictment as this would be to set at naught well-settled principles of criminal pleading, trench upon the constitutional rights of the accused, make his defense hazardous, and his acquittal insecure. The motion in arrest of judgment for the insufficiency of the second count in the indictment, on which the defendant was tried, ought to have been sustained; and for the error of the court in overruling that motion the judgment is reversed, and the defendant discharged.

All concur.

STATE *ex rel.* RICHEY *et al.* v. McGRATH, Secretary of State.

(*Supreme Court of Missouri.* May 21, 1888.)

BENEVOLENT SOCIETIES — WHAT ARE — BUILDING ASSOCIATIONS — EXEMPTION FROM TAXES.

An association whose object is to enable members to accumulate, by small monthly contributions from their savings, a fund out of which they can secure homes for themselves and families, with a capital stock of \$1,000,000, divided into 10,000 shares of \$100 each, cannot be considered as a benevolent association, and therefore exempt from incorporation tax, under Acts Mo. 1887, § 12, providing: "As building associations are only aggregations of laborers," etc., "which start without any paid-up capital, and as their members only pay each month an assessment, in proportion to shares, for the purpose of furnishing a home to each of its members in turn, which assessments stop the moment that every member has been furnished with a home, they are really benevolent associations as mentioned in article 10, § 21, of the state constitution, and shall * * * be exempt from payment of the incorporation fee [tax] mentioned in said article 10, § 21."

Proceedings for *mandamus*.

Berry & Richey, for relators. *Atty. Gen. Boone, E. Wilkerson, and R. F. Walker*, for respondent.

NORTON, C. J. This is a proceeding by *mandamus* in which the relators seek to compel the defendant, as secretary of state, to file and record in his office certain articles of association or agreement made by relators, and presented by them to defendant, and to issue a certificate of incorporation based thereon. The secretary of state refused to file the articles, and issue a certificate of incorporation, on the ground that he was not authorized to do so until the relators paid into the state treasury the sums required to be paid by article 10, § 21, of the constitution, and section 708, Rev. St. The said section of the constitution is as follows: "No corporation, company, or association, other than those formed for benevolent, religious, scientific, or educational purposes, shall be created or organized under the laws of this state, unless the persons named as corporators shall, at or before the filing of the articles of association or incorporation, pay into the state treasury \$50 for the first \$50,000 or less of capital stock, and a further sum of \$5 for every additional \$10,000 of its capital stock." Section 708, Rev. St., directs how such payments shall be made, and what shall be evidence of it to the secretary of state. The relators claim that by virtue of section 12, Acts 1887, p. 111, under which they seek to organize and become incorporate, they are exempted from the payment of the sums required to be paid by the constitution and statute above referred to. Said section 12 is as follows: "As building associations are only aggregations of laborers, mechanics, working-men, and working-women, which start without any paid-up capital, and as their members only pay each month an assessment, in proportion to shares, for purpose

of furnishing a home to each of its members in turn, which assessments stop the moment that every member has thus been furnished with such a home, they are really benevolent associations, as mentioned in article 10, § 21, of the state constitution, and shall consequently be exempt from the payment of the incorporation fee [tax] mentioned in said article 10, § 21."

It may be said of the said act of 1887 that, with the exception of the said section 12, it is almost a literal copy of article 9, 1 Rev. St. p. 175, devoted to mutual saving fund, loan, and building associations, and with said exceptions it is in all its essential features but a re-enactment of said article 9 of the Revised Statutes. The necessity or reason for its re-enactment is not apparent, unless it was to get such a legislative declaration as is contained in said section 12, of which declaration it may be said that if, in point of fact, the incorporation authorized by the act is not a corporation for benevolent purposes, the declaration of the legislature that it is a benevolent corporation does not make it so, any more than a legislative declaration that a horse is a cow would alter the fact, and convert the horse into a cow. Such legislative legislation is to be condemned, not approved. The nature or character of corporations authorized to be created by the act of 1887 is to be determined from the purpose to be accomplished, and the business they are authorized to engage in. It is stated in the relators' articles of association that the capital stock of the company is \$1,000,000, divided into 10,000 shares, at the par value of \$100 each; that 100 shares have been subscribed, and that the first payment has been made thereon; that the object of the association is to enable the members, or those who may become such, to accumulate, by small monthly contributions from their savings, a fund out of which they can secure homes for themselves and families. It is provided by section 4 of said act of 1887 as follows: "Every such corporation shall only lend its funds on real estate security, or on the security of its own shares of stock; such loans being made upon the terms and conditions and in the manner which shall be specified in its by-laws. No loans shall be made on shares of stock to an amount exceeding the installments actually paid on such shares. Such corporation may, however, employ a portion of its capital stock in the purchase of real estate, and the erection of buildings thereon for rent or otherwise. If, at any time, it shall happen that there is no demand by the shareholders for the funds of such corporation, then such funds may be loaned to others who are not shareholders, at such rate of interest as the directors may fix. No loans shall be made to members or others on personal security or on leasehold." It is also provided in section 7 "that no premiums, fines, or interest on such premiums that may accrue to said corporation according to the provisions of this article, shall be deemed usurious; and the same may be collected as debts of like amount are now collected by law." It is clear, we think, from the sections above quoted, as well as from the articles of association, that the leading purpose of this corporation is not to promote benevolence or charity, but to better the pecuniary condition of its members or shareholders alone, and we are unable to see how the fact that such an association may tend to promote frugality and economy, and open up a way "whereby the shareholders, out of their savings, may be enabled to secure houses, or loan their savings to others at high rates of interest, to be fixed by the directors," can be said to impress or characterize the association as one formed for benevolent purposes, when the chief incentive to each stockholder is that he may benefit himself. A peremptory writ is denied, and the proceeding dismissed.

All concur.

ISAACS v. SKRAINKA *et al.*

(Supreme Court of Missouri. June 4, 1888.)

1. SPECIFIC PERFORMANCE—DEFENSE OF FRAUD BY VENDOR.

In an action by the vendor for specific performance of a contract for sale of land, the vendee may defend by showing that the vendor falsely represented that the property was clear of tax liens, although the contract calls only for a quitclaim deed.

2. SAME—EVIDENCE.

Such defense is sufficiently proved where three witnesses testify that plaintiff so represented, although plaintiff and two witnesses, who were in a position to hear the conversation deny that such representations were made, and where it appears that plaintiff would agree to give only a quitclaim, not a warranty, deed, that defendants were to pay full value, that, at the time of making the contract, defendants were aware that work had been done for which tax bills could be issued, and that the tax liens for another year were considered by the parties in making the contract.

3. SAME—DECREE.

Upon judgment on appeal in an action for specific performance, reversing the judgment below for plaintiff because of false representations that the title to the land contracted for was clear when there were in reality tax liens against it, and holding that plaintiff is not entitled to specific performance so long as the property remains incumbered with the tax liens, the case will be remanded, and specific performance may be decreed if the title be perfected before judgment or decree.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge. Transferred from St. Louis court of appeals.

Action by Jacob L. Isaacs against William Skrainka and others for the specific performance of a contract. Judgment for plaintiff, and defendants appeal.

David Goldsmith, for appellants. *Wm. C. Marshall* and *Collins & Jamison*, for respondent.

BLACK, J. This is a suit brought by Isaacs for the specific performance of a written contract, dated February 17, 1882, and signed by the parties therein named. The contract is in the following words: "William Skrainka and Claus Vieths agree to take all the property of J. L. Isaacs now proceeded against on special tax-bills in their favor, and against said property, before Justice Taaffe, and in the circuit court, city of St. Louis, at fourteen hundred dollars, and J. L. Isaacs agrees to convey to them said property by quitclaim deed for said sum." There were suits pending before the justice, and in the circuit court, to enforce tax-bills against 16 lots, owned by Isaacs. Skrainka and Vieths, the present defendants, were the owners of the tax-bills, and were the plaintiffs in those suits. One of the suits was on trial in the circuit court, under an agreement that the others should abide the result of that one. During the trial the contract in question was made in settlement of the pending litigation. About two weeks thereafter Isaacs tendered defendant a quitclaim deed, and demanded the \$1,400; but defendant refused to accept it, and refused to pay the amount. Isaacs now tenders the deed with his prayer for specific performance. The substance of the defense is that there were other outstanding tax-bills against the property for other improvements, amounting to about \$150; that Isaacs fraudulently concealed the existence of these tax-bills, and represented the property to be free from such liens. The contract sued upon was made under these circumstances: One of the defenses made by Isaacs in the tax-bills suits was that they amounted to more than the value of the property. He produced a witness who valued the property at five dollars per front foot, and thereupon the defendant proposed, in open court, to take the property at that price. The property has a frontage of 400 feet, making the offer \$2,000. Isaacs accepted the proposition. The court took a recess until 2 P. M., to give the parties time to settle. Then defendants insisted that these tax-bills, amounting to about \$1,400, should be deducted,

but Isaacs did not understand the proposition in that way, and the parties separated without coming to a settlement. After recess the attorneys undertook to settle the matter. Propositions were made and rejected, and finally these defendants agreed to give Isaacs \$1,400 net for the property, and the foregoing contract was then executed. It is an undisputed fact that there were, at the date of the contract, other outstanding tax-bills against some of the lots, amounting to about \$150, for improvements on Jefferson avenue. The evidence on behalf of defendants, as to the representation made by Mr. Isaacs, is in substance as follows: Judge Rambauer, who represented Skrainka and Vieths, says: "My recollection is that I asked Isaacs if the improvements on Jefferson avenue were paid for, and he said they were; that Skrainka wanted a warranty deed, and Isaacs said he himself had only a quitclaim deed; that his counsel said he could not properly give a warranty deed, as these defendants were to pay their own tax-bills. Mr. Vieths testified that Isaacs refused to give a warranty deed because he had purchased the property at a sheriff or assignee's sale; that Isaacs said his quitclaim deed was as good as a warranty deed, except for taxes of 1882, and the tax-bills held by the present defendants. Mr. Skrainka says he went out into the hall, and there said to Isaacs that he wanted a clear title, and Isaacs said the title was clear; that they then had a conversation about taxes for 1882; that upon the advice of Rambauer he withdrew his objection to a quitclaim deed, on the assurance of Isaacs that the property was clear; that he asked Isaacs if all the improvements had been paid for, and he said they had. The evidence of a son of Skrainka is to the same effect. On the other hand, Mr. Isaacs says the conversation in the hall occurred while they were passing out of the courtroom, and did not last more than two minutes; that he simply spoke to the parties; was asked nothing about, and said nothing about, the property being free from other liens; that he did not say a quitclaim deed would be as good as a warranty deed, because he did not know the difference between the two forms. He says Skrainka and Vieths were to pay the taxes for 1882. Mr. Collins says he thinks he heard all that was said in the hall, and that he heard nothing said about other incumbrances against the property; that it was after the recess of the court that Skrainka wanted a warranty deed, and that Mr. Marshall then took charge of the matter. Mr. Marshall, who represented Isaacs, says he was with the parties until they separated; that he heard no conversation in the hallway; that when he came back in the afternoon he and Rambauer settled the matter; that Judge Rambauer and Skrainka yielded the point about a warranty deed, and the taxes of 1882; and that he heard nothing about other improvements having been paid for, and did not know of the existence of those tax-bills.

The defendants in taking the property at \$1,400, subject to their tax-bills and taxes for 1882, were to pay the full value of the property. They had information that led them to believe work had been done for which other tax-bills could be issued. It is conceded on all hands that the taxes for 1882 were considered, and it is reasonable to believe that other incumbrances were spoken of; and the fact that Isaacs would not make a warranty deed makes it the more probable that inquiry was made in respect of other incumbrances. Three witnesses say that Isaacs said the property was free from such liens. He denies that he made the representation, and two witnesses, who were in a position to hear, said they heard no such representations. It is a familiar rule that, where the witnesses are equally credible, the positive evidence that a given thing was said is of more weight than that of others who say they did not hear the alleged statement. *Henze v. Railway Co.*, 71 Mo. 633. Giving to the finding of the court due consideration, still we can come to no other conclusion than this; that Mr. Isaacs did lead the defendants to believe the property was free from other liens, and that this led them to agree to take a quitclaim deed. While the representations may not be such as would sup-

port an action at law for fraud and deceit, still it must be remembered that this is an action for specific performance prosecuted by the vendor. Fry says: "In equity, however, it furnishes a good defense to a suit for specific performance that the plaintiff made a representation which was not true, though without knowledge of its untruth, and this even though the mistake be innocent." Fry, Spec. Perf. § 432. This distinction is pointed out in *Dunn v. White*, 68 Mo. 182. It is held that it requires much less strength of a cause on the part of defendant to resist a bill to perform a contract than it does on the part of the plaintiff to maintain a bill to enforce specific performance. *Veth v. Gierth*, 92 Mo. 97, 4 S. W. Rep. 432. To defeat the specific performance of a contract it is enough that the representation was material, was actually untrue, was relied upon and did mislead the other party. It need not have been made with an intent to deceive. Pom. Spec. Perf. §§ 217, 218.

We do not think the fact that defendants were to take a quitclaim deed is of any controlling importance. Fry says: "The circumstance that the vendor sold 'with all faults,' though it may serve to put the purchaser on his guard, will not enable the vendor to say that the purchaser did not rely on his representation, or prevent the purchaser from avoiding the sale, if the representation was false." Fry, Spec. Perf. § 445.

Our conclusion is that the plaintiff is not entitled to specific performance so long as the property remains incumbered by these tax-bills, amounting to \$150 or thereabouts. As the judgment must be reversed, the cause will be remanded; for while the title may not have been perfect when the suit was commenced, still specific performance may be decreed, if the title be perfected before judgment or decree. *Lockett v. Williamson*, 37 Mo. 389.

Judgment reversed, and cause remanded.

All concur.

DENNISON *et al.* v. CITY OF KANSAS.

(*Supreme Court of Missouri*. June 4, 1888.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PAVING STREET—ORDINANCE.

Under the charter of Kansas City, (Acts Mo. 1875, p. 350,) which provides that streets shall not be improved at the expense of property holders thereon, until a majority thereof, in front feet, petition therefor, after which such petition shall be published, when persons liable for the expense of the proposed improvement may make objections thereto, which the council shall hear and decide, and that when the ordinance providing for such improvement declares that the requirements, as to petition and notice, have been complied with, such declaration shall be conclusive for all purposes, if the council refuse a hearing, when demanded, to interested persons making objections, the execution of such ordinance will be restrained until such hearing is had.

2. SAME—INJUNCTION—PARTIES.

One property holder may maintain a suit, on behalf of himself and others similarly situated, to restrain the execution of an ordinance, illegally passed, for the improvement of a street at the expense of said property holders.

3. APPEAL—PRACTICE—INJUNCTION

Upon appeal from a decree dismissing a bill for an injunction to restrain the execution of an ordinance for the paving of a street, the supreme court will not consider affidavits to the effect that, since the appeal was taken, the paving has been completed, and will not for that reason dismiss the bill, but will act upon the record as it came from the court below.

BLACK and BRACE, JJ., dissenting.

Appeal from circuit court Jackson county.

Suit in equity by M. L. Dennison, who sues on his own behalf, as well as for other owners of real estate fronting on Grand avenue, a street in the city of Kansas, against said city, to restrain the execution of an ordinance for paving said avenue at the expense of said real-estate owners. A demurrer to the bill was sustained, and the plaintiffs appeal.

C. F. Ballingall and Botsford & Williams, for appellants. Lathrop & Smith and Wash. Adams, for respondent.

NORTON, C. J. This is a bill in equity instituted by plaintiffs, who are the owners of certain lots abutting on Grand avenue, a street in the city of Kansas. The suit is brought in the name of plaintiffs, for themselves and all property owners on said street similarly situated; and the object of it is to restrain and enjoin defendants from executing a certain ordinance passed by the city council, providing for paving said Grand avenue between Twelfth and Twentieth streets, with cedar blocks set on hydraulic cement, concrete foundation, nine inches thick. The petition was demurred to, the demurrer sustained, bill dismissed, and judgment entered in favor of defendants, from which plaintiffs have appealed. So much of the petition as raises the points discussed by counsel is as follows: That on the 2d July, 1884, there was presented to the common council of Kansas City, at a special meeting thereof, and filed in the office of the city clerk, a petition signed by resident and non-resident owners of real estate to have Grand avenue, a street in said city, paved to the full width thereof, exclusive of sidewalks, from the south line of Twelfth street to the north line of Twentieth street; said paving to consist of cedar blocks set on a foundation of concrete hydraulic cement, nine inches in thickness; that said petition had been published in the *Kansas City Times*, a newspaper of general circulation in said city, for 10 days previous to its presentation to the said council, and that a certificate of the city engineer was appended thereto that the names signed to said petition represented a majority of the front feet of real estate owned by residents of said city fronting on Grand avenue from Twelfth to Twentieth streets; "that, at the same time of the presentation of said petition, remonstrances were presented to said common council against such a project. And your petitioners charge that said petition did not have signed thereto a majority of the names of property holders owning a majority of the front feet of property owned by residents of said city, and fronting on the said part of Grand avenue proposed to be paved as aforesaid; and that, prior to and at the time of the presentation of said petition, a large number of the resident property holders owning property fronting on said part of Grand avenue, signing said petition, had withdrawn their names therefrom, and remonstrated in writing against said paving, which said written remonstrance and withdrawals were presented to said city council at the time of the presentation of said petition, aforesaid; and that names of the resident property owners owning real estate fronting on said avenue remaining on said petition represented only a minority of the front feet of property owned by residents of said city, and fronting on said part of Grand avenue proposed to be paved as aforesaid; and that the certificate of said city engineer that said petition represented a majority of such resident property holders was and is wholly false. *Twelfth.* That thereupon, and notwithstanding that said petition did not represent a majority of the property holders owning a majority of the front feet of property owned by residents of said city, and fronting on said avenue proposed to be so paved as aforesaid, at said called session of said common council, an ordinance, number 27,461, to pave said Grand avenue from Twelfth to Twentieth streets, in accordance with said petition, was introduced into said common council by said defendant Hovelman, one of the members thereof, which said ordinance was taken up, read the first time, and referred to the street and alley committee of said council, and to said city engineer, with all said papers, for report at the next meeting of said common council; and that afterwards, and on the 18th day of July, 1884, at a special meeting of said common council, said street and alley committee reported back said ordinance with the recommendation that the same do not pass, which said report was taken up, received by said council, and filed; and the said ordinance, and the papers, petition, and remonstrances, was then and there referred

to the aldermen of the Second ward and the city engineer. And plaintiffs charge that said reference to said aldermen and city engineer was wholly without authority on the part of said common council; that said common council is, by the charter of said city, required to hear and determine all objections to said petition, and to the paving of said street therewith, and that it has no authority to delegate the power to hear and determine such objections to a portion of said common council, or any committee thereof, or to said city engineer; notwithstanding which, said aldermen of said Second ward of said city received said petition, remonstrances, and objections, and said ordinance number 27,461, and, at the time of the passage of the pretended ordinance hereafter mentioned, the same were in the hands of said aldermen and said city engineer. And plaintiffs charge that said aldermen of said Second ward refused to hear objections to said petition, or to examine the same; and that while said petition and ordinance, and objections and remonstrances, were in the hands of said aldermen and said city engineer, and pending before said council as aforesaid, the mayor of said city duly called a special session of said common council for and on the 15th day of September, 1884, among other things to act upon said petition and said ordinance to pave Grand avenue from Twelfth to Twentieth streets, and the remonstrances and objections of said property owners concerning the same; and that, at said special meeting of said council, said council did not act upon said petition, remonstrance, and ordinance number 27,461, pending before it at the time of said call of said mayor aforesaid, but wrongfully, arbitrarily, and without any authority, and without having been called together by the mayor for any such purpose or cause, did suffer and allow said defendant Hovelman, as one of the members thereof, to present and introduce to and before said council another and different petition, together with a document numbered 28,248, purporting to be an ordinance to pave Grand avenue from Twelfth to Twentieth street, and bearing substantially the same title as said first-mentioned ordinance, number 27,461, which had been introduced July 2, 1884, as before stated herein, and did thereupon, under a pretended suspension of the rules of said council governing it in the passage of ordinances of said city, wrongfully, arbitrarily, and without any lawful authority therefor, pass said pretended ordinance to the third and final reading thereof, and passed the same, which said pretended ordinance was afterwards presented to the mayor of said city for his approval; and, not having been returned by said mayor within five days (Sunday excepted) thereafter, it is pretended by the defendant herein that the same became a valid and binding law and ordinance of said city. And plaintiffs charge that said last-mentioned petition had not been signed by property holders owning a majority of the front feet of property owned by residents of said city, and fronting on said Grand avenue between said Twelfth and Twentieth streets; that the same was not published for five days in a newspaper printed in said city, but was wilfully and purposely and unlawfully inserted in and published for five days in a paper printed in said city called the 'Kansas City Daily Reporter,' but which plaintiffs aver is not a newspaper, within the meaning of the charter of said city, and does not purport to gather and publish either local or general news, but is principally confined to the publication of arrivals at the various hotels of said city, and other news of like character, and does not purport to be a newspaper for the collection and dissemination of general news; that said common council, in said pretended ordinance numbered 28,248, aforesaid, pretended to find and declare that the work had been petitioned for, and the petition published according to law, and that said petition, so published, was by the order of a majority of the front feet of the property owned by residents of the city of Kansas on said portion of Grand avenue to be paved. And said plaintiffs aver and charge that said common council, in the consideration and passage of said pretended ordinance aforesaid, did not have before it any evidence upon which to base said finding and declara-

tion aforesaid, but made said finding and declaration arbitrarily and without authority, and contrary to the facts, for the purpose of charging the cost of such paving upon plaintiffs herein, and others owning property fronting on said part of Grand avenue; and that said common council arbitrarily and wrongfully, and in direct defiance of the regulations of said city charter, refused to hear and decide upon any objections thereto, notwithstanding the fact that their attention had been specifically called to such objection, then on file and before said council, by said mayor and the city clerk of said city. And plaintiffs further charge that the written remonstrance and objections against said last-named petition had been duly presented to said common council, and were before it at and before the time said council passed said ordinance, and said council refused to hear the same."

The charter provisions having a bearing on the questions involved are as follows: Section 1, art 8, (Acts 1875, p. 250,) provides that "no street, avenue, alley, or public highway, or any part thereof, shall be graded, constructed, reconstructed, paved, or macadamized at the expense of the property holders owning the property fronting on such street, alley, or public highway, unless a majority of the real-estate owners in front feet on such street, avenue, alley, or public highway, or the part thereof proposed to be graded, constructed, reconstructed, paved, or macadamized, as are residents of the city of Kansas, shall petition the common council to have such street, avenue, alley, or public highway graded, constructed, reconstructed, paved, or macadamized." Another section provides that "when it is proposed to grade, construct, reconstruct, pave, * * * any street, sidewalk, * * * and pay therefor in special tax-bills, and under existing laws a petition therefor is required, a petition shall be sufficient if signed by property holders owning a majority of the front feet of property owned by residents of the city and fronting on the street, sidewalk, alley, avenue, or public highway, or part thereof, proposed to be improved. When a petition has been signed, the same may be published for five days in some newspaper printed in the city, and thereafter the common council shall hear and decide on all objections thereto, if any. If the common council shall, in the ordinance, causing to be done the work petitioned for, find and declare that the work has been petitioned for, and the petition published according to law, such finding and declaration shall be conclusive for all purposes, and no special tax-bills shall be invalid or be affected by any defect in or objection to the petition."

It is clear that the charter provisions above quoted invest the common council with power to pass an ordinance for paving or improving any avenue or street of the city at the cost of the owner of the property abutting thereon. It is also clear that the exercise of this power is made to depend at least upon two things, viz.: a petition signed by the resident owners of property abutting on the street or avenue proposed to be improved, representing in ownership a majority of front feet of such property, asking that the improvement be made; and, second, the publication of such petition in some newspaper in the city for five days before any definite action is taken thereon. It is also clear that when such a petition is presented, and published as required by the charter, parties interested, and whose property is liable to be charged with the payment of a special tax-bill for its proportionate part of the cost of the improvement, have the right to appear before the council with their objection, and to show, if such is the fact, that the persons signing the petition do not represent resident property owners owning a majority of the front feet of property abutting on the street or avenue proposed to be improved. The demurrer admits that the right of parties interested to a hearing before the council was denied. It admits that after the presentation of the petition, and its publication, that parties interested appeared before the council, and presented their objections, and that a hearing thereon was denied them; one of the objections being that the signers to the petition did not represent resident property own-

ers owning a majority of front feet on the avenue proposed to be paved, but only represented the resident owners owning a minority of such front feet. The right of a person upon whose property a charge is about being imposed, to be heard by the body who are empowered to improve it on certain conditions, as to whether said conditions exist or have been complied with, before it becomes fixed and fastened as a charge, is founded in the plainest principles of justice; and this right the legislature recognized in passing the section of the charter wherein it is provided that five days' publication of the petition shall be made in a newspaper, and thereafter the common council shall hear and decide on all objections thereto, if any; that it is not to decide without a hearing, if a hearing is demanded. The demurrer admits that this right was ignored, and the principle on which it is based wholly disregarded, by the common council. Why require a publication of the petition and notice to bring parties before the council, if, when in obedience to the notice, a hearing is denied them, in direct violation of the commands of the law which gives it the power to act? In *City of Kansas v. Swope*, 79 Mo. 448, it is said that the ability of the city to create a lien on the property of one of the citizens for street paving, in the manner pointed out in the ordinance referred to, is founded, not on any pre-existing right, but rests exclusively in an adherence to the methods prescribed by ordinance in pursuance of the authority contained in the charter. To say to a party, "You may come for the purpose of being heard," and then to say to him, when he comes, "You shall not be heard," is but trifling with his right. *Windsor v. McVeigh*, 93 U. S. 274. The objection made to the petition was not captious, but vital; and the council, in denying to the objectors the right to be heard, violated the charter provision above referred to, and committed a wrong for the ratification of which this proceeding was instituted.

In the case of *Ranney v. Bader*, 67 Mo. 476, and *Newmeyer v. Railroad Co.*, 52 Mo. 81, it is held that to prevent the collection of an illegal tax, that suit may be brought by any tax-payer for himself and all others similarly situated. These authorities justify the present proceeding, and authorize the injunctive powers of the court to be invoked, at least to the extent of temporarily restraining the execution of the ordinance till the council rectified the wrong by giving the plaintiffs a hearing on the objections interposed. See, also, 2 High, Inj. § 1308; *Allen v. Railroad Co.*, 114 U. S. 315, 5 Sup. Ct. Rep. 925, 962; *Overall v. Ruenzl*, 67 Mo. 206; *Book v. Earl*, 81 Mo. 246; *Newmeyer v. Railroad Co.*, 52 Mo. 81; and *Bennett v. Vinyard*, 34 Mo. 218. There is no question but that the legislature could have conferred upon the city council the power to improve the streets of the city at the cost of property owners, without requiring any petition. *Farrar v. City of St. Louis*, 80 Mo. 379. But it has not seen fit to do so in the charter of the city of Kansas, but has made the exercise of such power to depend upon a petition and notice, and has given to property owners whose property is liable to be taxed for the improvement the right to be heard upon objections; and we hold that, if this right is denied, the execution of an ordinance passed without such hearing, when demanded, may be restrained till such hearing is had; and we further hold that when objections are made and heard, and the council then pass an ordinance ordering the work to be done, and find and declare in the ordinance that the work has been petitioned for, and the petition published according to law, then such finding and declaration are conclusive for all purposes, and no special tax-bills shall be invalid or affected by any defect in or objection to the petition, and that such an ordinance, when so passed, is not subject to attack, except, perhaps, on the ground that its passage was the result of fraud and corruption.

It was suggested in argument that certain affidavits have been filed in this court since the cause was transferred to it by appeal, from which it appeared that the paving of said Grand avenue had been fully completed since the ap-

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peal was taken, and that for that reason the bill of plaintiffs should be dismissed by us, inasmuch as, if reversed and remanded, it would be a vain and useless thing for the chancellor to restrain the doing of that which had already been done. Our rule and duty are to determine a cause upon the record as it comes to us from the trial court; and, while the matter thus brought to our attention might properly be considered by the trial court if brought before it, it cannot be considered by us. The judgment is reversed, and cause remanded.

SHERWOOD and RAY, JJ., concurring. BLACK and BRACE, JJ., dissenting.

SHAW *et al.* v. TRACY.

(*Supreme Court of Missouri.* June 4, 1888.)

EJECTMENT—WHEN LIES—POSSESSION BY TENANT

Ejectment cannot be maintained against a landlord not in possession, without joining as defendant the tenant who is in possession.

Appeal from circuit court, Saline county; WILLIAM H. LETCHER, Special Judge.

Wm. D. Bush, for appellant. *Wallace & Chiles* and *Sam Boyd*, for respondents.

BLACK, J. This was an action of ejectment for the undivided one-third of the described land. As this case must be reversed, without remanding, for the reason hereafter stated, it will be useless to consider the action of the court in sustaining a demurrer to the second, third, and fourth defenses. The instructions for the plaintiff are based upon the theory that the plaintiff can recover, though the defendant was not in the actual possession of the land, provided the same was occupied by a tenant of the defendant. The action of ejectment is a possessory action, and must be brought against the actual occupant. It cannot be maintained against the landlord alone, when he denies possession. *Callahan v. Davis*, 90 Mo. 73, 2 S. W. Rep. 216; *Insurance Co. v. Cummings*, 90 Mo. 271, 2 S. W. Rep. 397. All the evidence shows that the land was occupied and in the possession of Mr. Roberts, tenant of defendant. Roberts is not a party to this suit. The judgment is reversed.

All concur.

SHIEDLEY *et al.* v. LYNCH *et al.*

(*Supreme Court of Missouri.* June 4, 1888.)

1. COUNTIES—COUNTY BOARD—POWER TO PURCHASE LAND.

Act Mo. March 14, 1885, granting authority to the county court in certain cases to cause the erection of court-houses at places other than county-seats, and granting therewith all the powers conferred for the erection of court-houses at the county-seat, confers as a necessary incident the power to purchase land for the erection of such court-houses, if necessary, and to determine whether such necessity exists.

2. SAME.

Under Rev. St. Mo. § 5323, providing that where the county court is about to cause the construction of a court-house, and land is purchased for such purpose, the circuit court "shall examine its title, and certify its decision thereon to the county court;" and section 5329, providing that, "if the title be approved, the county court, if they approve the selection, shall make an order," etc.,—a county court, having considered a selection of land, and disapproved it, with the required certificate of the circuit court before them, may subsequently, upon the same certificate of title, reconsider and approve such selection; there having been no change of title since the certificate of the circuit court was given.

3. SAME—WARRANTS.

The fact that there is not quite enough money in a county treasury to pay the price of land legally purchased for a court-house, is not ground for restraining such payment, where the deeds for the land had been accepted and filed for record; it appearing that, when the warrants were drawn, the county treasurer had stated to the county court that there was enough money to pay the appropriation, and the county court having the right to anticipate the revenue of the county to the extent of the revenue provided for that year.

Appeal from circuit court, Jackson county; J. H. SLOVER, Judge.

Action by one Shiedley and others against several public officers and private citizens to enjoin defendants from completing the purchase of a block of ground selected as a site for a court-house. Plaintiffs prevailed, and defendants appeal.

C. O. Tichenor, E. P. Gates, James R. Waddill, and Karnes & Krauthoff, for appellants. *Thomas T. Crittenden, R. H. Field, Dobson, Douglass & Trimble, Gage, Ladd & Small, and James Gibson*, for respondents.

NORTON, C. J. Stripping the record in this case of its verbiage and redundancy, it discloses the following facts, viz.: That the county court of Jackson county, at its May term, 1886, by an order duly made, submitted to the qualified voters of said county, at an election thereafter to be held, a proposition to issue the bonds of the county, to the amount of \$500,000, for the purpose of building a court-house in the city of Kansas. That said election was held, and a majority of the voters were in favor of said proposition, and afterwards said county court, by its order duly entered of record, declared that a majority of the voters at said election voted in favor of said proposition, and ordered and directed that said court-house be erected, and said bonds issued, and further ordered that George R. Nelson be appointed to superintend the erection of said building. That the said court also made an order as follows: "Whereas, there are no suitable grounds upon which to build the new court-house within the limits of the city of Kansas belonging to the county of Jackson, it is therefore ordered by the court that George R. Nelson, the superintendent heretofore appointed by this court, proceed to select a suitable piece of ground upon which to build said court-house anywhere within the corporate limits of said city of Kansas, and that he purchase, or receive by donation, a lot or lots of ground for that purpose, subject to approval or rejection by this court, and that said superintendent make a report of his proceedings under this order, and also to each division of the circuit court of Jackson at Kansas City." Said Nelson, having duly qualified, after reporting all the sites offered or suggested to him to the county court, and taking its opinion, selected a block of ground at Fifth and Oak streets, in said city, bounded on the north by Fifth street, on the east by Locust, on the south by Missouri avenue, and on the west by Oak street. That he entered into negotiations for the purchase of said block of ground with William W. Kendall, Samuel C. Gates, John Chrisman, and Henry Smith, who were the owners thereof, which culminated in a purchase of the property at the price of \$200,000. That said owners executed deeds conveying the property to the county, which were deposited in the National Bank of Kansas City. That Nelson duly reported the purchase, with the deeds and abstracts of title, to one division of the circuit court at Kansas City; and said circuit court (GILL being judge thereof) thereafter duly certified to the county court that the title conveyed by the owners of the property by said deeds to the county was a good, valid, and perfect title. That the matter presented to Judge GILL was passed on by him the 3d day of January, 1887. That the county court had, 15 days after the title was passed on, to decide whether they would take the property under the contract with the owners. It further appears that on the 12th of January, 1887, the selection by Nelson of the said property as a site for the court-house was taken up, disapproved, and rejected,—there being but two judges present,

Judge McDONALD, who was presiding justice, voting for disapproval and rejection, and Judge CHILES voting for approval, and objecting to the matter being taken up in the absence of Judge LYNOH; and the court adjourned to the 28th of January. It further appears that, after said order was made, the owners of the property demanded and received back their deeds. It further appears that thereafter, at a special term of said county court regularly called and held on the 20th of January, 1887, said court, (all the judges being present,) by an order of that date, rescinded the said order of the 12th January, 1887, disapproving said Nelson's selection of said court-house site; that other negotiations were entered into with the owners of said property, resulting in an agreement whereby said owners were to be paid \$210,000 for the property, of which said sum the county was to pay \$200,000, and \$10,000 to be paid by property owners interested in securing said site for court-house purposes. Thereafter, on the 28th of January, 1887, said Nelson reported to said county court that he had selected said site for the court-house, and said court thereupon approved such selection, received the deeds from the owners conveying the property to the county, and ordered warrants to the amount of \$100,000 to be issued to the vendors of said property in part payment of the purchase-price; the agreement being that the county would pay one-half the purchase-money in cash, and the other half at such times as it suited the court to do so, with 6 per cent. interest. It is a conceded fact that no other examination of the title to this property was made by Judge GILL than that made by him on the 3d of January, 1887, and it is also a conceded fact that from the time such examination and certificates were made till the 28th January, 1887, when the county court approved Nelson's report, confirmed the purchase, and accepted the deeds, that nothing either appeared or was of record affecting the title to said land. It further appeared that the county had owned, from about the year 1870 or 1872, lots 26, 27, and 30, in block 3, in the city of Kansas, situated on the north-east corner of Main and Second streets with a frontage of 142 feet on Second street, and 180 feet on Main street; that the three-story building on said lots was used for county offices and court-room till May, 1886, when it was blown down by a cyclone; that it has since been repaired, and had upon it a substantial two-story building, in which are held all the courts of the county except the circuit courts, and in which all the county offices are located at Kansas City, except the offices of the clerk of the circuit court and sheriff of the county. On the same day the county court approved Nelson's report, and accepted deeds to the property, plaintiffs, as citizens and tax-payers of Jackson county, commenced this suit against the judges of the county court; Burr, the county clerk; Murray, county treasurer; Nelson, superintendent; and Smith, Chrisman, Kendall, and Gates, the vendors of the property,—for the purpose of enjoining them from completing the purchase of the block of ground selected by Nelson as a site for the court-house. On a trial of the cause the court made a decree granting the prayer of the petition, from which defendants have appealed. The *first* ground for the relief asked, is, in substance, that the county judges, in the appointment of Nelson, were influenced by corrupt motives, and that Nelson and the county judges were influenced, in the selection of the ground in question, by the same motives; *second*, that the price agreed to be paid was exorbitant and extortionate; *third*, that the block of ground selected as a site is inconveniently located, and that the public would be greatly inconvenienced and discommoded if the court-house is built thereon. As to the grounds above stated for relief, the trial judge found as follows: That the said county judges, county officers, superintendent, and owners of the property, did at all times act in the utmost good faith, and what said public officers did concerning said purchase they believed to be for the public good; that the site selected is good as to air, light, freedom from noise, and reasonably convenient of access, and that the price agreed to be paid was reasonable. The evidence fully justified

these findings. The grounds relied upon for relief other than those above stated are that the county owned suitable grounds in the city of Kansas upon which the court-house could be built; that the county court, in making the purchase, had proceeded in disregard and in violation of sections 5327-5329, Rev. St.

These objections call for a decision of the vital question, did the county court have the power, under existing laws, to buy the land in the city of Kansas on which to erect a court-house? The power is claimed to be conferred by an act of the general assembly approved March 14, 1885, which is as follows: "An act providing for the erection of court-houses and jails in places other than county-seats, in certain cases," approved March 16, 1888, be, and the same is hereby, repealed, and in lieu thereof the following is enacted: "Section 1. In any county in this state in which terms of the circuit court, or court of common pleas having circuit court jurisdiction, are by law held at a place other than the county-seat, the county court of such county may cause the erection of a good and sufficient court-house and jail at such place other than the county-seat where such courts are held, and for such purposes shall have and possess all the powers conferred on it for the erection of court-houses and jails at the county-seat." Independence is the county-seat of Jackson county; and, as terms of the circuit court of said county are by law held at the city of Kansas, there can be no question but that the act above quoted confers the power on the county court of said county to build a court-house and jail in said city; and this power, thus expressly given, carries with it every incidental power necessary to the execution of the power expressly conferred. The correctness of this proposition is established by the following authorities: In Potter's Dwar. St. 123, rule 8, it is said: "In statutes, incidents are always supplied by intendment; in other words, whenever a power is given by a statute, everything necessary to the making of it effectual is given by implication." So, in the case of *Supervisors v. Gorrell*, 20 Grat. 484, 505, where, by a statute, power was given to the supervisors of Culpeper county to build and keep in repair county buildings, but no express power was given them to acquire land for any purpose; in the disposition as to the right of the supervisors to acquire land for the purpose of erecting county buildings thereon, it is said: "The implied power to acquire the ground is as plainly given as the express power to erect the buildings. In the construction of the most naked powers to which the strictest rules of construction are applied, there is no better settled rule than this: that every power necessary to the execution of an express power is plainly implied." So, in *De Witt v. City*, 2 Cal. 289, in the disposition of a like question, it is said: "It cannot be seriously doubted that if the power to purchase any property in express words, that the authority to erect a court-house or jail would necessarily embrace the power to purchase the land on which to erect it; the land whereon to build it being no less essential than the stone and material to build it with." So, in the case of *Railroad Co. v. Marion Co.*, 36 Mo. 303, it is said: "The county court is the agent of the county, and may lawfully and of right do whatever is necessary to carry out and execute the trusts reposed in it." So, in the case of *Walker v. Linn Co.*, 72 Mo. 650, at 653, it is said: "That a county court is invested with such powers only as are expressly conferred upon it by statute, or such as may be fairly and necessarily implied from those expressly granted, we think cannot be questioned." These citations are sufficient to establish the proposition stated.

It is claimed in the brief of counsel, as it was in the oral argument, that the above principle can only be invoked in a case where the county owns no land suitable for the erection of a court-house. Conceding this to be so, by whom is the question to be determined as to whether the land owned by the county in the city of Kansas was suitable for the purpose of erecting such a court-house as \$500,000, which has been voted for that purpose, would build? The solution of this question was necessarily devolved upon the judges of the

county court, upon whom the law conferred the power to build the house; and, when determined by the said court, we cannot interfere, and substitute our judgment, unless it appears that such determination or decision was brought about by fraud or corruption, or is so manifestly wrong, and so prejudicial to the public, as to create a conviction that it was the result of fraud and disregard of public duty. We find nothing in the evidence to justify a conviction that the decision of the county court as to the fact that Jackson county owned no land in the city of Kansas suitable for the erection of such a court-house thereon as was contemplated and authorized to be built, was the result of fraud or corruption, or so manifestly wrong and against the fact, or so prejudicial to the public, as to create a conviction that it was the result of either fraud or corruption; and agree, on this point, with the trial judge, that the court and its officers, in all that was done, acted in the utmost good faith. Dr. Mumford, one of the plaintiffs, was a witness, and testified on his cross-examination that he regarded the old court-house as an unfit place for the location of the courts, and there is abundant evidence in the record to the same effect.

It is also insisted that if the county court possessed the power to purchase the block of ground in question, that it exceeded its authority in making the purchase, without having before it such a certificate of the circuit court as to the title of the property as the statute required, and that the county court should therefore be enjoined from completing the purchase. It is an undisputed fact that the question of title had been submitted to a division of the circuit court of Jackson county at Kansas City presided over by Judge GILL, and that on the 3d of January he passed upon the question, and decided the title to be a good, valid, and complete title, and so certified. This certificate was before the county court on the 28th of January, 1887, when it took final action, and concluded the purchase, and it is an admitted fact in this record that nothing appeared or was of record between the 3d of January, 1887, and the 28th of January, 1887, affecting the title to the land. When the circuit court is called upon to investigate title in cases like the present, it is provided by section 5328, Rev. St., that "such court shall examine its title, and certify its decision thereon to the county court." And by section 5329 it is provided that, "if the title to the land so purchased or received be approved, the county court, if they approve the selection, shall make an order for the payment of the purchase money, if any, out of the county treasury." The county, having had before it the certificate that the title had been examined by the circuit court, and decided to be a complete and perfect title, cannot be said to have transcended their authority in acting upon it, especially so in view of the admitted fact that there had been no change in the title since the examination was made by said circuit court.

It is also insisted that there was not money enough in the county treasury to pay the purchase price for the land. Mr. Murray, the county treasurer, testified that he had been treasurer of Jackson county since the 1st of January, 1887; that on the 28th January, 1887, there was money in the treasury of said county, not set apart for other purposes, in the neighborhood of \$200,000; that the amount was between one hundred and sixty and two hundred thousand dollars; that, when the warrants for the court-house were ordered to be drawn, he was sent for by the court, and inquiry was made of him whether he had sufficient money to pay the appropriation, and that he informed the court he had plenty of it. Judge LYNCH testified to the effect that the county finances would have permitted the payment of the whole of \$200,000, but it was thought best to pay only part at once, and wait until additional revenue came in before paying the balance. In view of this evidence, and the fact that the county court might anticipate the revenue collected and to be collected, and bind the county to the extent, but not in excess, of the revenue provided for that year, the reason urged for restraining the county court from paying the purchase price to the owners of the property, whose title had been con-

veyed to the county by deeds accepted and filed for record, is without merit, and ought not to prevail.

For the reasons herein given, the judgment of the circuit court is reversed, and plaintiffs' bill dismissed; in which all the judges concur.

KENTUCKY LUMBER CO. v. GREEN *et al.*

(Court of Appeals of Kentucky. May 12, 1888.)

1. BOUNDARIES—NAVIGABLE STREAM—MEANDER LINE.

A patent calling to run with the meanders of the Cumberland river passes title to the bed of the river to the middle of the stream, unless the terms of the grant clearly limit the grantee's right of property to the margin of the river, with the usufruct of the water to the middle of the stream, subject to the public easement of navigation, and to the usufructuary rights of other proprietors above and below.¹

2. CORPORATIONS—ACTIONS BY—DEFENSE OF ULTRA VIRES—HOW PLEADED.

The articles of incorporation of a corporation created for lumbering purposes authorized it to purchase timber or other lands necessary or convenient for the transaction of its business. In a suit by the corporation to quiet its title to a tract of land, and to compel the removal of an obstruction therefrom, the defense of *ultra vires* was attempted to be interposed, but the answer did not allege that no part of the tract was timbered land suitable for the business of said corporation. *Held*, that the paragraphs stating this defense were defective and demurrable.

Appeal from circuit court, Whitley county.

Suit in equity to quiet title to real estate, and to compel the removal of obstructions therefrom, brought by the Kentucky Lumber Company, a corporation, against John Green *et al.* Judgment for defendants. Plaintiff appealed.

William Lindsay, for appellant.

BENNETT, J. The appellees having erected a pier on the bed of the Cumberland river, between the middle of the stream and the river bank, for the purpose of fastening thereto a sheer to a log-boom, the appellant, claiming to own and possess the adjacent shore and to the middle of the river, brought this action in equity against the appellees for the purpose of quieting its title to the bed of the river to the middle of the stream, and of compelling the appellees to remove said pier, etc. The circuit court adjudged that the appellant's title did not extend to the middle of the river, and dismissed its petition. It has appealed to this court.

The patent under which the appellant claims, is older than the patent under which the appellees claim, and calls to run with the meanders of the river; while the appellees' junior patent calls for the bed of the river from shore to shore. The controlling question in this case is, does the patent under which the appellant claims, calling to run with the meanders of the river, carry the appellant's title to the bed of the river to the middle of the stream? The grant of land, as bounded by the Cumberland river, or lying upon the side of it, passes the title to the bed of the river to the middle of the stream, unless the terms of the grant clearly limit the grantee's right of property to the margin of the river; also the usufruct of the water to the middle of the stream is the property of the grantee, subject to the public easement of navigation, and subject, of course, to the usufruct rights of other proprietors above and below. *Boom Co. v. Smith*, 1 S. W. Rep. 765, (opinion by Judge HOLT); *Luce v. Carley*, 24 Wend. 451; *King v. King*, 7 Mass. 496; *Jackson v. Lowry*, 12 Johns. 252. Section 4 of the appellant's articles of incorporation authorizes it to purchase timber lands, or purchase any other lands that may be necessary or convenient for the purpose of transacting its business. The demurrer to the paragraphs of the appellees' answer which alleged that the appel-

¹ As to riparian rights acquired under conveyances calling for streams as boundaries, see *Barre v. Flemings*, (W. Va.) 1 S. E. Rep. 781, and note; *Serrin v. Grefe*, (Iowa,) 25 N. W. Rep. 237, and note.

lant's purchase of the land in controversy was *ultra vires*, and therefore void, was properly sustained, for the reason that it does not appear that said land was not timbered land as well as farming land. It may be true that a part of the land was cleared and used for farming purposes, but it does not follow that the remainder of the land was not covered with timber suitable for the appellant's business. The appellant was entitled to a judgment quieting his title to the bed of the river to the middle of the stream, compelling the appellees to remove their pier therefrom.

The judgment of the circuit court is reversed, and the case is remanded, with directions for further proceedings consistent with this opinion.

TIPTON v. TIPTON.

(Court of Appeals of Kentucky. May 12, 1888.)

DIVORCE—DOMICILE.

Under Civil Code Ky. § 428, which provides that, in an action for divorce, the plaintiff "must allege and prove, in addition to a legal cause of divorce, a residence in the state for one year next before the commencement of the action," a mere legal residence or domicile in the state, with an actual residence out of the state, is not sufficient to entitle the plaintiff to maintain his action.

Appeal from court of common pleas, Madison county.

Action for divorce by G. W. Tipton against Fannie G. Tipton. The petition was dismissed on the hearing, and the plaintiff appeals.

Wm. Lindsay and *A. J. Reed*, for appellant. *W. B. Smith*, for appellee.

BENNETT, J. The appellant, a citizen of Madison county, and owning real estate on which he lived with his wife and children, in May, 1880, abandoned his wife and children, and left the state, and remained out of the state until November, 1883, when he returned to Madison county, and remained there about three months, not, however, visiting his former residence, which had remained in the occupancy of his wife and children. He then again left the state, and did not return until April or May, 1885, when he remained in Madison county until the 1st of January, 1886, but did not visit his former home, where his wife and children still resided. He, on the 1st of January, 1886, again left the state, and has remained out of it ever since. Since he left the state in 1880, and during his absence, except one year when he was in Maryland, he has lived on one of the West India islands, in the employment of a phosphate company. He says in his deposition, which, by consent, was read in this case, that he always regarded Madison county as his home, and never voted at any other place since he left the county, and did not leave the county with the intention of "remaining away any great length of time; not any longer than I could get things in a shape to return." The evidence also shows that he paid poll taxes, through his brother, in Madison county, and during his second visit he voted at the August election, 1885; that when he left in 1886 he told his brother that he was going away for a year or two, but would return. On the 4th of October, 1886, he commenced this action against the appellee, his wife, for a divorce, upon the ground of a continuous separation for the period of five years. The chancellor dismissed his petition for the reason that he was not a resident of this state for one year next before the bringing of his action. He has appealed to this court.

Section 423 of the Civil Code provides: "The plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce: (1) A residence in this state for one year next before the commencement of the action." There is a broad distinction between a legal and actual residence. A legal residence (domicile) cannot, in the nature of things, co-exist in the same person in two states or countries. He must have a legal residence somewhere. He cannot be a cosmopolitan. The succession to movable property, whether

testamentary or in case of intestacy, except as regulated by statute; the jurisdiction of the probate of wills; the right to vote; the liability to poll tax; and to military duty and other things,—all depend upon the party's legal residence, (domicile.) For these purposes he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him unless he voluntarily fixes it himself. His legal residence consists of fact and intention. Both must concur, and when his legal residence is once fixed, it requires both fact and intention to change it. As contradistinguished from his legal residence, he may have an actual residence in another state or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his actual residence must be substantial. He may not actually abide at his legal residence at all; but his actual residence must be his abiding place. His legal residence subjects him to the duties, and confers upon him the rights and privileges, above mentioned. But nevertheless he may in fact be a non-resident; for it is well settled that although he may have a legal residence in this state, yet if his actual residence is in another state, the latter fact is sufficient to authorize an attachment against his property upon the ground of non-residency. His domicile or legal residence may be in this state, but in fact he may be a non-resident. It is upon this distinction that a proceeding is allowed against him as a non-resident. Had the appellee motioned him in this case to execute a non-resident's bond for cost, doubtless it would not be denied that the motion should have prevailed. The mere fact of his legal residence—his actual residence being out of the state—would not have been a sufficient response to the motion. Doubtless the appellee could have proceeded against him as a non-resident for a divorce. According to these views, we think that the residence required by the section of the Code *supra* means that of an actual residence; and that a mere legal residence in this state, with an actual residence out of the state, is not sufficient to entitle the appellant to maintain his action. The judgment of the circuit court is affirmed.

PEPPER v. DONNELLY.

(Court of Appeals of Kentucky. May 15, 1883.)

1. JUDGMENT—RES ADJUDICATA—JUDGMENT NOT ON THE MERITS.

After a general demurrer to a petition had been overruled, the defendant answered, setting up matter that constituted no valid defense. The case was tried by the court, and the petition was dismissed; no reason for the decision being given. On appeal, this decision was affirmed on the ground that the petition did not state a cause of action. *Held*, that this judgment was no bar to another suit on the same cause of action; the case not having been determined upon its merits.

2. EXECUTORS AND ADMINISTRATORS—BOND—LIABILITY OF SURETIES.

Under Gen. St. Ky. c. 59, art. 3, § 18, providing that "if a personal representative shall give a new bond when ruled to do so, on motion of a surety, his former surety shall not be bound for any act of his done after the execution" of such second bond, the giving of such a new bond does not release the former surety from liability for acts done by his principal before the execution of the second bond, although such bond contain a covenant of indemnity to him for loss on account of his suretyship.

Appeal from circuit court, Kenton county.

W. K. Benton, for appellant. *Hallam & Myers* and *McKee & Finnell*, for appellee.

HOLT, J. The appellee, Charles Donnelly, in 1876, became the surety of the administrator of John Pepper. In 1880 the appellant, William Pepper, as the distributee, brought an action upon the bond. A general demurrer to the petition having been overruled, the appellee relied upon the execution of a new bond in June, 1879, with other surety, as releasing him from all liability. The answer presented nothing else as a defense, and its averments in no way

aided the petition. A demurrer to it was also overruled, and a reply then filed denying that the execution of the new bond, which contained a covenant of indemnity to Donnelly as to his suretyship, operated to release him, or that this was its legal effect. An amended reply averring that the administrator had received the assets before the execution of the new bond was tendered and rejected. By agreement, the law and facts were submitted to the court; and it, after hearing the testimony, dismissed the action as to Donnelly. The judgment does not show the ground upon which it was based. A motion for a new trial was overruled; a bill of exceptions filed, showing that all the assets came to the hands of the administrator prior to the execution of the new bond; an appeal was then taken, and the judgment affirmed by the superior court. Its opinion, fairly interpreted, put the affirmance upon the ground that the petition was defective. It substantially, if not in so many words, says so. After this the appellant proceeded against Donnelly again in this action. The answer relies upon the former suit and judgment therein as a bar. It contains no averment that issue was joined in the former suit, or that it was heard upon the merits. There was no demurrer to it, however, and it was aided by the reply, which substantially avers that the first action was dismissed upon the ground that the petition did not state a cause of action, and could not, therefore, have been tried upon the merits. A properly certified copy of the record of the original suit was referred to in the reply, and by agreement made a part of the record. A demurrer having been sustained to the reply, the plea in bar was held good, and the action dismissed as to Donnelly.

The question presented upon this appeal is, what effect is to be given to the judgment in the former action? In rendering it, the court did not state its conclusions of law and fact, and there is no averment that the record of that suit does not show all that occurred. We must therefore look to it alone to determine whether it was considered upon the merits, or disposed of upon technical grounds. An estoppel by a former judgment is based upon public policy. It demands that, when a fact has been judicially and finally determined between the same parties, it should be at rest. *Interest reipublicæ ut sit finis litium*. It is, however, equally well settled that a former judgment, to be a bar, must have been a decision upon the merits. Thus a judgment, for want of jurisdiction, or by reason of a technical defect in the pleadings, or as to parties, or upon any ground not going to the merits, will not prevent a second action. It does not determine the rights of the parties. This is true of a judgment of nonsuit. *Hughes v. U. S.*, 4 Wall. 232; *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. Rep. 319; *Kendal v. Talbot*, 1 A. K. Marsh. 321; *Insurance Co. v. Broughton*, 109 U. S. 125, 3 Sup. Ct. Rep. 99. Were it otherwise, one would be deprived of his "day in court," and justice be defeated; and, while rules are necessary to the administration of law, they should not be so technical or Procrustean as to deform it, and hamper justice by a sort of judicial jugglery. Where a party relies upon a former judgment as a bar, the burden is upon him to show that the merits of the case were considered. This must appear from the record, or by evidence *altunde*, where it is admissible. *Vaughan v. O'Brien*, 39 How. Pr. 515. In a case like this one, where the record shows that a demurrer to the petition was overruled, and the case then heard by the court upon the law and the facts, this might be presumed in the absence of any rebutting circumstance. In such a case, these facts would purport a trial upon the merits. They would not be conclusive, however. A ruling upon a demurrer does not prevent the court from again considering the legal question presented by it. *Post v. Pearson*, 108 U. S. 418, 2 Sup. Ct. Rep. 799. It may hear the entire case, and then dispose of it upon some technical question, as, for instance, a defect in the pleadings. In this instance it is manifest that the defense presented in the former suit was not a valid one. The execution of the new bond, with a covenant of in-

demnity, did not, under the then and now existing law, release Donnelly from liability for any act theretofore done by his principal. Formerly the county court had the power, by its order, to accept one bond in lieu of another, and thus release the sureties upon the first bond of an administrator *in toto*. This left the question to the order and action of the court. It was too varying and uncertain. The law was therefore changed, and provides: "If a personal representative shall give a new bond when ruled to do so by the court, on motion of a surety, his former surety shall not be bound for any act of his done after the execution." Gen. St. c. 39, art. 2, § 13. In another chapter the statute also provides for the release of the surety from future, and indemnity as to past, liability. It says: "If a new bond be given, it shall operate a discharge of all the sureties making the motion from all liability for the acts of the principal thereafter done; and, if the object be so specified, the bond shall contain a stipulation or covenant to indemnify the said sureties against any loss, cost, or damage legally incurred by reason of such suretyship." Id. c. 104, §§ 1, 3, 6. The surety, under these statutory provisions, cannot be released from responsibility for the acts of the principal done prior to the execution of a new bond. If it contain a clause of indemnity, he may look to it to reimburse himself. In this instance the appellant's petition averred the execution of the bond by the appellee as surety. It set forth when the assets were received by the administrator, to-wit, prior to the change of surety, and the only fact presented by way of defense was its execution. It was claimed that it operated to release the appellee from all claim by the heir or distributee for the acts of the administrator theretofore done. Under this state of case, to presume that the judgment of dismissal was rendered upon the merits is to convict the lower court of error. We are unwilling, therefore, to so suppose if the record authorizes any other conclusion. It is clear that the judgment did not necessarily involve a determination of the merits of the case. The superior court upon appeal, affirmed it, because the petition, as it held, failed to state a cause of action. It would be improper now to inquire whether it was right or wrong in this opinion. It was final, and must be regarded as correct. It did not affirm the judgment upon the merits of the case, but upon a ground that did not constitute a bar to another action. If the judgment of the lower court was rendered upon technical grounds, then, according to the opinion of the superior court, it was correct. We are inclined to the opinion that it must control. Suppose the conclusion of the lower court be correct, but based upon improper grounds, that will bar another action. Upon appeal the judgment is affirmed, but upon other grounds, that do not constitute a bar. Which is to prevail? An affirmance by the appellate court is, of course, not necessarily an affirmance of the grounds upon which the lower court bases its judgment. If they are incorrect, and yet must prevail, although the appellate tribunal, in affirming the judgment, has assigned the true grounds, then it follows that the inferior court is the superior one. The judgment is valid by reason of the affirmance. It should therefore be governed in its effect by the extent of the affirmance, or the opinion delivered upon the appeal. It certainly is the law of the case, and should control in construing the judgment below. In another action the ground of the affirmance must be taken as the ground upon which the judgment was rendered, and resort must be had to the opinion of the appellate court as to its extent and limitation. We think this the true rule, and in harmony with the reason and theory of our court system. In any event, however, where the judgment of the lower court is silent as to the ground upon which it is based, it should be presumed that it was founded upon the reason given for its affirmance upon appeal; and especially so, when a different conclusion will convict the lower court of error. According to the presumption which, under such circumstances, should exist as to the judgment below; according to the opinion, also, of the appellate tribunal,—the appellant has

never had a trial upon the merits of his case. If he attempts to look to the surety in the second bond, he will doubtless respond that "the act of which you complain occurred during the existence of the first one; and although the bond, to which I am a party, contains a clause of indemnity to the surety in the former one, yet he has not been damnified, and I am not, therefore, liable." If this be true, it results that, unless the appellant can have a trial upon the merits of his case as to the appellee, he is remediless.

The demurrer to the reply related back to the answer, and raised the question of its sufficiency. Considered in connection with the exhibit of the former suit, it did not present a defense, and the demurrer to the reply should have been sustained to the answer. Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

BARNARD v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 15, 1888.)

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

On a trial for murder, where defendant, knowing that deceased was on his premises, having a gun and pistol, with the declared purpose of giving defendant trouble, seized the gun from deceased, and ordered him off, but made no effort to use it until deceased advanced with drawn pistol, when he shot him, it is error to instruct the jury that defendant was guilty of murder or manslaughter if he provoked the trouble, without instructing them that, in such case, if deceased renewed the assault after defendant had abandoned it, defendant had a right to defend himself.¹

2. CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where a relative testifies for the accused, it is error to instruct the jury to give to the testimony of each witness the weight they deem it entitled to, in that it in effect leaves them to conclude as a matter of law that the statements of one interested are entitled to less weight than statements made by those disinterested in the result.

Appeal from circuit court, Laurel county.

Alvin Duvall, for appellant. *P. W. Hardin*, for appellee.

PRYOR, C. J. The appellant, Samuel Barnard, was indicted, in the Laurel circuit court, for the murder of Frank Harris, the trial resulting in a conviction for manslaughter, and the punishment fixed at 10 years in the state prison. The testimony conduces to show that the deceased had been prosecuted by the commonwealth for the commission of a public offense, and the appellant had testified as a witness against him. The deceased then became hostile to the accused, and made threats of a serious nature against him, and on the day of the killing was on his way to the distillery of the appellant, with a musket in his hand and a pistol in his pocket, making inquiry as to whether the appellant was at home, and remarking that it would be well enough for him not to be there, or words to that effect, and then continued on his way to appellant's premises. The latter was informed of what had been said by the deceased, and advised not to go to his still-house, but persisted in going, saying that he had a right to go to his own premises. When

¹On trial of an indictment for murder, the defendant cannot invoke the plea of self-defense if he provoked or brought on the difficulty, or is not reasonably free from fault. *Baker v. State*, (Ala.) 1 South. Rep. 127; *State v. Perigo*, (Iowa,) 23 N. W. Rep. 452; *Allen v. State*, (Tex.) 6 S. W. Rep. 187. The acts provoking the combat must be clearly calculated to have such effect. *White v. State*, (Tex.) 3 S. W. Rep. 710. If defendant, in good faith, endeavors to decline any further struggle, he may, although he was the assailant, justify the killing. *People v. Bush*, (Cal.) 3 Pac. Rep. 590; *People v. Robertson*, (Cal.) 8 Pac. Rep. 600; *State v. Partlow*, (Mo.) 4 S. W. Rep. 14.

See, also, on the general subject as to when a homicide is justifiable, *People v. Robertson*, (Cal.) 8 Pac. Rep. 600, and note; *State v. Donnelly*, (Iowa,) 27 N. W. Rep. 369, and note; *Darbey v. State*, (Ga.) 8 S. E. Rep. 663; *Lynch v. State*, (Tex.) 6 S. W. Rep. 190; *Stanley v. Com.*, (Ky.) Id. 155; *Duncan v. State*, (Ark.) Id. 164; *Fallon v. State*, (Ala.) 8 South. Rep. 525.

he reached the place, several persons being present, he passed the deceased, who was standing with his musket by his side, and, as he passed, snatched the musket from him, and told him to leave, and not to be standing around with a loaded gun to kill him. The deceased then turned from the accused, going behind some tubs, with his hand in his pocket, and, passing around them, approached the accused with his pistol drawn, when the accused shot him with the gun. This is the testimony, in substance, of all the witnesses present but one, who testifies for the commonwealth that the accused pointed the gun at the deceased as he left, and kept it leveled towards him until he fired. This witness also testifies that the accused had a pistol buckled around him at the time. The fact of the accused having a pistol around him at the time is denied by him, and in this he is corroborated by other witnesses. It is further shown by the commonwealth that the deceased went to the still-house for the purpose of trading his pistol with some one of the hands for brandy.

At the close of the testimony the court gave instructions in regard to murder and manslaughter that were proper; but erred, to the prejudice of the accused, by qualifying an instruction in regard to self-defense, and in refusing an instruction asked by the accused. The instruction complained of embraced the law of self-defense, but was qualified by the court to the effect that if the accused provoked the difficulty, and placed the deceased in danger of bodily harm, he was necessarily guilty of either murder or manslaughter. If the threats and purposes of the deceased in going on the premises of the accused had been communicated to him, and he had reasonable grounds to believe they would be carried into execution, he had the right to take from the deceased the gun in order to avoid the danger. If done in good faith, to save his own life, he was justifiable; but if taken from the deceased without any other reason than to provoke the difficulty, that he might take the life of the deceased, he would be guilty of murder. The uncontradicted testimony shows, however, that when he seized the gun he made no effort to shoot the deceased, although the latter was going from him, nor did he fire until the deceased had turned, and was approaching him with pistol in hand. Under the evidence the qualification to the instruction as to self-defense ought not to have been given without an instruction for the defense embodying the idea that if the accused intended to provoke an assault, and was not acting in good faith, that is, to protect his own person, when he snatched the gun, still, if the assault had been abandoned by him, and Harris then advanced, with pistol in hand, on the accused, for the purpose of taking his life, or inflicting on him great bodily harm, then the accused had the right to defend himself from the impending danger.

The court also erred, on the facts of this case, in telling the jury that they should give to the testimony of each witness such weight as they might deem it entitled to, and that they were the sole judges of the weight of the evidence. As an abstract proposition of law, this is unobjectionable, and ordinarily will not influence the finding. Still we perceive no reason for giving such an instruction in any case. The brother of the accused was an important witness for the defense. The court permits such evidence to go to the jury on either side as is competent, and, after hearing that evidence, the jury, in considering it, will attach to it that importance they may think it deserves. The manner of the witness, his conduct in the witness-box, his relation to the parties in interest, and the plausibility of his statements, are facts and circumstances necessarily considered in weighing the testimony of each and every witness. The trial judge, however, may perceive something in the manner of the witness when testifying, or a peculiarity in his statement of facts, impressing him with the belief that the witness is testifying falsely, while the jury, or some member of it, may attribute the conduct of the witness to no improper motive; and in cases where the witness, from motives of friendship or from

family ties, makes statements favorable to those in whom he is interested, the suggestion by the court in an instruction that they should give to the testimony of each witness such weight as they may deem it entitled to, is in effect saying to the jury that the statement of such a witness is entitled to less weight than statements made by those entirely disinterested in the result. While this may be true in most cases, it is also true that juries will generally, if not always, scrutinize closely the testimony of those who are directly interested in the result of the litigation; but, when their attention is particularly called to this mode of weighing testimony by the trial court, it leaves the jury to conclude that, as a matter of law, they must give more weight, in the particular case, to the testimony of a stranger to the controversy than one interested in the result, or, if not, that the judge, from the instruction, must believe that some witness has been making false statements. It is better, therefore, to leave the jury free to consider the testimony without any suggestion from the court as to the manner of weighing it.

The judgment is reversed, and remanded for proceedings consistent with this opinion.

BOARD OF TRUSTEES v. BORDERS.

(Court of Appeals of Kentucky. May 17, 1888.)

MUNICIPAL CORPORATIONS—OFFICERS—QUALIFICATION OF TOWN MARSHAL.

Under act Ky. March 24, 1851, §§ 5, 6, 10, 15, providing that the trustees of the town of Campbellsville shall appoint a treasurer, clerk, and such other officers as they may deem necessary, and take from them good and sufficient bonds, and providing also for the election of a town marshal, who, in addition to performing the duties of a constable, shall collect all taxes of said town, for which he shall have the same fees as are allowed sheriffs for collecting county taxes, and that the clerk of the board of trustees shall make out and deliver to the collector a fair copy of the assessment book, etc., and that the board may allow the collector such compensation as they may deem proper; and act Ky. Feb. 22, 1860, providing "that said town marshal shall give bond in Taylor county court in the same manner as constables are required to do;" and act Ky. Feb. 18, 1867, providing that the trustees of the town may fill any vacancy that may occur in the office of town marshal, and require the person appointed to execute sufficient bond, etc.,—a marshal of Campbellsville, who has simply given bond in the county court to the commonwealth, as required of constables, is not entitled to a copy of the assessment book, and a warrant of the trustees authorizing him to collect the town taxes, until he has executed a further bond, distinct from his official bond, approved by such trustees, conditioned for the faithful discharge of his duties as such collector.

Appeal from circuit court, Taylor county.

Action by Robert Borders for a *mandamus* ordering the board of trustees of the town of Campbellsville to make out and deliver to plaintiff, as town marshal, a fair copy of the assessor's book of the town for the years 1886 and 1887. Judgment for plaintiff. Defendants appealed.

Collins & Montague, for appellants. *Thomas H. Hines, H. S. Robinson, J. A. Woodford*, and *Chas. Patterson*, for appellee.

LEWIS, J. Appellee instituted this action September 17, 1887, for a *mandamus* ordering appellants to make out and deliver to him a fair copy of the assessor's book of the taxable property of the town of Campbellsville for the years 1886 and 1887, and to authorize him, as marshal of said town, by their warrant, to collect the taxes so assessed. In his petition he states that, in pursuance of the several acts of the general assembly mentioned and referred to by him, he was, on the first Monday in August, 1884, duly elected marshal of said town for the term of two years, and having executed bond, and been qualified in the Taylor county court, entered upon the discharge of the duties of the office; that no election was held in August, 1886, to fill said office, but he held it, under the election of 1884, until August 11, 1886, when the board of trustees of said town, by an order duly made, appointed him marshal until August, 1887, and on the same day made an order allowing 10 per cent. for

collecting taxes, and he entered upon his duty as such under said appointment; that at a regular election held the first Monday in August, 1887, and in pursuance of an order of said board of trustees, he was again elected marshal of said town, and on the day of that month was, by an order of the Taylor county court, duly qualified, and executed the bond required by law, a copy of which is filed with the petition. He further states that he has been the regular and acting marshal since 1884, and so recognized by said board of trustees, and that, according to the acts referred to, and in virtue of said office, he was and is collector of taxes for said term, and has the right to collect them for the years 1886 and 1887. To the petition a demurrer and answer were filed, and there was also filed a demurrer to the answer. But, without formally trying the demurrers or the issues of fact, the lower court rendered judgment, in substance, that, as no bond had been executed by the plaintiff for the collection of taxes for the year 1886, the defendants were not bound to deliver to him the tax-books for that year, and the *mandamus* asked, requiring them to do so, was denied; that the plaintiff, by virtue of his office of marshal, is entitled to collect the taxes levied and assessed for the year 1887, and the defendants should have delivered to him for collection the tax-books for that year, and they were adjudged to levy and assess the taxes, and deliver to the plaintiff within 10 days a copy of the assessor's book for that year, showing the amount of tax to be paid by each individual tax-payer, and by their warrant direct him to collect such taxes.

It is contended for the appellants that the lower court exceeded its power in ordering them to levy and assess the taxes for the year 1887. That part of the judgment, though clearly erroneous, does not prejudice appellants, and therefore is not sufficient reason for reversal; for it seems to be admitted by both the parties in their pleadings that a levy and assessment had already been made when the action was commenced, and the real issue was as to the right of the plaintiff to have delivered to him a fair copy of the assessor's book, accompanied with an order of the board of trustees authorizing him to collect the taxes. Whether he was entitled to the remedy sought, depends upon the construction of the various acts of the legislature referred to, and relied on by him as conferring the right to collect the taxes. The first act was approved March 24, 1851. See Acts, volume 2, 524. Section 5 of that act provides that it shall be the duty of the trustees of the town of Campbellsville to appoint a treasurer, clerk, and such other officers as they may deem necessary, and take from them, respectively, bonds with approved security, payable to the board of trustees of Campbellsville, and their successors in office, in such penalty as said trustees may direct, conditioned for the faithful discharge of their respective duties, etc. Section 6 provides for the election of a police judge and town marshal. And in section 10 it is provided that it shall be the duty of the marshal to serve all process and precepts to him directed from said police judge, and make due return thereof; collect all taxes of said town, executions, and other demands which may be put into his hands to collect; and account for and pay over the same to those entitled thereto, under the same rules and regulations required of sheriffs in the collection of taxes, and constables in the collection of executions or other demands; and, for a failure of any of the duties required of him, he shall be subject to the same proceedings and penalties which may be had against sheriffs or constables in similar cases. Said marshal shall have the same power, and be entitled to the same fees, for collecting the town tax that sheriffs have for collecting the county levy and revenue tax, and in all other cases the fees allowed constables for similar services. Section 15 is as follows: "That it shall be the duty of the clerk of the board of trustees to make out and deliver to the collector a fair copy of the assessor's book, with the amount of tax to be paid by each individual, and take his receipt therefor, and the trustees shall by their warrant authorize and direct the collector to collect the same, and shall make said clerk, assessor,

and collector such compensation as they may deem proper." Section 23 provides that for any tax to be levied there shall exist a lien in favor of the trustees for said tax, and, in case the owner of property subject shall fail to pay such tax on or before the 1st of September in each year, it shall be lawful for said trustees, by their town collector, to sell at the October county court so much real estate as will pay the tax due thereon, etc. Section 4 of an act approved February 22, 1860, (Acts, volume 2, 134,) provides "that said town marshal shall give bond in Taylor county court in the same manner, and conditioned in the same way, as constables of this state are required to do and perform." February 18, 1867, (see Acts, vol. 2, 16,) an act was passed, providing for filling, by the trustees of the town, any vacancy that may occur in the office of town marshal; but that, before the person so appointed should enter on the discharge of the duties of his office, he shall execute bond with sufficient security to faithfully discharge the duties of his office according to law.

We do not deem it necessary or proper to inquire into and decide the question raised by appellants, whether appellee was, when he commenced the action, marshal *de jure*. By section 10 of the act of 1851, it is provided the marshal shall have the same fees for collecting the town taxes that sheriffs have for collecting the county levy and revenue tax; but section 15 provides that the board of trustees shall make the clerk, assessor, and collector such compensation as they may deem proper. The only way to harmonize the two sections is upon the idea it was intended to give to the trustees the power to appoint the collector of taxes, and to fix his compensation in case he be a person other than the marshal; and this conclusion is fortified by mention of the person empowered to collect the taxes as the collector, and by the provision requiring a warrant from the trustees in order to authorize the collector to act, whether he be the marshal or other person. Whether this power to appoint a collector was intended to be a discretionary power, to be exercised by the board of trustees in every state of case, and to the exclusion of the marshal, it is not necessary to determine; but it seems to us clear that whether the marshal is or is not, in virtue of his office, entitled to collect the taxes, he has no right to do so without warrant of the trustees, and that they may withhold such warrant, and appoint another person, unless he in due time executes a bond for the faithful discharge of his duties as such collector, just as the sheriff is required to execute a revenue bond distinct from his official bond. The simple inquiry, then, is whether appellee did, within the time required by law, execute such bond. The bond filed with his petition, purporting to have been executed August 29, 1887, in the Taylor county court, is nothing more, in its terms and effect, than an official bond, such as a constable is required to execute, and binding him to discharge only the duties imposed upon a constable, which does not at all include the collection of taxes. The marshal, by section 10 of the act of 1851, is invested with the powers, and required to perform the duties, of a constable, and it was therefore provided he should execute a bond in the county court. Hence the bond executed by him in this case is a covenant with the commonwealth of Kentucky. But, being also empowered to collect taxes in the town of Campbells-ville, the bond for the faithful discharge of such duty was intended to be a covenant with the board of trustees, and subject to their approval, and the power to require such bond is, we think, given by section 5 of the act of 1851. It does not appear from the record at what time the collector shall execute bond, but it is alleged in the answer that the board of trustees had, when this action was commenced, already appointed a collector other than the appellee, and taken the bond from him; and it must be presumed it was done after the time had passed when it was appellee's duty to tender a bond as collector. But, be that as it may, he had no cause of action against the defendants, not having tendered a bond as tax collector.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

ON PETITION FOR REHEARING.

(May 26, 1888.)

LEWIS, J. Whatever right or authority the marshal may have to collect taxes in the town of Campbellsville is conferred by section 10 of the act of 1851, which provides, among other things, that it shall be his duty to "collect all taxes of said town, executions, or other demands which may be put into his hands to collect." That section does not in terms make it any more obligatory upon the board of trustees to put the tax-books in his hands, and authorize him to collect the taxes, than upon a plaintiff or other individual creditor to put executions or other demands into his hands for that purpose, and it is by no means clear that the trustees can be legally coerced to do so. But we have not deemed it necessary to decide that question; for assuming he has the right, in virtue of his office, to collect the taxes, the trustees are still not bound to deliver to him the tax-books, and authorize him by their warrant to collect the taxes until he has executed a bond with security, approved by them, conditioned for the faithful discharge of the duty of collector. The power of the trustees clearly exists, under the statute of 1851, to take such bond from the marshal or other person appointed collector; and, if it was not exercised by them, then no bond for the collection of town taxes was taken at all previous to the statute of 1859, when authority was first given to the Taylor county court to take a bond from the marshal. The only bond the county court was empowered by that statute to take from the marshal is one given "in the same manner, and conditioned in the same way, as constables in this state are required to do and perform." But as the law does not authorize or require a constable to collect any taxes whatever, nor empower the county court to take from him a bond for that purpose, it is manifest the legislature did not intend, by the statute of 1859, to divest the trustees of the power, and confer it upon the county court, to take from the marshal bond for the collection of taxes in the town of Campbellsville, the fiscal affairs of which the county court has neither appropriately anything to do with, nor adequate knowledge of. The bond given by appellee in the county court is in the precise form of the bond required by law of a constable, and contains no express or implied undertaking by him to collect and account for nor any mention of taxes. It is purely an official bond executed by him as marshal, and not in the nature of a bond as collector of taxes, nor binding upon him or his sureties as such. Petition for rehearing overruled.

COVINGTON S. R. T. RY. CO. v. PIEL.

(Court of Appeals of Kentucky. May 24, 1888.)

1. EMINENT DOMAIN—CONDEMNATION OF LAND—COMPENSATION TO OWNER—CONST. KY. ART. 13, § 14.

Act Ky. April 11, 1882, § 7, providing that, on an appeal by a railroad company from a judgment of a county court fixing the damages in condemnation proceedings, the company shall not be entitled to take possession of the premises sought to be condemned, unless it execute to the owner a bond, with surety in double the amount of damage assessed, conditioned to perform the judgment of the court, or any other court to which the case may be appealed, violates Const. Ky. art. 13, § 14, providing that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

2. SAME—COMPENSATION—MEASURE OF.

In proceedings to condemn a person's home and place of business for a right of way for a railroad company, the jury may, in estimating the damages, take into consideration the inconvenience and loss resulting to the owner from being deprived of his home and established place of business.

3. SAME—COMPENSATION—FINDING BY JURY—WILL BE SET ASIDE, WHEN.

In proceedings to condemn land for a right of way for a railroad company, where there have been three verdicts fixing the damages at \$7,750, \$8,000, and \$8,250, respectively, the final verdict will not be disturbed, in the absence of any evidence to show that either finding was excessive.

Appeal from circuit court, Kenton county.

Proceedings instituted by the Covington Short-Route Transfer Railway Company against Christian Piel to condemn certain property for a right of way. From the verdict of the jury assessing the damages, plaintiff appealed. *Hallam & Myers*, for appellant. *William Goebel*, for appellee.

PRYOR, C. J. This proceeding was had on the application of the appellant, the Covington Short-Route Transfer Railway Company, asking for the appointment of commissioners to assess the damages resulting from the condemnation of appellee's house and lot in the city of Covington for railway purposes. The commissioners appointed proceeded to value the property under the act approved April 11, 1882, and assessed the damages at \$7,750, and, each party excepting to their award, a jury was impaneled in the county court, and a verdict rendered in favor of the appellee for \$8,000. The case was then carried by an appeal to the circuit court, and a verdict rendered for \$8,250, and is now in this court on an appeal from the circuit court. The appellant, the railway company, declining to pay or tender the amount of the judgment because it regarded the sum allowed as excessive, executed a bond, with security, to the appellee, in accordance with the seventh section of the act of April 11, 1882, for double the amount of the damages assessed, conditioned to perform the judgment of the circuit court, or that of any court to which the case might thereafter be appealed, and on motion was awarded a writ of possession. The seventh section of the act is as follows: "Upon the confirmation of the report of the commissioners by the county court, or the assessment of damages by said court as herein provided, and the payment or tender to the owners of the amount due as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all costs adjudged to the owner, the railroad company shall be entitled to take possession of said land or material, and to use and control the same for the purpose for which it was condemned, as fully as if the title had been conveyed to it. But, when an appeal shall be taken from the judgment of the county court by the railroad company, it shall not be entitled to take possession of the land or material condemned unless it shall execute to the owner a bond, with surety, to be approved by the county court, in double the amount of the damages assessed, conditioned to perform the judgment of said court, and of any court to which the case may thereafter be appealed, which bond shall be filed with the papers in the case." Gen. St. 1887, c. 18. When the case reached this court, the appellee prayed a cross-appeal, and although a bond had been executed by the railway company, as provided by the seventh section of the act of 1882, was permitted by this court to execute a *supersedeas* bond, having the effect to stay the writ of possession until the case was disposed of on the appeal.

The right of the appellee to a *supersedeas* on his cross-appeal is one of the questions raised and to be disposed of on the final hearing. It is insisted by the appellee that so much of the seventh section of the act of April 11, 1882, as permits the railway company to take possession of his property, and apply it to the use of the company, upon the execution of a bond of indemnity only, is in violation of section 14, art. 13, of the constitution, providing that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." While the statute does not, in express terms, deny to the owner the right to supersede the judgment in a case like this, it provides that the corporation, when taking the appeal, may take possession of the property upon

executing a bond to the owner in double the amount of the damages assessed, excluding necessarily his right to prevent the public use by superseding the judgment, and thereby delay the progress of the work until the end of the litigation. This seventh section gives the right of entry upon the payment or tender of the money to the owner when the company proposes to abide by the judgment, and to afford the company a remedy by an appeal when it may deem the award of damages excessive. It further provides the execution of a bond, with surety, that the owner is compelled to accept if approved by the court, with the right to the company, after its execution, to enter and apply the property to its use. This latter provision of that section, the appellee maintains, is unconstitutional; and, if so, there is no reason why the *super-sedeas* should have been withheld by this court. It is essential, in taking private property for public use, that compensation should first be made. It is, says Mr. Mills, "in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to a public use;" and whether the corporation desiring that use can have the property valued, and then take it from the possession of the owner by executing a bond that may have the effect to reduce the value, and at the same time compelling the owner to risk the solvency of the parties to the obligation, is the question presented here. In considering this question no reported case is to be found in this state where a private corporation has appropriated the property of the citizen to its use upon the execution of a bond containing a mere promise to pay the damages sustained, at the end of a litigation by which the value of the property is to be determined. This court has held in more than one case, where property was condemned for the benefit of a municipality, or for county purposes, that, if the owner was made secure by the execution of a bond with surety, it was such a compensation as was contemplated by the constitution. In the case of *Gaskwiler's Heirs v. McIlvay*, 1 A. K. Marsh. 84, the damages were secured by a direction to pay the sum allowed out of the county levy; in the case of *Jackson v. Winn*, 4 Litt. 825, the property was taken for an incorporated town; and in *Duncan v. City of Louisville*, 8 Bush, 98, the mayor was authorized to sell bonds to pay the value of the property condemned. There is a distinction recognized by many authorities between a taking by a municipal subdivision of the state and a taking by a private corporation. The reason given is that in the one case the owner may resort to the public treasury of the state or the municipal government for his money, with the power in the state, if the treasury should be empty, to coerce, by taxation, a sum sufficient to make the compensation; while, as to a private corporation, the owner is compelled to risk the solvency of the parties to the bond, with no other remedy for the value of his property taken than a suit at law in the event of their failure to pay. This early doctrine, "that compensation need not precede the taking," was established, says Mr. Mills in his work on Eminent Domain, for the reason that the property was taken mainly for the state, and the payment to be made out of the public treasury. Whether or not this reason controlled the decisions of this court in the earlier cases is not now necessary to inquire; for it is manifest that a mere security in the bond of a corporation cannot be regarded as just compensation previously made the owner, within the spirit and meaning of the bill of rights. That the citizen would be more likely to receive compensation from the state out of an abundant treasury, and by reason of its power to enforce payment by exactions from its citizens in the form of taxation, than from a private corporation owning its corporate property, or the individual security given by it, will be readily conceded; but in what manner this protects the citizen who has been deprived of his property in his constitutional rights it is difficult to comprehend. The security may be more ample in the one case than in the other, and still his right of property has been destroyed in its appropriation to a public use without just compensation previously made; and all that is left him, whether due by the municipality,

county, or corporation, is the right, if a voluntary payment is not made at the end of the litigation, to take coercive measures for the recovery of the value of his property, to which he was clearly entitled from the municipality or the private corporation before either could use it for public purposes. Viewed in any aspect of the case, whether taken by the sovereign, or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, without the consent of the owner, to a public use, without first making compensation to him in money for the value of the property of which he has been deprived. We are aware that, in the condemnation of private property for the construction of railroads, serious injury might often result to the public by a delay in the progress of the work until the question of compensation is determined by litigation. The necessity for an immediate entry in all such cases is apparent. Still it could not have been intended by the framers of the constitution that a security for payment should be deemed equivalent to payment in fact. That just compensation previously named, authorized the corporation, under legislative authority, to take private property upon a credit, by executing a bond payable at the end of a litigation, is a doctrine that cannot be sanctioned by this court. The language of the bill of rights does not admit of such a construction.

In this case the homestead of the owner had been condemned; and the appellant, not satisfied with the assessment of damages, is permitted, by the act of 1882, to take possession of his dwelling, his business-house, and the lot upon which they stand, with no other compensation than the bond of the company, that may or may not be paid when the litigation terminates. He may be compelled to sue on the obligation to recover the compensation that the constitution in express terms provides he shall have before his property is taken. If the bill of rights provided that the citizen should be made secure before his property could be appropriated to public use, there might be some reason in requiring him to look to a bond of indemnity for his compensation; and the earlier cases seem to have proceeded on the idea that this security was what had been guaranteed to the citizen, and nothing more, when it is plain, we think, from the language used in that instrument, that just compensation, previously made, means the payment in money to the owner of the value of his property, whether for the sovereign, a municipality, county, or corporation, before it can be taken from him. When the damages are assessed under the act of 1882, the money may be paid or tendered to the owner; and, if he declines to receive it, his own act entitles the company to enter and appropriate the property condemned for the public use. "The legislature might as well declare a bond to be good compensation at the end of the condemnation proceedings as at the beginning; hence possession cannot be given simply on an offer to give or on the giving of a bond." Mills, En. Dom. (2d Ed.) § 136. Mr. Cooley, in his work on Constitutional Limitations, says: "It is not competent to deprive him [the citizen] of his property, and turn him over to an action at law against a corporation, which may or may not prove responsible, and to a judgment of uncertain efficacy." Const. Lim. 562. This court, in the case of *Arnold v. Bridge Co.*, 1 Duv. 372, speaking through Chief Justice ROBERTSON, said: "But the constitution constructively requires an impartial assessment, by a judicial process, of the actual value in money, and full payment, before private property shall be appropriated to public use." Authorities might be given sustaining a like construction of constitutional provisions similar to ours; and to require the citizen to look to a mere written promise to pay the compensation to which he is entitled, is, in our opinion, a perversion of the plain meaning of the bill of rights.

Objections were made in the court below to an instruction given at the instance of the appellee, and also exceptions taken to the refusal of the court to give instructions asked by the appellant. The court told the jury: "They

must find from the evidence the real value, in money, to the owner, of the premises as they were actually situated on the 12th of July, 1887, and they will find for the owner the value aforesaid." The appellant asked the court to say to the jury that they should not take into consideration any consequential injury or inconvenience to the defendant in the taking of his property. The last instruction the court refused to give, but gave the instruction asked by the appellee. The appellee owned no property adjacent to the property condemned; and the damages he sustained, if any, in addition to the value of the property taken, was the inconvenience and loss resulting from his being deprived of his home and place of business; and to say that no such facts should enter into the estimate of value would be unjust to the owner, and place him in a condition where he had sustained actual injury other than the mere market value of his property without affording him any remedy for the wrong. This character of case is unlike an appropriation of a strip of land where the mere market value is the criterion; the taking working no other injury. Here the owner and his family have been deprived of their homestead; his place of business taken from him; and to allow him simply what such property is worth or would bring in the market would not compensate him for the injury sustained. The instruction for the appellee was proper; and, while the jury might have been told that a mere ideal value placed on the premises by the owner should not control them in their verdict, yet it is evident that, in ascertaining the damages, the value of his home and business house to the owner, under the circumstances, should have entered into the estimate. It is not certain, however, from this record that the jury did more than to give the owner the marketable value of his premises. The witnesses for the railway company fixed the market value at from five to seven thousand dollars. Those for the appellee fixed the market value as high as \$9,361. The jury returned a verdict of \$8,200. The appellee was allowed to show that, in addition to the market value proven, he had sustained other loss, in having to abandon his place of business, to the extent of two or three thousand dollars. We perceive no objection to this testimony. The location of appellee's business house, its convenience for his labor and those who patronized him, were facts tending to enhance the value of the property to the appellant, and of which he ought not to have been deprived.

There have been, in effect, three different verdicts in this case fixing the value of appellee's property. The commissioners fixed the value at \$7,750, the jury in the county court at \$8,000, and the jury in the circuit court at \$8,200. After so many findings on the one issue, with such a small difference in each verdict, we see no reason for disturbing the judgment, in the absence of any evidence tending to show that either finding was excessive.

The only question made by the appellee on his cross-appeal was his right, as the company had appealed, to supersede the writ of possession. This he was allowed to do; and, perceiving no error to the prejudice of the appellant, the judgment is now affirmed, with damages. No reversal is asked on the cross-appeal.

PHOENIX INS. CO. v. SPIERS *et al.*

(*Court of Appeals of Kentucky. May 24, 1888.*)

1. INSURANCE—CONDITIONS OF POLICY—WAIVER OF PRELIMINARY PROOF OF LOSS.

An insurance company which refuses to pay a loss, because of an alleged avoidance of the policy, by additional insurance, without its consent, waives necessity for preliminary proofs according to the requirements of the policy.

2. SAME—AGENTS—WHO ARE EMPLOYEES OF AGENT.

Where an agent of an insurance company had no express authority to appoint a subagent, but agreed with another person to divide with him commissions on insurance procured, the company having no knowledge of such agreement, such third person is not the agent of the company, and conversations between him and the assured are not admissible, in an action by the latter on the policy.

8. SAME—AGENTS—WHO ARE—NOTICE OF ADDITIONAL INSURANCE.

A local agent of an insurance company of a distant state, who solicits insurance, takes the application, receives the premium, and delivers the policy, is to be regarded as the agent of the company for the purpose of receiving notice of an additional insurance, no particular notice being required in the policy.

4. SAME—BREACH OF CONDITION BY ADDITIONAL INSURANCE—KNOWLEDGE OF COMPANY—WAIVER.

An insurance company which has notice of an additional insurance, by the assured, and remains silent till after loss, waives a condition of forfeiture in the policy for want of its written consent thereon to such additional insurance.

5. TRIAL—SPECIAL VERDICT—INCONSISTENT FINDINGS.

The finding of a special verdict, in an action on an insurance policy, that the assured, prior to the loss, had no notice of any limitation upon the authority of the local agent who procured the insurance, and also that they knew the extent of the agent's powers when the application for insurance was made, and knew it was limited, is inconsistent, and the cause must be reversed.

Appeal from circuit court, Owen county.

Spiers & Thomas bring this action against the Phoenix Insurance Company, on a policy of insurance to recover the damages occasioned by the loss of insured tobacco by fire. The jury returned a special verdict, on which the court rendered judgment for plaintiff. Defendant appeals.

Wm. Lindsay, for appellant. *Montgomery, Lindsay & Botts*, and *O. B. Hallam*, for appellees.

HOLT, J. The appellant, the Phoenix Insurance Company of Hartford, Conn., issued to the appellees, Spiers & Thomas, of New Liberty, Ky., a policy of insurance of \$1,200, for six months from February 20, 1883, upon 12,000 pounds of tobacco. It provided: "If the assured shall have, or hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * this policy shall be void. * * * The assured shall forthwith give notice of loss to the company, and, as soon after as possible, tender a particular account of such loss, signed and sworn to by them. * * * The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same are made by the assured, and received at this office, in accordance with the terms of this policy. * * * Until such proof, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. * * * This policy may be canceled at any time by the company on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term." The assured added other tobacco to the stock, and on May 4, 1883, the Liverpool, London & Globe Insurance Company issued a policy for two months, for \$800, upon the entire lot, then amounting to 20,000 pounds. It was destroyed by fire on June 23, 1883, being then worth \$3,000, and the total insurance on it being \$2,000. The appellant never consented to the additional insurance by writing indorsed upon the back of its policy. The appellees now seek to enforce it. But two of the several defenses need be considered. They are—*First*, that the preliminary proofs were not made; and, *second*, that the policy is not enforceable because of the additional insurance taken without the written consent of the appellant.

Soon after the loss occurred, the appellant had it investigated by its adjusting agent, and thereupon notified the appellees, in writing, that it considered the policy void, by reason of the taking of the additional insurance without its consent, and distinctly refused to pay upon this ground alone. This was equivalent to the company saying that it would be useless to furnish any preliminary proofs; that no form or degree of them would induce payment, and

it would be but an idle ceremony to present them. Such conduct waives the necessity for their production before suit, although required by the policy. The stipulation is in favor of the insurer, and his conduct renders it an idle formality, the observance of which the law will not, therefore, require. *Insurance Co. v. Stien*, 5 Bush, 652; *Martin v. Insurance Co.*, 20 Pick. 389; *Thwing v. Insurance Co.*, 111 Mass. 110. Conditions affecting the risk itself are more strictly enforced in favor of the insurer than those relating to the mode of establishing a loss. In 2 Wood on Fire Insurance, § 496, it is said: "The production of proofs of loss, or defects therein, may be waived, and such waiver may be implied from what is said or done by the insurer." Another leading writer upon this subject says: "A distinct denial of liability, and refusal to pay on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss." May, Ins. § 469.

It is insisted, however, that there was a non-acceptance of this waiver; that the matter was reopened at the instance of the assured; and that they, therefore, could not thereafter sue without first furnishing these proofs. It appears that, soon after the refusal to pay, the attorneys of the appellees wrote to the company, saying that they believed it had been misled as to the facts, and requesting an investigation and remittance of the amount of the policy. The company replied that, if it had been misled, it would "entertain proofs to that effect." Evidently, the letter of the attorneys related alone to the refusal to pay upon the ground that the policy had been avoided by taking other insurance without the company's consent. The assured were induced by the insurer to believe that it based its refusal to pay upon this ground alone, and did not intend to insist upon the production of the preliminary proofs; and this refusal, so grounded, it never did withdraw, and is now insisting upon it. One of the special findings of the jury is that the company refused to pay upon this ground; and we think its conduct lulled the appellees into the belief that the mere preliminary proofs would receive no consideration. It will not, therefore, be heard to now defend because they were not furnished before suit.

It is insisted that the forfeiture provided by the terms of the policy, in case other insurance should be taken without the written consent of the appellant indorsed upon its policy, was waived by it. A brief statement of facts is necessary to a proper understanding of this question: One Curtis was the agent of the company at New Liberty. Sometimes he styled himself its surveyor. He took applications for insurance, made the surveys, received the premiums, countersigned and delivered the policies to the insured, but did not issue them. He was the sole representative in that locality of the appellant, a corporation located in a distant state. One Vallandigham was loaning money upon tobacco in the vicinity of the appellees, and therefore desired its insurance. He agreed with Curtis, if he would divide his commissions with him, that he would bring to him the insurance upon all the tobacco in which he might thus become interested. This arrangement was unknown to the company; and between it and Curtis the powers of the latter, as its agent, appear to have been limited. It is not certain whether Vallandigham suggested the insurance of their tobacco to the appellees, or they to him. They doubtless believed he was an agent of the company. He so represented to them, and they obtained both policies of insurance through him; that is, he furnished the information and made the applications for the insurance, received the premiums, and paid the same, in one instance, to Curtis, and in the other to one Gayle, who was the local agent of the Liverpool, London & Globe Company. The policies were delivered by the agents to him; that in the last-named company being still in his possession when the loss occurred. There is evidence tending to show that it was the understanding between Vallandigham and the appellees that the additional insurance was to be taken out upon the 8,000 pounds of tobacco

only. The testimony is conflicting as to whether he so applied for it. He signed the names of the appellees to the application for the insurance in the Phoenix Company, but in obtaining the additional insurance the agent of the Liverpool, London & Globe Company merely obtained from him information as to the property, and no formal application was made out. The policy issued, however, upon the entire 20,000 pounds; and the appellees, after the loss, proved it as such, without qualification, explanation, or conjecture, and obtained the \$800 of insurance. It must therefore, as to them, be regarded as having been an insurance upon the entire lot of tobacco. Vallandigham certainly was not even purporting to act as agent for the appellant in obtaining the second policy. Nor can he be regarded as its agent as to the first one. The arrangement between him and Curtis was not binding upon the company. It had no knowledge of it. Curtis had no express authority from it to appoint another or a subagent. An agent ordinarily has no power to do so without the knowledge or consent of his principal; and while an agent of an insurance company who is authorized to contract for risks, receive premiums, and deliver policies, may confer upon a clerk or a subordinate authority to exercise these powers, as the service is not of such a personal character as to come within the maxim, *delegatus non protest delegare*, yet in this instance the circumstances show that it was the private arrangement of Curtis and Vallandigham, who was interested in the subject of the insurance, and, if it were material to the question at issue, he cannot be regarded as having acted as the agent of the company. It follows that the testimony detailing what was said between him and Spiers and Thomas was incompetent.

It has been held in some few cases, as in *Hutchison v. Insurance Co.*, 21 Mo. 97, that where the policy provides for a forfeiture in case of additional insurance without the written consent of the insurer indorsed upon the policy, it can only be waived by a literal compliance with the condition. The decided current of authority, however, is that this waiver may arise from the act or conduct of the insurer; and silence for an unreasonable time upon his part, after notice or knowledge of the breach of the condition, will constitute such conduct. If notice be given to the company of the additional insurance or increased risk, and no objection be made within a reasonable time, fairness and good faith should estop it from insisting upon a forfeiture of the policy because its consent was not indorsed upon it according to its literal terms. The assured has a right to infer therefrom that the company will not insist upon it. It has not spoken as to a matter for its benefit when it could and should have done so to prevent another from being misled to his probable injury. If it had done so he might have protected himself, probably by other insurance. Its silence under such circumstances is a consent to the additional insurance. A forfeiture upon this ground is not for fraud. It may cancel the policy by reason of it, but, if it does so, it must refund a proper proportion of the premium. It cannot, therefore, remain mute, with a knowledge of the existence of a ground of forfeiture, and if there be no loss, retain the entire premium, but if there be one, rely upon the breach of the contract. The term "void," as used in the policy, is to be regarded as meaning that the insurer may, at his exclusive option, treat it so, and not that the contract becomes an absolute nullity as to either party. The insurer may therefore, by his conduct, waive his right of forfeiture, and estop himself from insisting upon it. *Baer v. Insurance Co.*, 4 Bush, 242. The contract of insurance may be by parol. It is not within the statute of frauds. Such a contract, although in writing, may be changed by parol even though it provide that it shall only be done by writing, because men cannot so tie their wills as not to be able thereafter to do by consent what the law allows. Conditions of forfeiture in a policy of insurance, as indeed the entire instrument, are to be construed most strongly against the insurer. The company prepares it, and is familiar with its details, and many conditions. Its ambiguities are to be resolved against the insurer;

but, while all this is justly so, yet undoubtedly a condition of forfeiture like the one in question should be upheld. Its object is to guard against overinsurance, and the consequent temptation to fraud and crime. Experience teaches that in such matters the interest of men is more to be relied upon than their morality. Therefore no prudent company ever insures property to its full value. It will not do to say that the first insurer should not complain of additional insurance, since it aids him in case of loss by way of contribution, because overinsurance not only is likely to lead to fraud and the destruction of property, but it takes away the owner's incentive to care for and protect it, and therefore greatly increases the danger of loss. While, however, these reasons exist for upholding such a condition of forfeiture, yet it may now be regarded as settled law that insurance companies may, by conduct or parol agreement, waive it, and become estopped from enforcing what is but a conventional condition of forfeiture. *Insurance Co. v. Shea*, 6 Bush, 174; *Von Bories v. Insurance Co.*, 8 Bush, 183; *Insurance Co. v. McCrea*, 8 Lea, 513.

There is evidence in the record tending to show that Curtis had notice of the additional insurance. The special verdict so finds, and it is claimed that this was notice to the company, and that its silence, under these circumstances, operated as a waiver of any right of forfeiture. Upon the other hand, it is insisted that notice to him was not notice to it, and that no power of waiver existed in him, because the contract of insurance had been closed, because his powers were limited, and he then owed no duty to the assured. If the latter knew that his powers were limited, and that he was invested with no power of waiver, or if there was anything connected with the transaction to put the assured upon inquiry, then any conduct of the agent in excess of his authority would not bind the company. Of course, it could limit his power; and if the assured knew it had done so, or as prudent men should have known it, then they dealt with him at their peril in matters in excess of his power. The policy in this case contains no provision as to how or to whom notice of other insurance is to be given. If, however, the agent had apparent authority in the matter; if, under all the circumstances, he ostensibly had it; if his acts indicated general power as to the subject of insurance for his company,—then although in fact his authority was limited, yet it should be considered adequate as to third parties, unless those dealing with him had express or inferential notice of the want of power. The acts of an agent, within his ostensible authority, are binding upon his principal. If the latter has authorized the opinion that he has given more extensive authority than he has in fact, he will be estopped to deny it. If he holds him out as his general agent, he will be bound by his acts and conduct, although, as between them, his powers are in fact limited, provided the party dealing with him has no notice of the restriction. Thus if the agent be intrusted with the general management of a business, he has implied general authority to do all that ordinarily enters into the conduct of that business. *Williams v. Getty*, 31 Pa. St. 461. In the language of the supreme court of the United States, *Insurance Co. v. Wilkinson*, 13 Wall. 222: "The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." The authority of the agent need not be express. It may be implied from circumstances, and may thus exist as to third parties, although in fact forbidden by agreement between the company and its agent. Mr. May says: "The authority of an agent must be determined by the nature of his business, and is *prima facie* co-extensive with its requirements. It cannot be limited by special private instructions, unless the insured has notice, or there is something in the nature of the business, or

the circumstances of the case, to indicate that the agent is acting under such special instructions." May, Ins. § 126. The tendency of recent decisions, and we think properly, is to hold the insurer bound by the acts and conduct of the local agent whenever it can be done consistently with the rules of law. The maxim, *qui facit per altum facit per se*, should apply with peculiar force to the acts of an insurance agent. He usually represents a company remotely located. Its patrons in his vicinity naturally look to him for direction generally as to the insurance obtained through him. He is generally regarded as having full power in reference to it. Being usually the only man upon the ground having anything to do with it, the persons insured in his company, with few, if any, exceptions, would, in the absence of notice that his powers were limited, regard his statement as to any matter relative to such insurance as authoritative, and any notice to him as to it as sufficient. They rarely know anything of the company, or of its officers, who issue the policies, and look to the agent through whom they have obtained the insurance as the complete representative of the company in everything connected with that insurance. If they did not consider that they were authorized to do so, it would undoubtedly create distrust and cripple the business. As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. Under this rule, an agent who solicits the insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, by his conduct or acts, bind his company by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted. This being so, it follows that the knowledge of the agent, under such circumstances, is to be imputed to the company. In Wood on Fire Insurance, § 406, it is said: "In all cases where notice is required to be given, unless some special officer is named to whom it shall be given, notice to an agent of the company is notice to the company. Thus when notice of other insurance is required to be given, notice given to the agent is sufficient, and, if no special mode in which it shall be given is provided, any notice conveying the requisite information, written or verbal, is sufficient; or, if the agent knew of the other insurance when the contract was entered into, it is not only a waiver of notice, but also of a forfeiture on that ground. It is not necessarily essential that the agent should be clothed with authority to issue policies. It is enough if he is authorized to receive applications, make surveys, deliver policies, and receive the premiums therefor, and is in any measure held out by the insurer as having authority to act for it in any or all of these respects."

In the case now under consideration there were a myriad of questions submitted to the jury. It is not surprising, therefore, that some of the findings are inconsistent with each other, while others are directly in the teeth of the testimony. For instance, the jury found that the second policy did not cover the property embraced by the first one, and that the appellees, under the second policy, only proved for the loss of 8,000 pounds of tobacco. This finding is directly in the face of all the evidence, both verbal and written. In answer to question number 9 of the appellees, they say that Spiers and Thomas had no notice, prior to the loss, of any limitation upon the authority of Curtis as agent; and then, in response to the second question submitted by the court, they declare that the appellees knew the extent of his powers when the application for the insurance was made, and that both they and the public knew his agency was limited. It is apparent, from what has already been said, that this was a vital point in the case. It is unnecessary to further review the findings, but sufficient to say that they are too inconsistent and conflicting to support the judgment, and a new trial should have been awarded. We have indicated our view of the law governing the case at length, not only upon account of its legal importance, but because it must upon another

trial be submitted to a jury, under proper instructions, for a general verdict, a special one being no longer authorized.

Judgment reversed, and cause remanded for a new trial in conformity to this opinion.

LOUISVILLE & N. R. Co. v. ROBERTS.

(Court of Appeals of Kentucky. May 24, 1888.)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—ORDINARY NEGLIGENCE.

In an action against a railroad company, it appeared that plaintiff attempted, in a dark night, to cross defendant's track on a street in a village; that he lacked but one step of clearing the train when struck; that the train was running on a down grade, approaching a flag station; that before reaching the crossing the air-brakes were released, increasing the speed of the train to 17 miles an hour; that the engineer could have seen plaintiff and slowed the train, but was not looking out, and did not see plaintiff until he was struck. *Held*, that the facts establish a case of ordinary negligence only, and that a judgment for punitive damages should be reversed.¹

2. SAME—ACCIDENTS AT CROSSINGS—FINDING OF JURY—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company, plaintiff testified that he was struck by a train at a point where a highway crossed defendant's track. There was evidence that none of his bones were broken; that he moved himself after he was struck, and before he was discovered; that he was found, unable to move, 80 feet from the crossing; that his hat was found some distance from the crossing; that the shock rendered him unconscious for a time. *Held*, that a finding that he was struck at the crossing was not against the weight of evidence.

Appeal from circuit court, Gallatin county.

Action brought by W. Bower Roberts against the Louisville & Nashville Railroad Company for injuries received at a highway crossing. Verdict and judgment for plaintiff, and defendant appeals.

Wm. Lindsay, H. W. Bruce, Winslow & Winslow, and L. L. Tiller, for appellant. *O. B. Hallam, T. F. Hallam, Montgomery, Lindsay & Botts, and Montgomery & Perry*, for appellee.

BENNETT, J. The appellee, W. B. Roberts, by this action, claims that between 10 and 11 o'clock at night, on the 22d of March, 1884, he was crossing the appellant's railroad track at a place where the public highway crosses the same at Sparta station, in the village of Sparta, Gallatin county, Ky.; that, while crossing the appellant's road at said place, the appellant's employees, in charge of its passenger train of cars, grossly, willfully, and negligently ran the engine drawing said train against him, thereby inflicting upon him serious and permanent injuries. The appellant denies that the appellee was injured by the gross or willful negligence, or any negligence whatever, of its employees. It claims that the appellee was not injured while on the public crossing; that whatever injuries he received occurred while he was a trespasser upon the appellant's track, and without any negligence on its part. The case was submitted to the jury for special findings; and upon their findings the circuit court gave judgment for the appellee for \$7,000 actual damages, and \$8,500 punitive damages. The case is here for review. The jury found—*First*, that between 10 and 11 o'clock at night the appellee was struck by the appellant's engine while crossing the appellant's track, where the public road leading from Owenton to Warsaw crosses the same; *second*, that the appellee, in attempting to cross the track, exercised ordinary care and diligence by looking and listening to ascertain the approach of the train.

The only positive proof as to the place where the appellee was when he was struck is furnished by his own evidence. He says that he was on the crossing. The circumstances relied on by the appellant to disprove his statements are that, when attention was directed to him by his calling for help, he was lying

¹See note at end of case.

partially on the end of the platform, about 80 feet from the crossing, and his hat was found some distance from the crossing, near the rail, with the brim cut as though the wheels of the car had passed over it; also that the shock of the collision rendered him unconscious for a time, and the further fact that he was unable to move himself when found. To counteract these circumstances, the jury had his positive statement that he was on the crossing at the time he was struck. And as none of his bones were broken, and as the shock did not immediately overcome his power to move himself,—for he did move himself before he was discovered,—said circumstances do not conclusively establish the fact that he did not move himself, although in an unconscious or dazed condition, from the crossing to the end of the platform. The jury doubtless concluded that he did, and we are not prepared to say that their finding is against the weight of the evidence.

Although the appellee was crossing the appellant's track on a dark night, yet, his purpose being lawful, he was not guilty of negligence in attempting to cross the track, provided he used that degree of care and prudence, to prevent a collision with any train that might be passing, that men of ordinary care and prudence would commonly use under similar circumstances. The jury found that he did use such care and prudence. On the other hand, the appellant's engineer, in charge of the train, testifies that the train approached the crossing on a down grade; that the air-brakes which had been put on for the purpose of decreasing the speed of the train, and stopping it in case the stop signal was displayed at the depot, were released, there being no signal displayed, within 65 or 100 yards of the crossing, whereby the speed of the train was gradually increased; that when in about 50 yards of the platform, which was about 80 feet from the crossing, he took his eyes from the track, and looked into the cab for the purpose of putting the injector, an instrument used to supply the boiler with water, to work; that when he again put his eyes upon the track he saw something, which he took to be a dog, was being struck; that he could have seen a man on the track at a distance of 60 or 70 yards. From this and other evidence the jury found that the engineer was negligent in releasing the air-brakes, thereby increasing the rate of speed to 17 or 18 miles an hour, and taking his eyes off the track, whereby the appellee was struck; that but for such negligence he could have seen the appellee in time, with the air-brakes in a condition for immediate service, to check the speed of the train so as to give the appellee time to cross the track in safety; that but for the increased speed of the train the appellee could have crossed the track in safety.

It is clear, from the evidence, that one more step would have brought off the appellee harmless; it is clear that he could have taken that step with safety but for the increased speed of the train; it is also clear that, had the air-brakes remained on, the speed of the train would not have been increased; and, if the engineer had not taken his eyes off the track, he could have seen the appellee in time, with the aid of the brakes on, to check the speed of the train so as to enable the appellee to cross the track in safety. Both appellee and appellant had an equal right to cross the track at the place of crossing. It was the duty of the appellee to use such care and caution in order to prevent injury to himself as well as the appellant and its passengers, as persons of ordinary prudence would commonly use under similar circumstances. A similar duty rested upon the appellant, not only for the protection of the appellee, but for the protection of its passengers. As the crossing was in the village of Sparta, and within a few feet of the depot, and as residences were on each side of the track, and as the train was moving down grade towards the depot platform and crossing, and as travelers on foot and with teams were likely to be traveling on the highway at the crossing at that time of night, and as the engineer could not see a person beyond 65 or 70 yards from the engine, it was but ordinary duty on the part of the appellant to use such care for the protection of

persons crossing at the crossing as was reasonably commensurate to the foregoing surroundings. Therefore, as the appellant's engineer failed to keep the train under his control, by releasing the air-brakes while the train was moving on a down grade, and as such release was at a point from which the engineer could not see whether the crossing was clear, it was proper for the court to submit the question as to whether such conduct was negligent to the jury. Also it was proper for the court to submit the question to the jury as to whether or not it was negligent in the engineer to take his eyes from the track, under the circumstances. For as the appellant was engaged in a business that involved danger, and as the danger was such as to imperil human safety, especially at said crossing at that particular time, its care should have been such as was reasonable enough to prevent the possibility of mischief, so that its occurrence might be rightfully treated as accidental, and not negligent; and the jury having found that the engineer's releasing the air-brakes, and taking his eyes off the track, was negligence, we think that, under the circumstances of this case, it was actionable negligence. We think, however, that the facts establish a case of only ordinary negligence, and not a case of gross or willful negligence. The action of the circuit court, in so far as judgment was rendered on the separate findings of the jury fixing punitive damages at \$3,500 for willful neglect, must be reversed, with directions to dismiss said claim; but the judgment of the court on the other separate finding of the jury, for \$7,000, the actual damages that the appellee sustained by reason of his injuries, is affirmed.

NOTE.

EXEMPLARY DAMAGES. Judgment cannot be rendered for exemplary damages, in an action against a railroad company for personal injuries, when the petition contains no allegation of any act or circumstance indicating either fraud, malice, gross negligence, or oppression on the part of the company, and also fails to allege any acts of its servants constituting fraud, malice, gross negligence, or oppression committed by direction of the company, or ratified by it, or that the company has been guilty of gross negligence in the selection and employment of servants whose acts constitute fraud, malice, gross negligence, or oppression. *Railway Co. v. Garcia*, (Tex.) 7 S. W. Rep. 802.

Punitive damages may be given against a defendant when the injuries received by plaintiff were intended, or occurred through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse. *Ross v. Leggett*, (Mich.) 28 N. W. Rep. 695; *Boyle v. Case*, 18 Fed. Rep. 880; *Sullivan v. Navigation Co.*, (Or.) 7 Pac. Rep. 508; *McDevitt v. Vial*, (Pa.) 11 Atl. Rep. 645; *Traction Co. v. Orbann*, (Pa.) 12 Atl. Rep. 816; *Railroad Co. v. Rice*, (Kan.) 16 Pac. Rep. 817. But the facts need not be such as would subject the defendant to a criminal prosecution. *Railroad Co. v. Randall*, (Ga.) 4 S. E. Rep. 674. Such damages, to be effectual, must have some relation to the financial ability of defendant. *Spear v. Hiles*, (Wis.) 30 N. W. Rep. 506; *Brown v. Evans*, 17 Fed. Rep. 912; *Webb v. Gilman*, (Me.) 18 Atl. Rep. 688. The fact that the plaintiff is a corporation is no objection to an award of exemplary damages. *Railroad Co. v. Telephone Co.*, (Tex.) 5 S. W. Rep. 517. Exemplary damages cannot be awarded where no actual damage has been suffered. *Schippel v. Norton*, (Kan.) 16 Pac. Rep. 804; *Kuhn v. Railroad Co.*, (Iowa), 37 N. W. Rep. 116.

TAYLOR v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. May 24, 1888.)

CRIMINAL LAW—EVIDENCE—CORROBORATION OF ACCOMPLICE TESTIMONY.

Crim. Code Ky. § 241, provides that "a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence, tending to connect defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed, and the circumstances thereof." Defendant was connected with the theft for which he was indicted, independently of the testimony of an accomplice, only by testimony that one of the things stolen had been found in a place where it was probable he had hidden it. *Held*, that defendant was entitled to an instruction embodying the entire substance of the above section.¹

¹ Concerning the necessity of corroborating the testimony of an accomplice, in order to sustain a conviction, and the extent of such corroboration, see *Blain v. State*, (Tex.) 7 S. W. Rep. 239, and note; *Wisdom v. People*, (Colo.) 17 Pac. Rep. 519, and note.

Appeal from circuit court, Harlan county.

Indictment of Dillard Taylor for house-breaking, and stealing therefrom. Judgment of conviction, and defendant appeals.

D. K. Rawlings, for appellant. *P. W. Hardin*, for the Commonwealth.

LEWIS, J. Appellant was indicted for the offense of house-breaking, and stealing therefrom, and the only evidence connecting him with the commission of it, besides that given by an avowed accomplice, was that a bottle of whisky, identified by the owner of the store-house broken, was found where it is probable the accused hid it. But that fact was explained by him, and by his mother and sister, in a manner calculated to relieve him from the charge; for those two witnesses testify, not only that the accused purchased the whisky from the person who acknowledged his own guilt, and yet testified as a witness, and hid it because his father was opposed to the use of whisky by his son, but they also state facts tending strongly to establish an *alibi*. It is therefore clear that the conviction of appellant was obtained principally, if not wholly, upon the evidence of an acknowledged accomplice, and the accused, as has been repeatedly held by this court, was entitled to an instruction to the jury given in the language of section 241, Crim. Code, which is as follows: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."

The lower court omitted from the instruction, given on its own motion, the last part of the section which we have italicized, and refused to give an instruction asked for in behalf of the accused in the language, and embodying the entire substance of that section. It is not difficult to perceive how a corroboration by another person of the testimony of an accomplice, as to the commission of the offense and the circumstances under which it was committed, might be regarded by an ordinary jury as tending to connect the accused with it, even in the absence of other evidence in fact having such tendency or reasonable effect. And hence the necessity of clearly, fully, and explicitly instructing the jury what evidence, according to law, they may, and what they may not, consider sufficient to connect the defendant with the commission of the offense. Besides, the legislature has deemed it necessary to prescribe the condition upon which the testimony of an accomplice may be received, and the rule by which juries are to be governed in determining the credibility of such testimony, and courts are not authorized to disregard the conditions, or relax or impair the rule. For that error, which we consider prejudicial to the substantial rights of the accused, the judgment is reversed for a new trial.

ELLISON v. STATE.

(Court of Appeals of Texas. April 7, 1888.)

LARCENY—EVIDENCE—VALUE.

Conviction of theft of corn, in the total absence of proof as to its value, will be set aside.

Appeal from Dallas county court; E. G. BOWER, Judge.

Information against Floyd Ellison charging the theft of corn of the value of \$2.40. Judgment of conviction, from which defendant appeals. Punishment was assessed at five days in the county jail.

Lauderdale & Cullen, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It is essential, in all prosecutions for theft, except for theft from the person, and theft of a horse, mule, ass, or cattle, to both allege and

prove the value of the property stolen. In this case the conviction is for the theft of corn, and there is no proof whatever in the record in support of the allegation of value; wherefore the conviction is not warranted by the evidence, and must be set aside. Willson, Tex. Crim. Laws, § 1285. There are other questions presented in the record, which we do not determine, because they are not likely to arise on another trial. The judgment is reversed, and the cause remanded.

ROE v. STATE.

(Court of Appeals of Texas. February 29, 1888.)

1. HOMICIDE—MURDER—INSTRUCTIONS—RIGHT TO BE HEARD BY COUNSEL.

Under the rule that a charge, if clearly erroneous, is ground for reversal, though not objected to until appeal, if it relates to a material matter, and is calculated to prejudice defendant, a charge on a trial for murder, not excepted to, to disregard the arguments of counsel, and try the case by the law given in the charge and the testimony admitted, "and allow nothing else to influence you in finding your verdict," is not a deprivation of the right to be heard by counsel so as to be cause for reversal.

2. SAME—MURDER—INSTRUCTIONS—COMMENTING ON THE EVIDENCE.

Under the rule above mentioned, language in a charge not excepted to, as follows: "In so far, in this case, as circumstantial evidence is relied on to convict,"—is not an intimation that, in the opinion of the judge, there was direct evidence in the case, so as to be cause for reversal.

3. SAME—MURDER—INSTRUCTIONS—ACCOMPLICES.

Under the rule above mentioned, in a trial for murder, a charge that the defense alleges that two witnesses are accomplices when the defense does not so allege, but claims that the two witnesses were sole perpetrators, objected to as directing the mind of the jury to defendant as principal, since upon the evidence a charge upon accomplices was required whatever was alleged by defendant, is not cause for reversal.

4. SAME—MURDER BY POISONING—SUFFICIENCY OF EVIDENCE TO CONVICT.

On trial of defendant for the murder of his wife, whom the inquest showed to have died from strychnine, evidence that he gave her as medicine a powder, saying that it was quinine; that he substituted for the paper which had contained the powder another paper like it, which had contained quinine; that defendant was seen shortly before the death, in consultation with witness C., who testified that he bought strychnine at request of defendant, who told him to explain that it was wanted to kill wolves with, and that if he was asked as to what became of it to say that he had left it in his overcoat pocket, from which it was stolen, defendant stating that his purpose was to kill some dogs, so that he could visit a woman in the neighborhood at night; that, after the death, he wished witness to go into the country; and that the wife's life was insured for \$3,000,—sustains a verdict for conviction.

5. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Objection to evidence admitted at the trial will not be considered in the absence of a bill of exceptions, or a showing in the record that objection below was made.

Appeal from district court, Grimes county; N. G. KITTRELL, Judge.

Indictment and conviction of W. H. Roe, the appellant. At about noon on the 7th day of September, 1886, Mrs. Jennie Roe, the wife of the appellant, complaining of feeling unwell, the defendant administered to her a medicine in powder, which he told her was quinine. He placed the particles in a spoonful of cold coffee. Mrs. Roe, in the presence of one of the witnesses, endeavored to dissolve the powder by stirring it with her finger, and called the defendant's attention to the peculiar appearance of the quinine. He, however, assured her that it was quinine, and that he got it from a particular drug-store. Thereupon she drank the preparation, and retired to another room of the house. She was soon taken with convulsions, and, after suffering for an hour or more, died. Examination of the stomach disclosed that death resulted from strychnine poison. Several witnesses for the state testified that they saw the defendant and one Cotton, a negro, at one time a family servant of the defendant, in close, confidential conversation, at about 11 o'clock on the fatal morning. They located the two first at a certain saloon

in Huntsville, and then in an alley-way near a certain restaurant. Cotton testified for the state that early on the morning of the fatal day he met the defendant at the saloon mentioned by other witnesses, and went from there with him to the alley at the restaurant. At that point defendant gave him 25 cents, and asked him to go to a certain drug-store, and purchase a small bottle of strychnine for him, and to explain, if asked why he wanted it, that it was for him, (Cotton,) and that he intended to use it to kill wolves. The witness asked defendant what he really wanted with the strychnine, and he replied that he wanted to poison some dogs belonging to a neighbor who had in his employ a certain negress whom he wanted to visit at night. Cotton testified that he bought the strychnine, in a small bottle, from the druggist, explaining that he wanted it to poison wolves with, (and to this extent he was corroborated by the druggist,) and took it to and gave it to defendant, who then told him that, if he was questioned by anybody about the strychnine, he must say that he put it in the pocket of his overcoat, then hanging in the restaurant, and that it was removed from that pocket by some one whom he did not know. Defendant and witness then separated, and about 2 o'clock the witness heard of the sudden death of Mrs. Roe. He was questioned, during the evening, about the bottle of strychnine he had bought in the morning, and, as directed by defendant, he represented that it was stolen from his overcoat. It was also shown that on the night of the day of Mrs. Roe's death, which was before the arrest of the defendant, the defendant went to Cotton's house, and, disguising his voice, called him. Cotton not being at home, his wife answered the call, and defendant told her that he wanted Cotton to go to the country for him on that night. The paper from which the defendant poured the powder in the spoon was taken by him from the mantel-piece. He left another paper like it on the mantel-piece. That paper, it was proved by analysis, contained pure quinine, and, it was proved by a druggist, was one of two papers of quinine sold by him to defendant a few nights before. He identified it by means of the paper, and by means of a cross-mark placed on it by defendant at the time he bought it. He put a cross-mark on both quinine papers, the witness supposed, as a means of distinguishing the quinine from Dover's powders which he bought on the same night. The quinine in the two papers came from the same bottle, and was taken out of the bottle at the same time. It was also proved that the defendant and his wife were members of the society known as the "Knights and Ladies of Honor," and that the lives of each were insured for the benefit of the other for \$2,000, and that defendant, but a few days before, paid the dues on the policies with borrowed money. He was defeated for city marshal on the day before the tragedy. The defense was directed to the impeachment of the main witnesses for the state, and proof that defendant had always been a kind and indulgent husband.

J. M. Macey and Earle Adams, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant was indicted for the murder of his wife by poison. There were two changes of venue in the case; the first at defendant's instance, and based upon both the grounds mentioned in the statute. Code Crim. Proc. art. 578. The second was at the suggestion of the defendant, but upon the court's own motion, on the ground of undue excitement of the public mind, and attempted mob violence, in Madison county, (to which the venue had first been changed,) rendering it probable that a trial alike fair and impartial to the accused and the state could not be had in said county. On October 31, 1887, the cause was brought to trial in the district court of Grimes county, to which the venue had thus finally been changed, and the result of the trial was defendant's conviction of murder of the first degree, and his punishment assessed at death. The record is voluminous, containing over a hundred pages of closely-written matter, and it shows that the case was earnestly

and hotly contested by the able and zealous counsel engaged on both sides, and yet there is not a single bill of exceptions reserved by the defendant to any ruling of the court; and no exception was saved to the charge of the court, and no special instruction requested for defendant. The motion for a new trial contained eight separate grounds of supposed error. It was overruled, and the learned trial judge has given in a writing embodied in the transcript his reasons *seriatim* for the several rulings complained of. These supposed errors are objections relating chiefly to certain portions of the charge of the court. As stated above, the charge of the court was not excepted to. In such a state of case, in order to avail of errors in the charge on a motion for a new trial, it must appear that "the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." Code Crim. Proc. art. 777, subd. 2. A charge clearly erroneous, though objected to for the first time on appeal in this court, will constitute cause for a reversal if it relates to a material matter, and was calculated to mislead the jury, to the defendant's injury. *Bishop v. State*, 43 Tex. 390. The true rule, as now recognized and settled by this court, is that "if there was a material misdirection of law applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was, under all the circumstances of the case, calculated to prejudice the rights of the defendant, this court should, for either cause, reverse the judgment." *Elam v. State*, 16 Tex. App. 34; *Lewis v. State*, 18 Tex. App. 401; *Hart v. State*, 21 Tex. App. 163; *Leache v. State*, 22 Tex. App. 280, 3 S. W. Rep. 539; *Smith v. State*, 22 Tex. App. 316, 3 S. W. Rep. 684; *Jackson v. State*, 22 Tex. App. 442, 3 S. W. Rep. 111; *Cook v. State*, 22 Tex. App. 511, 3 S. W. Rep. 749.

Let us apply these tests to the particular portions of the charge complained of in this case. In the fifth paragraph, the instruction is: "What counsel on either side may say, in the course of argument, as to their personal belief in the guilt or innocence of the defendant, is not in any degree evidence, and as such will be entirely disregarded by you, and you will try the defendant wholly by the law as given you in this charge, and by the testimony admitted to go before you, *and allow nothing else to influence you in finding your verdict.*" We have italicized the portion which is the subject-matter of complaint. It is insisted that to instruct the jury thus was equivalent to telling them that they should pay no regard whatsoever to the arguments made by counsel in behalf of the defendant, and contravened the tenth section of our constitutional bill of rights, which guaranties to an accused in all criminal prosecutions "the right of being heard by himself or counsel, or both." Mr. Cooley says: "With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." Cooley, Const. Lim. (4th Ed.) 412. "At *nisi prius* trials, the right of being heard cannot be denied the accused. In *Word v. Com.*, 3 Leigh, 745, it was held that, upon the trial of a question of fact in a criminal case, the accused has the right to be heard by counsel before the jury, and the court has no right to prevent him from being heard, however simple, clear, unimpeached, and conclusive the evidence, in its opinion, may be." And in *People v. Keenan*, 13 Cal. 581, the court say: "It is unquestionably a constitutional privilege of the accused to be fully heard by counsel." *Tooke v. State*, 23 Tex. App. 10, 3 S. W. Rep. 782. "It is said that every party to a trial, civil or criminal, has the legal as well as natural right to be heard in his own cause by himself or counsel; and no rule of practice can deprive him of this right if, at the proper time and in the proper way, he offers to exercise it." *Sodousky v. McGee*, 4 J. J. Marsh. 271. Another court has said that "a party to a civil action has a right to be heard, not only in the testimony of his witnesses, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be, if it is enough to present a disputed question of fact upon

which he is entitled to the verdict of the jury, he has a right to present in the arguments of his counsel his view of the case. This is no matter of discretion on the part of the court, but an absolute right of the party. *Douglass v. Hill*, 29 Kan. 527." In criminal cases the right of accused persons to be defended by counsel is a right of a very high nature, which is guarantied by the constitution of the United States, and by the constitutions of most of the states. Under these constitutional guaranties it is the unquestioned right of every person tried upon a charge of crime to be heard, by the court and jury, through the lips of counsel learned in the law, upon the whole case." 9 Crim. Law Mag. 612-614. In a civil case this identical question came before the supreme court of Georgia, and because the views, language, and conclusions of that court are, in our opinion, worthy of all approval, we reproduce what was said by NISBET, J., on the subject. He says: "The court, further, as we have seen, charged the jury that, in determining this question, they were not to look to the argument of counsel. Upon this subject, we can lay down no precise rule. In a very significant sense, they must look to the argument of counsel. Parties have a right to be heard by counsel, and it is the privilege of counsel to address the jury on the facts. If the jury are to disregard the arguments of counsel altogether, if they are to shut their eyes to their illustrations, comments, and reasonings, how unmeaning, indeed how absurd, is the appearance of counsel. It is a most valuable right to be represented by learned and eloquent counsel, not only before the court as to the law, but also before the jury as to the facts. It means something; it is a guaranty against the encroachments of power upon the personal rights of the citizen. It is in this country no mean privilege. So far as the facts in the case are concerned, the privilege is valuable just because the jury may look to the argument of counsel,—may consider his reasoning before making up their verdict. I do not suppose the judge in this instance intended to instruct the jury that they should not listen to and avail themselves of the aid of the argument of counsel in coming to a decision in this case. He meant that the argument of counsel should not be to them a basis of decision. He meant to say that the statements and inferences of counsel are not the criterion of their judgment, but that the evidence is. In this view of the charge, it is not at all objectionable. The true view of the position of counsel before the jury is that of aids or helps. * * * His business is to comment on the evidence; to sift, compare, and collate the facts; to draw his illustrations from the whole circle of the sciences; to reason with the accuracy and power of the trained logician, and enforce his cause with all the inspirations of genius, and adorn it with all the attributes of eloquence. It is the business of the jury to listen, to be informed, but not to obey. They sit the sworn arbiters of the cause, bound by the most solemn sanctions to do justice between the parties according to the evidence." *Garrison v. Wilcoxson*, 11 Ga. 154. A very nice and most serious question would have been presented in the case we are considering had this portion of the charge been specially excepted to. This, however, was not done, and the question is, was it calculated, under the facts and circumstances of the case, to injure the rights of defendant? In view of the explanation made by the learned judge, we think not. He says: "As to denying the right to be heard by counsel, I allowed four counsel to speak for the defense,—all that they asked; and gave them unlimited time, the four aggregating seven hours."

It is strenuously insisted that serious injustice was done the defendant in that portion of the sixth paragraph of the charge contained in the words: "The facts of any case may be established either by direct or circumstantial evidence, and in so far, in this case, as circumstantial evidence is relied on to convict." The contention is that the language "In so far, in this case, as circumstantial evidence is relied on to convict," intimated to the jury that, in the opinion of the court, there was direct evidence of defendant's guilt,

and that the jury were doubtless thereby misled, and influenced prejudicially to defendant's rights. This charge was not excepted to. Viewing it in connection with the other portions of the charge and with the evidence, we cannot say it was unwarranted, misleading, or calculated to injure the rights of the accused, or a charge upon the weight of the evidence.

Again, the tenth paragraph of the charge is claimed to be unjust, unwarranted, and prejudicial to defendant, in that it told the jury that "the defense alleges in this case that if Jennie Roe was murdered by poison, as alleged, that the witnesses Ann Derry and Lewis Cotton stand to such crime in the relation of accomplices;" whereas, on the contrary, defendant's counsel alleged nothing of the kind, but claimed that Ann Derry and Lewis Cotton were themselves the principals in the crime, and that the defendant had no hand in it. It is claimed that the charge directed the mind of the jury to the defendant as the principal. This portion of the charge was not excepted to. Under the facts of the case as developed by the evidence, it was the bounden duty of the court, as was done in all the varied phases presented, to charge the jury fully as to the law of accomplices, accessories, and *particeps criminis*. If not "alleged" by defendant, still the evidence required that the jury should consider the relationship of Derry and Cotton to the murder, both of whom defendant was endeavoring to implicate in the crime as principals; and, if not principals, then to determine their complicity, if any, and, if they were *particeps*, then the necessity for corroboration of their testimony. Taking the whole of the charge, together with the evidence on this phase of the case, and we are unable to declare that prejudicial or reversible error has been committed in this particular. *Coleman v. State*, 44 Tex. 109.

Objections urged to other portions of the charge are, in our opinion, without merit, and therefore will not be discussed, and especially so in view of the fact, repeatedly stated, that no exceptions were reserved to the charge. Over and above the questions already discussed relative to it, in our opinion, the charge was a full and explicit exposition of the law, and so presented as carefully to guard and protect all the material rights of the defendant in connection with the evidence.

One or more complaints are made to evidence which was permitted to be introduced. There is no bill of exceptions saved to any evidence introduced on the trial, and the record fails to show even that any objection was made to the introduction of any of the evidence. "The action of the court below in receiving alleged incompetent evidence is not reversible by this court in the absence of a bill of exceptions (in the statement of facts or separately) showing that such evidence was objected to when it was first offered." *Conner v. State*, 17 Tex. App. 1.

A last ground of contention upon the part of the appellant is that the evidence does not sustain the verdict and judgment. On the contrary, it is claimed that they are against the evidence. To this we cannot agree. The evidence is amply sufficient if the state's witnesses are to be believed, as it seems they were both by the jury and the judge presiding at the trial. If they are to be credited in their statements, then those statements and surrounding circumstances establish a case against defendant entirely free of any reasonable doubt. In so far as we can see, defendant's trial was a fair and impartial one, and by a jury presumably free from all chances of having been biased or prejudiced against him. He has been defended by learned, skillful, and distinguished counsel. We have listened to their able arguments, and have maturely considered their able briefs in his behalf. We have examined the record most carefully in the light of the argument and briefs; and our deliberate conviction is that no error has been shown of sufficient magnitude to justify us in setting aside the verdict and judgment which condemn this appellant to death. If guilty, no punishment is too severe for one who willfully, deliberately, and with malice aforethought could take the life of his

own innocent and confiding wife, by means of poison; and that, too, when actuated solely by the motive to obtain the paltry sum for which her life was insured. If guilty, this appellant's case is totally without the slightest extenuating circumstance to palliate its enormity. The judgment is in all things affirmed.

MALCOLMSON v. STATE.

(Court of Appeals of Texas. March 17, 1888.)

1. EMBEZZLEMENT—BY OFFICER OF CORPORATION—INDICTMENT.

Defendant was indicted for embezzling the money of a corporation of which he was secretary and treasurer. It appeared that by virtue of his office he was custodian of the company's books, and took charge of and received all of its money. Held that, an indictment alleging that defendant embezzled \$500 lawful money of the United States, a more particular description of which could not be given, need not allege the kind of money, that it was current, or from whom it was received.

2. SAME—EVIDENCE.

The secretary and treasurer of a corporation was indicted for embezzling its money. On trial, evidence was admitted showing that defendant, with an ex-president of the company, had conveyed some of its land for worthless stock. Held, that such evidence was inadmissible, and as it prejudiced the defendant, and it did not appear to a reasonable certainty that he was guilty as charged, the case would be reversed. WILLSON, J., dissenting.

3. SAME.

On a trial for embezzling the money of a corporation, it is not error to admit evidence showing that defendant, who was secretary and treasurer of the company, and handled all its money, purchased, with funds of the corporation, a span of horses and a set of harness, and afterwards sold them and appropriated the proceeds.

4. SAME—INSTRUCTIONS.

In such a case it was not error to refuse to charge that the jury could not convict for converting the horses, as the evidence only showed that defendant received certain money from this source, which he did not account for.

Appeal from district court, Parker county; G. A. McCALL, Judge.

This conviction was for the embezzlement of \$500 of the money of the Franco-Texan Land Company, and the penalty assessed was a term of two years in the penitentiary. The state proved that the Franco-Texan Land Company was a private corporation, incorporated under the law of this state, and that the defendant was the legally elected and qualified secretary and treasurer of the same, and held that office during the months of August, September, October, November, and December, 1885, during which latter month he was removed. His duty, as treasurer, was to receive and disburse the moneys of the company, and to keep a correct account of the same, balancing the books at the close of each day. The books of the concern, the extracts from which, covering the period of the defendant's service, fill a large number of pages of the transcript, were introduced in evidence by the state. The secretary and treasurer, who succeeded the defendant, testifying, with respect to these books, stated that they showed the defendant, when he went out of the service of the company, to be short in the cash account of the company largely in excess of \$500. It was also proved that, without authority either of the president or of the board of directors, he bought, with \$385 of the company's money, a buggy and harness, and that he charged the said \$385 to the company; that he afterwards sold the same for the consideration of \$150 and the discharge by the purchaser of some of his private debts. It was also proved that, subsequent to the removal of himself and the ex-president of the company, but while they were claiming their removal to be void and unauthorized and that they were yet officers, the defendant joined the said ex-president in the conveyance, in the name of the company, of a tract of land to one Milliken, in consideration of certain shares of the stock of the said

company. The rulings of this court relate directly to the evidence as to the buggy and land transactions. The testimony for the defense related chiefly to the manner of transacting the business of the concern, and did not meet the testimony of the present secretary and treasurer to the effect that the books, at the time of defendant's supersession in office, showed him to be in arrears with the company in a sum exceeding \$500.

A. T. Watts, E. P. Nicholson, and L. F. Smith, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. Appellant was convicted at the June term of the district court of Parker county of embezzlement, from which conviction he appeals here, and by counsel assigns numerous errors for a reversal of the judgment. Several objections are urged to the sufficiency of the indictment, some of which will be noticed, to-wit: (1) That said indictment fails to allege the names of the persons from whom the \$500 were received by defendant; (2) that it does not state the kind of money received,—whether said money was gold, silver coin, national bank or treasury notes of the United States, or whether the same was United States paper money authorized by law. Under the facts of this case, the indictment alleging that a more particular description of said money cannot be given, we hold the indictment sufficient. The record shows that the Franco-Texan Land Company was organized July 25, 1876. At a meeting of the shareholders of the company on July 30, 1885, appellant was elected its secretary and treasurer. This position he held until some time in December, 1885. By virtue of the by-laws of said company, the secretary and treasurer was the custodian of the books of the company, and received the moneys of the same. Appellant took charge of the money belonging to the company when elected, and he received moneys from all sources as treasurer, until he was superseded by another treasurer, some time in December, 1885. Under this state of case, it would be very remarkable indeed if the prosecution could, with any degree of certainty, show the character of moneys, or from whom they were received, etc. This would, in most of such cases as this, be a moral impossibility; and to hold that the indictment should allege and the state prove these facts would be monstrous. The result of such a doctrine would protect from just punishment those whose guilt could be made absolutely evident by the clearest proof. The indictment alleges that the appellant embezzled "\$500 lawful money of the United States of America of the value of \$500, a more particular description of which the grand jury cannot give." Under the facts of this case, this is all that could have been alleged with certainty or safety. It is urged in the brief of counsel for the appellant that for the offense of embezzlement of money the indictment must charge that the money was current money; citing us to *Williams v. State*, 5 Tex. App. 116; *Boyle v. State*, 37 Tex. 359; *Block v. State*, 44 Tex. 620. In some cases such a description would be necessary, but not in cases like this.

There was evidence introduced by the state showing that appellant, without authority, purchased two horses and a set of harness, charging the same to the company. There was also evidence introduced by the state, over objection of defendant, showing that appellant sold the same to Jasper Haney. In this there was no error. This property was purchased with funds of the company, and the money obtained from Haney by its sale belonged to the company, and went into the hands of appellant, he being responsible for it to the company as its treasurer; and if he embezzled it he should be held criminally liable.

It is objected that the court failed to instruct the jury that they could not convict appellant for a conversion of the horses and harness, or for a sale of the same by him. There was no attempt to convict him for either of those acts. This transaction was shown for the purpose of proving that appellant received from this source a certain amount of money, for which he was re-

sponsible to the company. It went to make up the grand total received by him as treasurer of said company.

Over objection of appellant, the state read in evidence a deed from the company signed by R. W. Duke as president, and attested by appellant as secretary, conveying to C. H. Milliken nine sections of land situated in Nolen county, for 520 shares of the capital stock of said company. Appellant was on trial for embezzling the money of the company. What legitimate purpose the exchange of the company's land for stock would serve we cannot perceive. In the brief of the state it is urged that this transaction was fraudulent; that the company in fact received nothing for the nine sections of land; that the deed was executed after Duke ceased to be president of the company, which fact was known to appellant. There is evidence showing that this transaction, to say the least of it, was not at all profitable to the company. If not fraudulent in fact, it was sought to be made to appear so to the jury. There was no fact in this record, legitimately bearing upon the case being tried, which was, in our opinion, in the slightest manner elucidated by this land transaction. It was not in itself competent evidence tending to prove the embezzlement, nor did it tend remotely to explain any material fact in the case. Its effect, therefore, was to place appellant before the jury as a corrupt man, capable of committing at least a fraud upon the rights of the company for which he was then the secretary and treasurer. This land and stock transaction was foreign to this prosecution, and to meet which it is not at all probable that appellant was prepared, and its development to the jury was unquestionably calculated to prejudice his case with those called upon to pass upon the really material facts of the case. See this subject elaborately discussed in *State v. Lapage*, 57 N. H. 245. See, also, 1 Phil. Ev. (7th Ed.) 181; Starkie, Ev. 490; 1 Chit. Crim. Law, 504; *State v. Renton*, 15 N. H. 169; *Shaffner v. Com.*, 72 Pa. St. 60. We are cited by the state, in support of the admissibility of this transaction in evidence, to *Leonard's Case*, 7 Tex. App. 417, and to *Cox's Case*, 8 Tex. App. 256. Neither of these cases has any bearing upon the matter under consideration.

While this transaction was not competent evidence, it does not follow that the judgment must necessarily be reversed, for it is not every error of this sort, namely, the admitting of incompetent evidence, which works a reversal of the judgment. There must be probability of injury to the accused. On the other hand, when we look to the use which this matter was made to serve, there can be no question of its damaging effect upon the cause of defendant. This being the case, this court will not pause to consider the extent of the wrong, but will reverse the judgment. Let us view this matter from another stand-point. We have repeatedly read the facts of this case, earnestly endeavoring to understand them clearly, and, if we do comprehend them, then we are not perfectly satisfied that they show appellant's guilt with reasonable certainty. We cannot with perfect safety and certainty place our finger on the facts which reasonably show that the appellant embezzled any of the money of the company. We are not to be understood as holding the evidence insufficient to support the verdict. All we mean to say is that the facts leave some doubt in our minds of the guilt of the appellant; that the case is not perfectly free from doubt; that it is left at least in some uncertainty; and that the guilt of appellant is not rendered so clear and certain as to render harmless the land and stock transaction. If, therefore, in a case where there is a conflict of testimony, or a case in which the jury would be justified from the meagerness or uncertainty of the evidence in finding a verdict of not guilty, and still the evidence is such as to require an affirmance of the judgment by this court if the jury should convict, the admission of incompetent evidence, with the slightest tendency to injury, or to place the accused in an odious light before his jurors, should and will be ground for a reversal of the judgment. We are of opinion that, under the facts of this case, there

was error in admitting this matter in evidence, calculated to work serious wrong to the appellant, for which the judgment is reversed and the cause remanded.

WILLSON, J., (dissenting.) I do not concur in the opinion of the majority of the court that it was error to admit the testimony relating to the land and stock transaction. I think that testimony was admissible. This is a case of circumstantial evidence. Every fact which tends to throw light upon the transaction; which is even remotely connected with the crime charged; which, even though slightly, tends to develop the *animus* of the defendant,—his good or bad faith with reference to the funds and business of the company of which he was an officer,—is admissible against or for him. When the inculpatory evidence is circumstantial in its nature, the mind seeks to explore all sources from which light, however feeble, may be derived. In the investigation of such cases, therefore, greater scope is allowable than when the evidence is direct and positive. *Preston v. State*, 8 Tex. App. 30; *Washington v. State*, Id. 377; *Simms v. State*, 10 Tex. App. 131.

It seems to me that the transaction with regard to the land throws some light upon the charge of embezzlement. The land was the property of the company,—a part of its assets. Defendant joined the ex-president of the company in conveying this land to one Milliken for the stock of the company, which stock was valueless. Defendant knew, at the time he joined in this conveyance, that the ex-president had no authority to dispose of said lands. It was an attempted fraud upon the company, and defendant knew it was a fraud, and the evidence is pretty strong that he intended it as a fraud at the time. A fair inference from the evidence bearing upon this transaction is, I think, that Duke, the ex-president, Milliken, and the defendant were acting together in concert to deprive the company of these lands. Who was to be benefited by the transaction does not clearly appear from the evidence, except that Milliken was getting the lands for a valueless lot of stock in the company, and it is reasonable to suppose that Duke and the defendant were promised or expected a fair divide in case the scheme should succeed. Now, I ask, does not this transaction tend to show the attitude of the defendant to the company at that time? Does it not tend to show that he was not cautiously guarding the interests of the company, as it was his duty to do? Does it not tend to show that he was not only willing, but was intending and aiding, to appropriate wrongfully, without authority, the assets of the company? Does it not tend to show system, design, scheming on his part to defraud the company? Does it not tend to show a fraudulent, corrupt intent on his part with respect to the property and interests of the company? It appears to my mind that it has such tendency, and is therefore pertinent and relative to the issue, as much so as any other circumstance proved.

In my opinion there is no error in the conviction, and I think the judgment should be affirmed. Reversed and remanded.

GRAVES v. STATE.

(Court of Appeals of Texas. April 4, 1888.)

LARCENY—FROM THE PERSON—WHAT CONSTITUTES.

On a trial for theft from the person, it appeared that defendant snatched money from the vest pocket of complaining witness, and offered to bet with it; that they stood talking at arms-length for about 10 minutes, when, after taking a drink, witness asked for his money. Defendant said he had returned it, and asked to be searched. He afterwards went away a short distance out of sight of witness, then returned, and was searched, but the money was not found. *Held*, under Pen. Code Tex. art. 737, providing that, if the taking was lawful, to constitute theft the property must be obtained by some false pretext, or with the intent to deprive the owner of the same, that the evidence did not warrant a conviction.

Appeal from district court, Collin county; H. O. HEAD, Judge.

Lawrence Graves was indicted for theft from the person. Trial and conviction, and the penalty assessed at two years in the penitentiary. Defendant appealed.

W. M. Abernathy, and *J. A. Evans*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is a conviction for theft from the person. The testimony of the prosecuting witness is, in effect, as follows: "I know the defendant. I saw him about the latter part of November, 1887, in McKinney, in Hedrick's store. * * * We sat about the store until about 12 o'clock. At this time a man by the name of Williams, and George Banks, Anderson Bell, and George Washington were in Hedrick's back room, talking. Defendant took a ten-dollar bill from my vest pocket. I saw him take it. It was taken quickly,—almost in a second. He just dipped his fingers into my pocket, and pulled it out as quick as he could. The bill was a ten-dollar bill, and was taken without my consent. * * * After the defendant took my money we stood around talking, and then took a drink of whisky, and I demanded my money of defendant, who denied he had it, and said he had given it back to me. After talking awhile, some one proposed a search, and defendant at once left, and went some sixty feet, and out of my sight. Mr. Hedrick stepped to the door, and called him back. He came back, and was searched, but no money was found on him. * * * I was offering to bet Williams that my horse could outpull any horse in town. Williams wanted to bet on a horse. While this was going on between us, defendant stepped up, took the money from my vest pocket, and said, 'You haven't got any nerve to bet,—I will bet him;' and stood there at arms-length, talking about the bet for ten minutes, when we all took drinks, and I then asked defendant for my money, and he denied having it; said, 'Search me;' and I did so, and failed to find it. * * * While defendant stood by me with my money, he had it in his hand, twirling it in his fingers, and I made no objection in any way, and did not object to the bet he was offering to make with Williams. I said nothing about it one way or the other. I could reach him, without moving, at any time during the ten minutes. I never tried to stop him, or to retake my money. * * * I was sober, but I think Graves was drunk, and all the others nearly so." The above testimony presents the case more strongly against the appellant than the evidence of the other witnesses.

In theft, general or from the person, the taking must be without the consent of the owner; or, though lawful, (with consent,) possession of the property must be obtained by some false pretext, or with intent to deprive the owner of the value of the property, and appropriate it to the use of the taker, with an actual appropriation. If there be consent to the taking, and this consent is not obtained by false pretext, or there is no intent to deprive the owner of the value, accompanying the taking, there can be no theft, under articles 745 and 748 [727] of the Penal Code. That there was no false pretext used by appellant is clear; hence, to convict under this indictment, the proof must show that the fraudulent intent existed at the time of the taking. This must be shown to the jury beyond a reasonable doubt, and to this court with reasonable certainty. Applying the facts of the case to these rules, they (the facts) fail to establish the intent with reasonable certainty, and to hold them sufficient to sustain the verdict would be a dangerous precedent. If, when appellant took the money, he believed he had the consent of the owner, in the absence of false pretext, he is not guilty of theft, though he may afterwards convert the same to his own use; and, notwithstanding the learned judge gave to the jury a very clear and excellent charge in all other respects, we think the circumstances of this case demanded that this proposition should be submitted to the jury, it having been requested by the defense.

Because the evidence is not sufficient to support the verdict, and because the court failed to give the fourth charge requested by the defendant, the judgment is reversed, and the cause is remanded.

TARIN v. STATE.

(Court of Appeals of Texas. May 2, 1888.)

LARCENY—EVIDENCE—SUFFICIENCY—POSSESSION OF STOLEN GOODS.

On a trial for larceny, it appeared that defendant, having been found in possession of the goods alleged to have been stolen, explained his possession, and he also introduced evidence tending to corroborate such explanation. The state offered no evidence that the explanation was false, or rebutting his testimony in support thereof. *Held*, that the evidence was insufficient to support a conviction.¹

Appeal from district court, Atascosa county; D. P. MARR, Judge.

Lorenzo Tarin was convicted of the larceny of ten head of horses, and the penalty assessed was a term of seven years in the penitentiary.

Ast. Atty. Gen. Davidson, for the State.

WILLSON, J. Defendant, on the day he was first seen in possession of the mares, explained his possession by stating they were sent from Mexico to defendant's mother by her husband, one Ortez, for the children of said Ortez; that they were in the brand of said Ortez; and that they were brought from Mexico by Bernardo Ortez, the father of said grantor.

On the trial of the case the state proved said explanation, but failed to prove that it was false. On the other hand, the defense proved that Bernardo Ortez brought and delivered to one Osten, for the use and benefit of defendant's mother and children, certain mares similar in description to those sold by defendant to Tullos, and executed therefor a bill of sale, which was read in evidence, and the defendant's mother testified that the mares sold by the defendant were some of the same which were brought to her by said Bernardo Ortez, and that she directed the defendant to sell them to said Tullos. There was no testimony directly rebutting or contradicting defendant's explanation, or the testimony in support thereof. There is nothing in the evidence which shows his explanation to be unreasonable or probably not true. Besides the fact that he had possession of the mares, and sold them, there is no other fact of any importance in evidence, even tending to establish his guilt of the theft of them. We are of opinion that the conviction is not sustained by the evidence.

The judgment is reversed, and the cause is remanded.

THURMOND v. STATE.

(Court of Appeals of Texas. May 2, 1888.)

FORGERY—UTTERING FORGED INSTRUMENT—PLEDGING FORGED BILL OF EXCHANGE.

Pledging a forged negotiable bill of exchange as security for the payment of goods taken on credit, with knowledge that it is forged, is as much the uttering of a forged instrument, denounced by Pen. Code Tex. art. 443, as giving it in payment.

Appeal from district court, Colorado county; GEORGE McCORMICK, Judge.

S. W. Thurmond was indicted, tried, and convicted for uttering a forged instrument, knowing it to be forged, and was sentenced to two years' imprisonment in the penitentiary. Defendant appeals.

Ast. Atty. Gen. Davidson, for the State.

WILLSON, J. Exceptions to the indictment were properly overruled, as the indictment follows the statute, and is in accordance with precedents. Penal

¹See *Young v. State*, (Fla.) 3 South. Rep. 881, and note.

Code, art. 443; *Johnson v. State*, 9 Tex. App. 249; 1 Whart. Prec. Ind. §15, §16. Defendant requested the court to charge the jury as follows: "Knowingly passing as true such forged instrument as described in the indictment is putting such forged instrument off in exchange or payment. Pledging, however, such instrument in writing, to be redeemed at a future day, is not a passing within the meaning of article 443 of the Penal Code, under which defendant is being tried. The forged instrument, alleged to have been knowingly passed as true, purports to be what the law terms a negotiable bill of exchange, and which is negotiable in law only by the indorsement of the payee, that is, the party to whom the bill is made payable, which is done by the act of the payee writing his name across the note and the like, which, when done by the payee and delivered to the purchaser for a valuable consideration, passes the legal title to the purchaser, and without such indorsement no legal title to the bill can pass to the purchaser. And though you may believe, from the evidence, that the written instrument described in the indictment was a forged written instrument, and that the defendant pledged the same to George Herder with the understanding that it was to be redeemed at a future day by him, it is not knowingly passing as true a forged instrument in writing within the meaning of article 443 of the Penal Code, and you will acquit the defendant." Said instruction was refused by the court, and defendant excepted. It cannot be questioned that the instruction would have been applicable to the evidence. We are of opinion, however, that it is not the law, and was properly refused. It has been held in one case, by a divided court, that a mere pledge of a written instrument was not a passing of it. *Gentry v. State*, 3 Yerg. 451. The opinion in that case cites no authority, and advances no reason for its support, merely declaring that pledging a note is not passing it within the meaning of the statute. Mr. Bishop, in his work on Statutory Crimes, questions the correctness of the decision, and suggests that there is no difference in principle between passing a thing in pledge and giving it in conditional payment. Section 808. We agree with Mr. Bishop. We can see no difference in principle between pledging a note as security for the payment of a debt and delivering it in payment of a debt, with the agreement that it should be taken back if it should prove not to be genuine. *Perdue v. State*, 2 Humph. 494. We think that, to constitute the offense defined by article 443 of the Penal Code, all that is required is that a person, knowing that an instrument in writing is a forgery, deliver it to some other person as true and genuine, with the intent to thereby injure and defraud. It matters not, we think, that the complete legal title to the instrument does not pass by the delivery. The instrument itself is passed, its possession is changed, and this change of possession, accompanied by a knowledge on the part of the accused that it is a forged instrument, and by the intent on his part to defraud, constitutes the crime as completely as if the legal title to the note passed with the possession thereof. In the case before us the defendant delivered the note to Herder as security for the payment of the price of merchandise purchased by him of Herder. He delivered the note to Herder as a true note, and as such Herder received it, and delivered the merchandise. The evidence sufficiently shows that the note was forged, and that the defendant, at the time he delivered it to Herder, knew that it was forged.

As we view the case, there is no error in the judgment, and it is affirmed.

CHAMBERLAIN v. STATE.

(Court of Appeals of Texas. May 5, 1888.)

LARCENY—INSTRUCTIONS—EVIDENCE TO SUPPORT.

On an indictment for larceny of a watch, it appeared that defendant placed a roll of money in the hands of one person, and the prosecuting witness placed his watch in the hands of another, and that they agreed that when the roll of money, or fifty dollars of it, was delivered to the prosecuting witness, the watch should be deliv-

ered to defendant. *Held*, that an instruction containing the words, "and the watch to be delivered after the money delivered by the defendant had been counted by the owner of the watch," was erroneous, as being based upon facts not proved on trial.

Appeal from district court, Caldwell county; H. TRICHMUELLER, Judge.

This conviction was for the larceny of a watch, the property of one Lamson, of the value of \$20. The penalty assessed was a term of two years. According to the testimony for the state, the defendant, in the presence of two others, proposed to buy Lamson's watch for \$50. He exhibited a roll of money, and Lamson agreed to make the sale. He then proposed that Lamson should place the watch in the hands of Bob Chamberlain, and that he would place the roll of money in the hands of Ed Clark, and that when Ed Clark had counted out the \$50 to Lamson, which he was to do at once, Bob Chamberlain should deliver him the watch. Lamson agreed, and handed the watch to Bob Chamberlain, and defendant handed the roll of money to Clark. Bob Chamberlain at once handed the watch to defendant, and Clark handed Lamson the roll of money, which, upon opening, he found to contain a one dollar greenback bill and a mutilated one hundred dollar Confederate States note. Lamson protested against this transaction, but did not recover his watch. The witnesses for the defense testified, in substance, that, in the course of a conversation about the sale of the watch, Lamson proposed to sell it to the defendant for a roll of money which defendant had in his hand. Defendant agreed, and Lamson proposed that the money be delivered to Clark, and the watch to Bob Chamberlain, and that, upon the delivery of the roll to him by Clark, Bob Chamberlain was to deliver the watch to defendant. Nothing whatever was said about \$50 or any other amount of money. The transaction was accomplished in the manner indicated; and when Lamson opened the roll, and found it to contain a greenback one dollar bill and a Confederate one hundred dollar bill, he said: "Well, I am bit, but it is a fair trade. I never made a trade in my life without getting bit."

Storey & Storey, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. In a criminal case it is required that the charge of the court "shall distinctly set forth the law applicable to the case." Code Crim. Proc. art. 677. "The law applicable to the case" has been construed to mean the case as made by the evidence. *Priesmuth v. State*, 1 Tex. App. 480; *Hudson v. State*, 40 Tex. 15. The sixth subdivision of the charge complained of is as follows, viz.: "If you find from the evidence that the parties made an agreement to the effect that the owner of the watch agreed to sell it to the defendant for the specified sum of fifty dollars; that the watch and roll of money were to be placed into the possession of other parties, *and the watch to be delivered after the money delivered by the defendant had been counted by the owner of the watch*; and if you further believe from the evidence that money of the represented value of fifty dollars was not delivered by the defendant; that he acquired possession of the watch, and appropriated it without paying for it, according to the terms of the ostensible agreement; and that he did so by a false pretense and device, and with the fraudulent intent to deprive the owner of the value of the watch,—such facts will be sufficient in support of the offense as charged." Defendant saved a bill of exception to this paragraph of the charge. We have italicized that portion of it which it is claimed is not warranted by the facts proved in the case, viz., "and the watch to be delivered after the money delivered by the defendant had been counted by the owner of the watch." There is no evidence in the record that the agreement was that the watch should not be delivered until the owner had counted the money delivered by defendant. Lamson, the injured party, testified that the agreement was that "Clark should count out the money to me;" and this is the only evidence as to the counting of the money before de-

livery of the watch found in the record. Now, it is in proof by all the witnesses that the watch was delivered before the money was counted by Lamson. Under the charge of the court, the delivery of the watch before Lamson counted the money would be both wrongful and unlawful, as would also have been its possession by defendant; the condition precedent not having been complied with. This was making the illegality and wrongful possession by defendant depend upon a different circumstance, contract or condition to the one stated by the witness as that agreed upon by the parties. We cannot say how far this error in the charge was calculated to injure the rights of defendant. It was not warranted by the case as made by the proof, and was promptly excepted to at the time by defendant, because there was no evidence to support it. Code Crim. Proc. art. 686. The other matters complained of are of a character not likely to arise upon another trial. For the error discussed the judgment is reversed, and the cause remanded.

KIMBROUGH v. STATE.

(Court of Appeals of Texas. May 5, 1888.)

GAMING—EVIDENCE—SUFFICIENCY.

On an indictment for permitting a game of *monte* to be played in a house under defendant's control, the evidence is insufficient to warrant a conviction where it appears that the game was played during the occupancy of the house by a tenant who was then in possession and carried the keys.

Appeal from Williamson county court; W. M. KEY, Judge.

J. C. Kimbrough was indicted for permitting a game of *monte* to be played in a house under his control. There was a conviction, and defendant appeals. *Makemson & Price*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It is charged in the indictment that the defendant permitted the game of *monte* "to be played in a house under his control." We are of opinion that the evidence does not sustain this charge. At the time the game of *monte* was played in the house in question, said house was in the possession and under the control of one Holcomb, he having rented the same from Hardeman and defendant, to whom it belonged. Holcomb occupied the house, carried the keys to it, and had the complete and sole control of it. Such is the uncontradicted evidence before us. There is no evidence whatever that, at the time the game of *monte* was played in the house, the defendant had any control or any right to control the house. The judgment is reversed, and the cause remanded.

PANCHO v. STATE.

(Court of Appeals of Texas. May 5, 1888.)

INFORMATION AND INDICTMENT—SUFFICIENCY—DESCRIPTION OF DEFENDANT.

Under Code Crim. Proc. Tex. art. 430, subd. 4, providing that an information shall contain the name of the person accused, or state that his name is unknown, and give a reasonably accurate description of him, and article 436, requiring that, in alleging the name of defendant or other person in an indictment, it shall be sufficient to state one or more of the initials of the Christian name and surname, a complaint and information describing the accused as "one Pancho" are fatally defective.¹

Appeal from Travis county court; J. M. BRACKENRIDGE, Judge.

Complaint and information against one Pancho for gaming. Judgment of conviction, and defendant appeals.

A. S. Houston, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

¹ See, also, *Persqual v. State*, post, 477.

WHITE, P. J. In both the complaint and information the only allegation as to the name or description of the accused is "one Pancho." One of the requisites of an information is "that it contain the name of the person accused, or [it] be stated that his name is unknown; and give a reasonably accurate description of him." Code Crim. Proc. art. 430, subd. 4. A similarly substantial requisite is prescribed for indictments. Code Crim. Proc. art. 420. It is further provided that, in "alleging the name of the defendant or any other person necessary to be stated in an indictment, it shall be sufficient to state one or more of the initials of the Christian name and the surname." Code Crim. Proc. art. 425. These provisions of the statute have been construed by this court, notably in the case of "*Victor, a Mexican*," v. *State*, 15 Tex. App. 90, where that description of the accused was held insufficient. See, also, *State v. Vandever*, 21 Tex. 335; *Brewer v. State*, 18 Tex. App. 456.

The complaint and information are fatally defective, and therefore the judgment is reversed, and the prosecution dismissed.

PERSQUAL v. STATE.

(Court of Appeals of Texas. May 5, 1888.)

INFORMATION AND INDICTMENT—SUFFICIENCY—DESCRIPTION OF DEFENDANT.

Under Code Crim. Proc. Tex. art. 430, subd. 4, providing that an information contain the name of the person accused, or it be stated that his name is unknown, and give a reasonably accurate description of him, and article 425, requiring that, in alleging the name of defendant or other person in an indictment, it shall be sufficient to state one or more of the initials of the Christian name and surname, a complaint and information describing the accused as "one Persqual" are fatally defective.

Appeal from Travis county court; J. M. BRACKENRIDGE, Judge.

Complaint and information against one Persqual for gaming. Judgment of conviction, and defendant appeals. Code Crim. Proc. Tex. art. 430, subd. 4, provides that an information contain the name of the person accused, or it be stated that his name is unknown, and give a reasonably accurate description of him, and article 425 provides that, in alleging the name of defendant or other person in an indictment, it shall be sufficient to state one or more of the initials of the Christian name and surname.

A. S. Houston, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. There is no difference, except as to the name, in the complaint and information in this case, and the case of *Pancho v. State*, ante, 476, (just decided.) In this case the accused is only named and described as "one Persqual." Because the complaint and information are fatally insufficient as to the name and description of the accused, the judgment is reversed, and the prosecution dismissed.

STICHTD v. STATE.

(Court of Appeals of Texas. May 9, 1888.)

1. LIBEL AND SLANDER—CRIMINAL SLANDER—PLEADING—VARIANCE.

There is a fatal variance where an indictment for criminal slander alleges that the slanderous words were spoken in English, while the proofs show that they were spoken in German.

2. SAME—EVIDENCE—TIME OF COMMISSION OF OFFENSE.

In a trial for criminal slander, failure to prove the time of the commission of the offense is a fatal error.

Appeal from Guadalupe county court; J. F. McKEE, Judge.

Martin Stichtd was indicted for criminal slander. The information alleged that appellant, in the presence of divers persons, said that "—— is nothing but a whore; she has done nothing since she came to Texas but live as a whore

with negroes." The proof was that the words set out were uttered by the appellant in the German language. A fine of \$100 was the penalty assessed by the verdict, and defendant appeals.

Burgess & Dibrell and *James Greenwood*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. In the statement of facts before us, there is no evidence showing the time of the commission of the alleged offense. This is fatal to the conviction, and the assistant attorney general confesses the error. *Temple v. State*, 15 Tex. App. 804. A novel question is presented in the record. In the information the alleged slanderous words are set out in the English language. On the trial, over defendant's objections, the state was permitted to prove slanderous words uttered by the defendant in the German language; said words, when interpreted, meaning substantially the same as the slanderous words set out in the information. The question presented is: When oral slander is alleged to have been committed by the use of the English language, can such slander committed by the use of the German language be proved, there being no allegation that the slander was uttered in the German language? We are of the opinion that the question must be answered in the negative. In a civil action for slander, the rule is that, where the slanderous words were spoken in a foreign language, they must be set forth together with a translation into English. To set forth the foreign words alone will not be sufficient; and to allege a publication of English words, and prove the publication of words in another tongue, is a variance. *Townsh. Sland. & Lib.* § 330. The reasons upon which the above-stated rule is founded, demand its application with equal if not greater force in a criminal than in a civil prosecution for slander. In all criminal prosecutions the accused party has the right to be informed, by the information or the indictment, of the facts charged against him, that he may prepare to meet them, and he can only be required on the trial to meet and defend against the exact matter charged against him. The allegation and the proof must meet, and substantially correspond; otherwise the accused might be convicted of a different offense than that with which he is charged, which he had not been informed he was called upon to meet. To charge a person with uttering slanderous words in the English language certainly does not inform him that he will be required to meet and defend against words uttered by him in a different language. We hold that the court erred in permitting the state to prove the words uttered by defendant in the German language, and that the slander as charged in the information is materially variant from that proved. The judgment is reversed, and the cause remanded.

GOVETT v. STATE.

(Court of Appeals of Texas. May 9, 1888.)

INDICTMENT AND INFORMATION—ALLEGATIONS—DESTROYING PROPERTY—CONSENT OF OWNER.

A complaint and information charging malicious mischief in tearing down the fence of two persons, are fatally defective when they fail to allege the want of consent of each of the owners.

Appeal from Guadalupe county court; *J. F. McKee*, Judge.

The conviction was for pulling down and injuring the fence of *J. B. Dibrell* and *E. Masheim*, and the penalty imposed was a fine of \$10. The information alleged that appellant "did * * * unlawfully break, pull down, and injure the fence of *J. B. Dibrell* and *Emil Masheim*,

W. E. Goodrich and *James Greenwood*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Both the complaint and the information are fatally defective, in that they fail to allege the want of consent of each of the owners of the fence to the pulling down and injury thereof by the defendant. *Taylor v. State*, 28 Tex. App. 689, 5 S. W. Rep. 141; *Brumley v. State*, 12 Tex. App. 609. The judgment is reversed, and the prosecution is dismissed.

FERGUSON v. STATE.

(Court of Appeals of Texas. May 26, 1888.)

FALSE PRETENSES—SWINDLING BY MEANS OF CHATTEL MORTGAGE—INDICTMENT.

An indictment for swindling by means of a chattel mortgage, accompanied by verbal representations, which fails to set out the mortgage *in his verbs*, or, if that cannot be done, to state the reason for the omission, and to set out the mortgage in substance, is fatally defective.

Appeal from district court, Smith county; FELIX J. McCORD, Judge.

The defendant, Henry Ferguson, was convicted of swindling, and sentenced to three years' imprisonment. From the judgment he brings this appeal.

J. F. Onion, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction is under an indictment which undertakes to charge the offense of swindling by means of certain false representations made by the defendant concerning his ownership and right to dispose of certain personal property, and by means of a chattel mortgage, in writing, upon said property, executed and delivered by him to the alleged injured party. A motion in arrest of judgment was made by the defendant; the ground of said motion being that the indictment was fatally defective because it neither set forth the alleged mortgage *in his verbs* nor substantially. Said motion was overruled, and in said ruling we are of opinion the court erred. It is plain from the allegations in the indictment that the swindle, if one was accomplished, was by means of the alleged mortgage, accompanied by verbal representations as to the defendant's ownership of the property. Said alleged mortgage entered into the offense charged, as a part of the basis thereof, and, in conformity with the general rule, should have been set out *in his verbs* in the indictment, or good reason should have been stated why it could not be set forth, and in such case it should have been set forth substantially. Willson, Tex. Crim. Laws, §§ 1888, 1895.

Because the indictment is defective in matter of substance in the particular above stated, the judgment is reversed, and the prosecution is dismissed.

EX PARTE SUDDATH.

(Court of Appeals of Texas. May 9, 1888.)

BAIL—IN CHARGE OF MURDER—WHEN ALLOWED.

Evidence, in a murder trial, that defendant and deceased had a quarrel resulting from defendant's fondness for deceased's wife; that the two met on the sidewalk, and, after loud words, defendant shot deceased four times, the latter also firing; the testimony being conflicting as to which drew his weapon first,—does not authorize the refusal of bail.

Appeal from district court, Tarrant county; R. E. BEEKHAM, Judge.

The evidence for the state shows that deceased's wife, prior to her marriage, was a "sweetheart" of the relator. She married deceased in 1887, but separated from him three months after marriage, and at the time of the homicide was being sued for divorce by deceased upon the ground of infidelity. It was further shown that, about a month before the homicide, relator and deceased met in the post-office, and had a quarrel. The state also proved that, a night or two before the homicide, a pistol ball was fired through a window into the

sitting or sleeping room of deceased. The state's testimony further shows that defendant and deceased got into a quarrel on the street, and quarreled violently until a constable got in between them, and pushed deceased back against the wall, and that, while he was pushing deceased, the relator drew his pistol, and shot deceased twice; that deceased, as he was falling, drew his pistol, and fired as his hand was knocked up, and that the relator then fired two more shots into his body. Witnesses for the relator testified, in substance, that relator was passing deceased, who was talking to a party about somebody shooting into his room a night or two before, and said in a loud voice that whoever fired that shot was a "God d—d — son of a b—h;" that relator stopped, and asked if that remark was meant for him; that the quarrel then progressed, the deceased using oaths, applying them to the man who fired into his room; that relator denied that he was the man; that about that time the quarrel became boisterous, and the constable interfered, taking hold of deceased; that, as he caught deceased, the deceased thrust his hand in his pocket, drew his pistol, threw his hand over the Constable's arm, and, according to the latter and some of the witnesses, fired the first shot at relator, when relator opened fire, shooting deceased four times. Some of the witnesses testified that the shot fired by deceased and the first shot fired by relator were so near together they could not tell which, if either, preceded the other. There was a general agreement, however, among the witnesses for the relator that the deceased drew his pistol first.

H. M. Furman, for relator. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Upon the evidence as contained in the record before us on this appeal, we are of opinion that appellant is entitled to bail. There is no evidence in the record upon the question of his ability to give bail, and we have, therefore, had no special *data* to guide us with reference to the amount. The judgment refusing bail is reversed, and the relator will be released from custody upon his execution of a bond, with good and sufficient sureties, in the sum of \$5,000, conditioned as the law requires.

NININGER v. STATE.

(*Court of Appeals of Texas. May 28, 1888.*)

INTOXICATING LIQUORS — CRIMINAL PROSECUTION — ALLEGING ELECTION UNDER LOCAL OPTION LAW.

A complaint and information under the Texas local option law, alleging an election thereunder to prohibit, not only the sale, but also the exchange, of intoxicating liquors, do not allege such an election as calls such law into operation, and are fatally defective.

Appeal from Tarrant county court; **SAM TURMAN**, Judge.

Complaint and information against **E. F. Nininger** for a violation of the local option law. Judgment of conviction, and defendant appeals.

J. A. Holland, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This is a prosecution by information for a violation of the "local option law." It is alleged in the information that the defendant did unlawfully sell and exchange to one Jim King intoxicating liquor in a certain justice's precinct in Tarrant county, after the qualified voters of said justice's precinct, at an election held in accordance with the laws of the state, had determined that the sale and exchange of intoxicating liquors should be prohibited in said justice's precinct; and the commissioners' court of said county had passed an order to that effect, etc. It is insisted by the appellant that the information is bad, because it shows upon its face that the election and proceedings thereunder are void for the reason that the prohibition included the exchange as well as the sale of intoxicating liquors. A motion in arrest of

judgment, based upon this ground, was made by the defendant, and was overruled by the court. We are of opinion that the objection to the indictment is a valid and fatal one. If the allegation in the information that the election, and the prohibition declared thereunder, embraced the exchange as well as the sale of intoxicating liquors, be true, such election, and the order of the commissioners' court thereupon, were without authority of law, and did not have the effect to call into operation the local option law in said locality. *Holley v. State*, 14 Tex. App. 505; *Steele's Case*, 19 Tex. App. 425. It is suggested in the brief of the assistant attorney general that the words "and exchange," where used in the information, may be rejected as surplusage, and the information then be held sufficient. We cannot agree to this view. As the allegation appears in the information, we regard it as descriptive of the offense sought to be alleged, and to disregard any portion of it would be unauthorized. In drawing the information, the pleader has followed a form heretofore suggested by the writer as sufficient, but which is, in view of the subsequent decision of this court in *Steele's Case*, *supra*, we think, substantially defective in the particular referred to. Willson, Crim. Forms, 257; Willson, Tex. Crim. Laws, § 632, "Indictment;" *Ex parte Beaty*, 21 Tex. App. 426, 1 S. W. Rep. 451; *Ex parte Kennedy*, 23 Tex. App. 77, 8 S. W. Rep. 114.

Because the information and complaint are fatally defective, the judgment is reversed, and the prosecution dismissed.

Ex parte GALLAHER.

(Court of Appeals of Texas. May 28, 1888.)

BAIL—WHEN ONE ACCUSED OF MURDER ENTITLED TO.

A woman and her son, who had dispossessed relator's tenant from a house claimed both by her and relator, were in the evening forcibly expelled therefrom, and led off by two masked men personating officers, and a few days afterwards found murdered, and relator was arrested and held without bail, though he proved an *alibi* by several witnesses. Held, that relator was entitled to bail.

Appeal from district court, Wharton county; W. H. BURKHART, Judge.

James Gallaher was held on two indictments, the first charging him with the murder of Mrs. Mary K. Brown, and the second with the murder of her son, Mayo Brown, and bail refused. The evidence adduced on the two proceedings for bail was identically the same. The whole of the state's proof may be briefly summarized as follows: The relator, at the time of the murder of Mrs. Brown and her son, Mayo,—which murder was committed on the night of Wednesday, December 7, 1887,—owned, and by his agent, Capt. Van Houton, was in possession of, a tract of land in Wharton county known as the "Slaughter League." The land owned by the relator included 400 acres, which at one time was owned by one B. B. Brown, and his wife, Mary Brown, the murdered woman. A decree of divorce granted to B. B. Brown against Mary Brown, of date June 11, 1888, awarded to said B. B. Brown, and said Mary Brown, each an undivided half interest in and to the said 400 acres. The 200-acre interest of B. B. Brown was afterwards purchased by the relator at sheriff's sale. Two or three years prior to the murder, Mrs. Mary Brown instituted suit against the relator to recover the entire 400 acres, and counsel for the relator exhibited to the counsel for Mrs. Brown, the relator's chain of title to the land, including the decree entered on the divorce proceeding awarding 200 acres to B. B. Brown, and 200 acres to Mrs. Mary Brown; and proposed, on behalf of the relator, to confess judgment in Mrs. Brown's favor to the 200 acres, and release the same to her. Mrs. Brown refused to consider the proposition, discharged her then counsel, and procured other counsel, who, at the term of court preceding the murder, secured a continuance of the case in order to substitute lost papers. Among the several tenement-houses on

the land claimed by the relator was one occupied by one Davy James, a negro, and his family, which was known as the "Davy James House." A few days before the murder Mrs. Brown, with her son, Mayo Brown, without notice to relator or his agent, Van Houton, moved into and took possession of the said house; Mrs. Brown informing James that the house belonged to her; that she had grown tired of the relator's control over it; and that he (James and his family) must remove themselves and their effects as soon as they could do so. On Thursday morning, December 8th, it was reported to the civil authorities that, on the night before, two masked men, personating officers, forced James' house, and forcibly removed Mrs. Brown and Mayo Brown, upon the pretense of taking them to the county jail at Wharton, 20 miles distant, and that nothing had been since heard of Mrs. Brown or her son. On the next day, Friday, the dead bodies of Mrs. Brown and her son were found on the common, a short distance from the James house, and in the direction in which the men left the house with Mrs. Brown and Mayo Brown on the night before.

Davy James, his wife, Judy James, and one Allen were the material witnesses for the state. Davy James testified, in substance, that immediately after Mrs. Brown took possession of his house he reported that fact to Van Houton, the agent of the relator, who lived in the main house on the premises, not a great distance from his house, and that he was directed by Van Houton to remain in the house until he could send for relator, who lived at Eagle Lake, in Colorado county, and have the woman and boy ousted by legal process. Relator came to the plantation several days before the fatal Wednesday night. In conversations with witness he told witness to remain in the house. The witness told him that he would not remain in the house unless Mrs. Brown was removed. Relator replied that proceedings had been instituted to remove her, and that she would be put out very soon. On Thursday before the fatal Wednesday night the witness called on relator and told him that, unless he was put in sole possession of the house very soon, he would have to hunt another home. The relator asked him to remain a short while longer; that the officers would soon have Mrs. Brown out; and that, if they failed, he, relator, would get her out if he had to kill and drag her out. Witness replied that he would not stay in the house if Mrs. Brown was removed in that manner, and the relator repeated, in substance, that, other means failing, he would kill and drag the woman out of the house. The witness saw the relator again at Van Houton's house late on Wednesday evening, and, in response to witness' complaint that the woman was still in the house, the relator remarked that she would not be there long, and directed the witness to tie his two certain savage dogs and keep them tied. Witness went home and tied one of the dogs behind the house, but found that the other had followed his daughter to the house of a neighbor. Between 7 and 8 o'clock that night, while witness and his wife were sitting in their room, witness heard his dog bark, and went to and opened his back door. Instantly Allen, a negro neighbor, stepped in, and two masked white men, with drawn pistols, rushed by witness, and went into Mrs. Brown's room. Both wore broad-brimmed white hats and gray coats and pants, the legs of the pants stuffed into their boot-tops. The taller man seized Mrs. Brown, announced that his name was Jones, and that he and his companion were officers, and had come to remove her and her son to the Wharton jail, and that they had deputized Allen to help them. The other man seized the boy. Mrs. Brown pleaded, in vain, not to be removed until morning, and then began to struggle, when the man called to witness that he deputized him, witness, to help remove the woman and boy, and that if he hesitated he and his companion would kill every "d—d soul" in the house. Thereupon the witness, actuated by fear, went to the assistance of the other man, and helped him drag the boy as far as the gate. Allen and the tall man took the woman out. The men, when they got out the gate, said something

about tying Mrs. Brown and the boy, and finally went off with them in the direction of some timber. The two men were white, and had their faces, from the eyes down, masked with white, colored-bordered handkerchiefs, which looked to witness just like those placed in evidence, and which, it was shown, were found by the sheriff's *posse* in Van Houton's house. Witness did not identify either of the men. On the Saturday following, the day after the bodies were found, witness was arrested for complicity in the murder, but was soon released. Mrs. Judy James, testifying for the state, corroborated her husband in every particular as to what transpired in the house, and, in addition, that in the tall man who took Mrs. Brown off, and called himself Jones, she fully recognized and identified the relator. She repeatedly reiterated her recognition of the relator, and stated, in addition, that, a short while after he and his companion left with Mrs. Brown and the boy, she heard several shots fired at about the point the bodies were found on the succeeding Friday. Allen testified that two men, masked with handkerchiefs like those in evidence, called him out of his house on Wednesday night, December 7, 1887, and told him that they "deputized him to go with them and take Mrs. Brown." They then marched him in front of them to Davy James' house, about 100 yards distant, where they, forcing witness and Davy James to help, committed the acts described by said Davy James in his testimony. Witness was not absolutely certain that he recognized either of the parties, but, judging from his hat, coat, pants, walk, and voice, he thought the tall man, who called himself Jones, was the relator.

The defense relied upon was an *alibi*. Van Houton testified that the relator left his plantation, on which the "James House" was situated, on Wednesday morning, to return to his home, via New Philadelphia. Several witnesses testified that they saw him at New Philadelphia, which was 12 or 14 miles from the "James House," about noon on that day. Two witnesses, at least, besides one Rhody Cooper, testified that the relator left New Philadelphia about 1 o'clock P. M., with said Cooper, to go to Cooper's house to dinner, and that they saw him as late as sundown on that evening at Cooper's house. The testimony of Rhody Cooper, Mrs. Rhody Cooper, and one Lewis Busch, an inmate of Cooper's house, erected a complete and unbroken *alibi* for the relator. They located him at Cooper's house, 14 miles distant from the scene of the murder, every minute of time from sundown on Wednesday evening—some hours previous to the murder—until 9 or 10 o'clock on the next day, nearly 12 hours after the murder. Of the seven or eight state's witnesses who testified to the bad reputation of Cooper for truth and veracity, four or five admitted that they were unfriendly to Cooper, and the others that they heard Cooper's truth and veracity questioned for the first time on the examining trial of this defendant. A very large number of witnesses supported the reputation of Cooper for truth and veracity as unexceptionable, and the reputation of the relator as a peaceable, law-abiding man, as above reproach.

I. H. Dennis and P. E. Peareson, for relator. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. We have maturely considered the record presented on this appeal, and from our view of the evidence, as herein disclosed, we are of opinion that appellant is entitled to bail. The judgment of the court below refusing him bail is reversed, and appellant is admitted to bail in the sum of \$10,000,—\$5,000 in each case. Upon the execution by him of a bond in said amount of \$5,000, with good and sufficient sureties in each case, conditioned as the law requires, he will be released from custody by the sheriff of Wharton county. The judgment is reversed, and bail granted.

INTERNATIONAL & G. N. RY. CO. v. KUEHN *et al.*

(Supreme Court of Texas. May 1, 1888.)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Where, in an action for negligent killing, the evidence shows that deceased, on arriving at defendant's railroad crossing, saw its train moving towards him at a distance of 40 paces, and, thinking he could drive across the track before it would reach him, whipped up his horses for that purpose, and was killed in the attempt, a clear case of culpable negligence on the part of the deceased is made out.¹

2. SAME—ACCIDENTS AT CROSSINGS—INSTRUCTIONS—OBSTRUCTION OF VIEW OF TRACK.

The court instructed the jury: "It is negligence in a railroad company to permit or suffer brush or tall weeds to grow upon its right of way, so as to materially obstruct the view of approaching trains by persons about to cross its track; and if the jury believe from the evidence that the defendant permitted and suffered brush and tall weeds * * * to grow upon its right of way, * * * and that but for such obstruction the injury would not have happened," the defendant was liable. The only evidence was that some hackberry trees were growing along the line, from 10 to 20 feet outside of the right of way, and that, at the time of the injury, they were bare of leaves, and in fact were no obstruction. *Held*, that the instruction was unauthorized, and was error.

3. SAME—ACTION AGAINST, FOR PERSONAL INJURIES—DEATH OF PLAINTIFF—RIGHT OF WIDOW TO SUE.

The fact that the deceased had begun a suit for damages for the injury, which suit was pending at his death, is no bar to the action by his widow and children.

4. DEATH BY WRONGFUL ACT—ACTION BY WIDOW—SUBSEQUENT MARRIAGE OF WIDOW.

The fact that, pending the suit, the widow remarried, does not preclude her right of action.

5. SAME—ACTION BY WIDOW AND CHILDREN—GUARDIAN AD LITEM—WHO MAY ACT.

The fact that the husband of the mother acted as next friend for the minor children was not error.

Appeal from district court, Comal county.

J. D. Guinn and J. H. McLeary, for appellant. *Burges & Dibrell and W. R. Neal*, for appellees.

WALKER, J. The widow and the two minor children of Julius Kuehn sued the appellant, and obtained judgment for negligently killing the said Julius. It is elementary, and recognized in the many decisions of this court in like cases, that, to recover in such case, it devolves upon the plaintiffs to show that the death was caused by the defendant; that, in the collision causing the death, the deceased was using proper care, that is, that he was not himself guilty of negligence directly contributing to the collision; and that the defendant company was guilty of negligence, or want of the proper care called for under the circumstances. Regarding the testimony as sufficient in this case to show want of care or negligence on part of the defendant, it remains to determine whether the deceased so acted in the matter as to allow the plaintiffs to recover for the negligence of the defendant. It is a natural presumption that a man in his right mind will not voluntarily and without motive encounter a threatening danger. Where the attendant circumstances show facts from which a jury may deduce the conclusion of want of negligence on part of the deceased, this court will accord to the verdict a conclusive effect. The amount of testimony is for the jury; and, if exercising their judgment upon facts in evidence, their action will not, or rarely, be set aside.

¹Respecting contributory negligence in crossing a railroad track, see *Kelly v. Railroad Co.*, (Pa.) 8 Atl. Rep. 856; *Purinton v. Railroad Co.*, (Me.) 7 Atl. Rep. 707, and note; *Chase v. Railroad Co.*, (Me.) 5 Atl. Rep. 771, and note; *Sherry v. Railroad Co.*, (N. Y.) 10 N. E. Rep. 128; *Cooper v. Railway Co.*, (Mich.) 83 N. W. Rep. 306; *Slater v. Railway Co.*, (Iowa,) 82 N. W. Rep. 264; *Mynning v. Railroad Co.*, (Mich.) 81 N. W. Rep. 147, and note; *Railway Co. v. Henry*, (Kan.) 14 Pac. Rep. 1; *Glascoc v. Railroad Co.*, (Cal.) Id. 518; *Guggenheim v. Railway Co.*, (Mich.) 83 N. W. Rep. 161; *Woodard v. Railroad Co.*, (N. Y.) 13 N. E. Rep. 424; *Nosler v. Railway Co.*, (Iowa,) 84 N. W. Rep. 860; *Yancy v. Railway Co.*, (Mo.) 6 S. W. Rep. 272; *Granger v. Railroad Co.*, (Mass.) 15 N. E. Rep. 619.

In this case the testimony shows that deceased was going home from the town of New Braunfels, near which he lived, by an old and much-traveled public road, with which he was well acquainted. The track of the defendant's railroad crossed the road he was traveling nearly at right angles. The track, at the crossing and for several hundred yards west of it, was upon an embankment variously estimated at from three to seven feet above the level; that to the right of the deceased, and for a distance of 300 yards from the crossing upon the railroad track, there was an unobstructed view from the road on which he was traveling. Some hackberry trees grew along a fence north of the track, and outside of the right of way; but these, being bare of leaves, made no material obstruction to the sight. The testimony is conflicting whether the bell was rung or the whistle sounded at the approach of the train to the crossing; but it is in evidence that the deceased had stated to witness Smith that he saw the train when it was about 40 steps off, and thought he could drive across it before it would reach him, and whipped up his horses for that purpose; to witness Hertman, "that he had seen the train while he was stopping in the lane." Witness Bruestedt, for the plaintiff, had testified to meeting the deceased in the lane, about 50 steps from the track, at which point it seems some halt was made by the deceased. The train was provided with Westinghouse automatic air-brakes, the best known to the witnesses. The engineer testified that he "could not have stopped sooner than he did after seeing the intention of the deceased to cross the track." The duty to halt on part of those managing the train did not arise until it became manifest to them that the deceased was intending to go upon the track in front of the train.

In the charge of the court was the following clause: "It is negligence in a railroad company to permit or suffer brush or tall weeds to grow upon its right of way, so as to materially obstruct the view of approaching trains by persons about to cross its track; and if the jury believe from the evidence that the defendant permitted and suffered brush and tall weeds, as alleged in plaintiff's petition, to grow upon its right of way, so as to materially obstruct the view of approaching trains, by persons about to cross the railroad, on the crossing in question, and that but for such obstruction the injury would not have happened, then the defendant is liable in this case, unless you believe from the evidence that the deceased's own negligence directly contributed to the injury." After a careful study of the statement of facts we find no testimony authorizing this issue. The defendant asked a charge correcting the error, and saved the exception. The trial judge, in refusing the correction, remarks that, in his opinion, there was some such testimony. It may be that the statement of facts omitted it, but we are governed by the record as before us. It is shown that the hackberry trees spoken of by the witnesses grew some 10 to 20 feet outside of the right of way; that at the time, 27th February, the trees were bare of leaves, and in fact were no obstruction. It was shown that the deceased was under the influence of liquor, and in approaching the crossing acted in a reckless manner. Besides this, his actual knowledge of the presence of the approaching train rendered all questions as to means of knowledge of it of no importance. To give the charge set out above was error, and the verdict was against the testimony upon the issue of contributory negligence. We can but hold that the testimony negatives proper care, and shows culpable negligence on part of deceased, without which he would not have been injured.

We can notice but few of the many other assignments of error. The petition was good. That deceased had instituted suit for damages, which suit was pending at his death, is no bar to the action of the plaintiffs. That, pending the suit, the widow married again, does not preclude her right of action. The fact doubtless affected the verdict, as it gives her less damages than were given to each of the children. That the husband of the mother

acted as next friend of the minor children was not error. He was not interested in the suit by them. Since this appeal was taken, this court has held in *Railway v. Morris*, 68 Tex. 49, 3 S. W. Rep. 457, that the defendant is not released from liability by its lease of the road to another company.

The charge of the court is exceptionally full and fair to both parties, with the exception of the paragraph above given. The court properly charged that the neglect of statutory duties was negligence as matter of law. Having given a clear exposition of the law applicable to the facts, it was his duty to refuse charges asked upon the subjects covered by the general charge. The defendant does not have the right to have the court charge upon the effect of isolated facts as negligence or not. The jury determines, upon the circumstances of the situation, where not a matter of law, the fact of negligence, under the charge as to the duty or degree of care imposed upon the parties arising from the entire fact, and upon exercising their judgment upon them.

For the error above stated, the judgment below is reversed, and the cause remanded.

FENNELL v. SEGUIN ST. RY. CO.

(Supreme Court of Texas. May 8, 1888.)

1. NEGLIGENCE—DANGEROUS PREMISES—INJURY TO CATTLE.

The owner of a lot on which green millet is growing, carelessly leaving his fence down, is not liable in an action to recover the value of a cow killed by eating the millet, where the court finds as a fact that it is not generally injurious to stock.

2. APPEAL—REVIEW—FINDINGS.

The finding of the district court upon a matter of fact, where the evidence is conflicting, has the effect of a verdict, and will not be disturbed by the appellate court.

Appeal from district court, Guadalupe county.

Action by J. W. Fennell against the Seguin Street Railway Company, to recover the value of a cow killed by eating green millet on a lot owned by defendant. There was judgment for defendant, and plaintiff appeals.

W. E. Goodrich, for appellant.

WALKER, J. This suit was begun in a justice's court, where judgment was rendered for the plaintiff. Appeal was taken to the county court. The county judge being disqualified, the case was transferred to the district court, and from a judgment for defendant the plaintiff below appeals to this court. The cause of action is this: The defendant rented a spot of ground, and in putting up its depot left the fence down. On the ground was growing sorghum or sugar millet, which was green, growing about 18 inches high, and the second crop, and in September, 1885, plaintiff's cow got into the lot, ate of the green millet, and died therefrom.

The fourth paragraph of the findings by the court is as follows: "The evidence showed that such cane was generally grown in this section by farmers, and by persons owning lots of ground in this city, for food for stock, and that to feed it when green was not generally considered hurtful to cattle, although there was some evidence showing its dangerous character when eaten under circumstances shown in this case. As matter of law, the court held "that leaving the fence down by defendant was not such carelessness on its part as to render the company liable for the loss of plaintiff's cow."

There is no general law in Texas prohibiting owners from permitting their cattle to run at large. The fence law, (art. 2431, Rev. St.,) requiring that "every gardener, farmer, or planter shall make a sufficient fence about his cleared land in cultivation," (and defining a sufficient fence,) evidently looks to the protection of the crops inside the inclosure against stock running at large; for it is enacted, (art. 2434:) "If it shall appear that the fence is insufficient, then the owner of such cattle," etc., "shall not be liable to make satisfaction for

such damages." As cattle may lawfully run at large, the question arises, what duty does the law impose upon land-owners for the protection of such stock? "The general rule of law is that he who has property should so use it as not to injure the property of his neighbor." From this has been based the rule that "a person who opens a shaft, and thus makes an alteration in the normal state of things, should take proper steps to fence it to prevent injury happening to him who had previously the right to the use of the surface of the soil." Whart. Neg. § 825, note. Under statutes providing for partition fences between land-owners, a failure on part of one party to keep in repair his part, it has been held that, "if domestic animals of his neighbor should wander upon his lands, invited by his own neglect, and there should fall into pits or otherwise receive injury, he would be responsible for this injury as one occurring proximately from his own default." Cooley, Torts, 838. Should it be conceded that cattle have the right to run at large upon all unfenced lands, and even upon lands not inclosed by sufficient fences, and that the law imposes upon the land-owner the duty of fencing against injury from any change in the surface of his grounds by excavations or by erection of unsafe buildings or structures of any kind, or from permitting them to become unsafe, still this duty of proper care only arises to prevent a threatened and probable danger. If growing of sorghum be a change of the land from safe to unsafe pasture, the rule above cited probably could apply. The finding of the court cited above may be considered as equivalent to finding that the feeding of sorghum was not dangerous, though there was some testimony otherwise. If there be no danger to be guarded against, the law would not impose proper care, or indeed any care, upon the owner of the premises.

Appellant insists that the finding is not supported by the testimony. The testimony is conflicting, but, according to the finding by the judge the same effect as a verdict, it will not be disturbed.

This case is distinguished from *Edwards v. Chisholm*, 6 S. W. Rep. 558, in which the presence of negligence of defendant, upon which the judgment followed, was not ascertained as a fact, but only as a conclusion of law. Here the finding of the judge ascertained as a fact the harmless nature of the sorghum; from which finding, as a fact, negligence, which is a want of proper care, is negatived. No care being needed, there could be no neglect or want of it. There being no error in the record, the judgment below is affirmed.

MORGAN v. STATE.

(Court of Appeals of Texas. June 2, 1888.)

BURGLARY—EVIDENCE—POSSESSION OF STOLEN GOODS.

Proof that a house was burglariously entered, and certain articles stolen therefrom, which were soon after found in the possession of the defendant, who appropriated them to his own use, and made no explanation of his possession, will warrant a conviction.¹

Appeal from district court, Robertson county; W. E. COLLARD, Judge.
Asst. Atty. Gen. Davidson, for the state.

WILLSON, J. There is but a single question to be determined on this appeal, and that is the sufficiency of the evidence to support the conviction. We are of opinion that it is sufficient. It was proved that a house was burglariously entered by some one, and certain property stolen therefrom. Recently thereafter the defendant was seen in possession of some property which had been so stolen, and which was positively identified as such by the owner. Defendant appropriated said property as his own by pledging it as security for a debt he owed. He made no explanation of his possession of said prop-

¹ See note at end of case.

erty at any time, and made no attempt on the trial to account for or explain when, where, how, or from whom he acquired possession of it. *Prince v. State*, 44 Tex. 480; *Payne v. State*, 21 Tex. App. 184. The judgment is affirmed.

NOTE

BURGLARY—POSSESSION OF STOLEN PROPERTY—PRESUMPTION. Possession of property, taken at the time of the commission of a burglary, without other facts indicative of guilt, is not sufficient to support a conviction of burglary. *Stewart v. People*, (Mich.) 3 N. W. Rep. 868; *State v. Tilton*, (Iowa,) 18 N. W. Rep. 716; *People v. Flynn*, (Cal.) 15 Pac. Rep. 102. Though the unexplained possession of property recently stolen is *prima facie* evidence that the one in possession is guilty of larceny, it is not alone sufficient to sustain a conviction of burglary, *State v. Shaffer*, (Iowa,) 13 N. W. Rep. 306; otherwise, where it is shown that the larceny and the burglary were committed at the same time, *Smith v. People*, (Ill.) 3 N. E. Rep. 738; and by the same person, *State v. Frahn*, (Iowa,) 35 N. W. Rep. 451; *State v. Rivera*, (Iowa,) 27 N. W. Rep. 781. See *Young v. State*, (Fla.) 3 South. Rep. 881, and note, as to the presumption of guilt arising from the possession of stolen property.

MORGAN v. STATE.

(Court of Appeals of Texas. June 2, 1888.)

BURGLARY—EVIDENCE—SUFFICIENCY.

A store-house was burglariously entered, and certain articles of merchandise taken therefrom. Shortly thereafter similar articles were found in the possession of defendant, who explained his possession by saying he had purchased them at another store, there being proof that other merchants in the country kept similar articles. *Held*, the proof did not warrant a conviction.¹

Appeal from district court, Robertson county; W. E. COLLARD, Judge. Indictment for burglary against Charles Morgan. Verdict of guilty, and defendant appeals.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. As presented to us in the statement of facts, the evidence is insufficient to support the conviction. Stated concisely, the evidence is that a store-house was burglariously entered by some one, and some articles of merchandise stolen therefrom. Shortly thereafter, some articles of merchandise similar to those which had been stolen were found in the possession of the defendant. The articles found in his possession were not identified as the stolen ones; the evidence merely showing that they were similar thereto, and of the same line of goods, which line of goods was kept and sold by other merchants in the country. Defendant made no effort to conceal the goods found in his possession, and explained his possession of them by saying that he had purchased them in Waco of a merchant; and there is no evidence in the record which contradicts or even raises a doubt of the truth of such explanation. The judgment is reversed, and the cause remanded.

SHARP et al. v. ELLIOTT et al.

(Supreme Court of Texas. May 8, 1888.)

PARTITION—SETTING ASIDE DECREE—VENDOR AND VENDEE.

When a decree in partition is set aside, and a new decree entered at the same term as the former decree, and a party who receives less land by the second decree than by the first appears and objects to the proceedings, such second decree is binding upon his vendees, who purchased after the first decree was rendered, and before any steps had been taken to set it aside.

Appeal from district court, Bell county.

Action of trespass to try title by Nathan Elliott and others against W. F. Sharp and others. Judgment for plaintiffs, and defendants appeal.

¹ See *Morgan v. State*, *ante*, 487, and note.

Harris & Saunders and *G. W. Tyler*, for appellants. *Morgan & Freeman* and *Monteith and Furman*, for appellees.

STAYTON, C. J. M. F. De Graffenried owned, at the time of his death, 4,480 acres of land situated in Bell and Williamson counties. He left 10 children, of whom were B. M. De Graffenried, R. C. De Graffenried, and Mrs. Flora Wilson. On September 4, 1882, B. M. De Graffenried instituted a suit in the district court for Bell county to partition the tract of 4,480 acres of land of which that in controversy in this action is a part. R. C. De Graffenried was a resident of this state, and appeared in the cause, but the other children were non-residents, and cited by publication, and an attorney was appointed to represent them. It was claimed that, by reason of advancements made by M. F. De Graffenried to his children, they were not all entitled to equal interests in the land to be partitioned. The court caused an inquiry to be made as to this, and determined that B. M. and R. C. De Graffenried and Flora Wilson were entitled to have the entire tract partitioned between themselves alone, and the share each was to receive was fixed by the court. After this commissioners to make partition were appointed, and they performed that duty in accordance with the order of the court, and made their report, whereby they set apart to Flora Wilson 1,377 acres, to B. M. De Graffenried 1,103 acres, and to R. C. De Graffenried 2,000 acres. On October 2, 1883, this report of the commissioners was approved and confirmed, and the usual order made vesting in each of the three persons the particular tract of land as designated for such persons by the commissioners. On October 5, 1883, the appellants purchased from R. C. De Graffenried the 2,000 acres of land set apart to him through the proceedings before mentioned, and therefor paid \$8,000 in cash, and gave their note for \$1,000 more. On October 22, 1883, without notice to R. C. De Graffenried or his vendees, a motion was filed by Flora Wilson and others to set aside the decree of partition entered on the second day of that month, which, on hearing, was granted, and the former decree and the proceedings which led to it were vacated. The court then made inquiry as to the rights of the children of M. F. De Graffenried to parts of the land, and found that the land should be divided between six of the children instead of three. The interests of these were determined; commissioners again appointed to make partition, which they did, and reported it to the court on November 6, 1883. On that day the appellants, purchasers from R. C. De Graffenried, in his name and with his consent, caused to be filed objections to all the proceedings had in the case subsequently to the decree of October 2, 1883, which were overruled, and the court on November 7th confirmed the report of commissioners, and by decree vested the title in each of the distributees to the several parts allotted to them. By this last proceeding title to 1,298 acres of the same land set apart to him by the decree of October 2, 1883, was vested in R. C. De Graffenried, but the residue of the 2,000 acres was vested in Flora Wilson, and this is the land in controversy. Notice of appeal was given by or for R. C. De Graffenried when the decree of November 7, 1883, was entered, but it was never perfected, and it appears that he refused to perfect it, or to prosecute a writ of error or to permit his vendees to do so in his name. The term of the court at which the partition proceedings were had began on September 24, and ended on November 9, 1883. The appellees claim through conveyance made by Flora Wilson and her husband. From this statement it will be seen that the only question is whether the proceedings had in the partition suit subsequently to October 2, 1883, are binding on the appellants, who purchased from R. C. De Graffenried before any steps were taken to set the decree of that date aside. We are of the opinion that this must be answered in the affirmative. The appellants must be held to have known that the court had full power to set that decree aside at any time during the term, and to have bought with a knowledge of that fact. Whether this power could have been legally exercised after the ex-

piration of two days after the decree, without notice to R. C. De Graffenried, would seem to be questionable. Be that as it may, his subsequent appearance in the case gave to him every opportunity to enforce his right that he would have had had he been notified of the motion to vacate the decree, which was, in effect, but a motion for new trial made by those who, prior to the time it was filed, had not been personally before the court as well as by B. M. De Graffenried. If the judgment rendered on November the 7th was erroneous, it might have been corrected through such direct proceeding as the law provided, but cannot be attacked in this proceeding. The following cases we deem conclusive of the question: *Bryorly v. Clark*, 48 Tex. 345; *Garza v. Baker*, 58 Tex. 483; *Blum v. Wettermark*, Id. 125; *Hurle v. Langdon*, 60 Tex. 555; *Randall v. Snyder*, 64 Tex. 350. There is no error in the judgment, and it will be affirmed.

FREE *et al.* v. SCARBOROUGH, Sheriff.

(Supreme Court of Texas. May 8, 1888.)

TAXATION—LEVY—CALLED TERM OF COUNTY COURT.

Under Rev. St. Tex. art. 1517, providing that "no county tax shall be levied except at a regular term of the [county] court," a tax levied at a called term of the court is illegal.

Appeal from district court, Jones county.

Suit by A. P. Free *et al.* against George A. Scarborough, sheriff, to restrain the collection of taxes levied at a called session of the county court of Jones county. There was judgment for defendant, and plaintiffs appeal.

Jones & Cunningham, for appellants. *B. F. Buie* and *C. D. Davis*, for appellee.

WALKER, J. The only question in this case that can be considered is the power of the county commissioners to levy a tax at a called session of the court; citing from a standard author: "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes or to accomplish some governmental end. The power to impose taxes is vested in the representatives of the people in the legislative branch of government." Burr. Tax'n, § 4, and cases cited. The constitution (article 5, § 18) provides: "The county commissioners, * * * with the county judge as presiding officer, shall compose the county commissioners' court, which shall exercise such powers and jurisdiction over all county business as is conferred by this constitution and the laws of the state, or as may be hereafter provided." Article 11, § 1: "The several counties of this state are hereby recognized as legal subdivisions of the state." Section 2: "The construction of jails, court-houses, and bridges, and the establishment of county poor houses and farms, and the laying out, construction, and repairing of county roads, shall be provided for by general laws." Under this power the legislature (Rev. St. art. 1514) conferred certain powers and duties upon the county courts. Article 1515 gave the power to levy taxes for county purposes, and in article 1517 imposed limitations as to the mode of imposing taxes, as follows: "No county tax shall be levied except at a regular term of the court, and when all the members of said court are present." Unquestionably, the legislature had the power to make this rule. The limitation admits of no construction. The meaning is clear; courts cannot alter it or dispense with it. A tax levied at a called session of the court, or without the presence of the full membership, is not levied according to law, and cannot authorize the tax collector to seize and sell property to enforce its collection.

As to the tax of 62½ cents per hundred dollars so levied, the injunction in

favor of the appellants should have been granted and perpetuated. *Court v. O'Connor*, 65 Tex. 339, and cases cited.

The judgment below is reversed, and will be here rendered in accordance with this opinion.

HAYS v. GAINESVILLE ST. RY. CO.

(Supreme Court of Texas. May 1, 1888.)

1. HORSE AND STREET RAILROADS—LIABILITY FOR NEGLIGENCE—INSTRUCTIONS.

In an action against a street-car company for personal injuries, it appeared that plaintiff, a boy 11 years old, carelessly ran against a mule attached to defendant's car; that the mule suddenly sprang to one side, causing plaintiff to fall upon the track about 11 feet in advance of the car; and that the driver saw plaintiff, after he had fallen, in time to stop the car. The court charged that, though the driver's negligence may have contributed to the injury, still, if plaintiff was guilty of negligence which directly contributed to the injury, he cannot recover unless the jury find that the driver's negligence was malicious and willful, or wantonly reckless, showing an utter disregard of plaintiff, and the plaintiff's negligence was but slight. *Held*, that such instruction was erroneous, as precluding plaintiff from recovery unless he exercised extraordinary prudence and foresight to avoid the injury.

2. SAME—INJURY TO PERSONS ON TRACK—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

In such case, where the driver discovers the peril of plaintiff in time, and by the reasonable exercise of means at hand could have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit recovery notwithstanding the injured party was guilty of contributory negligence.¹

3. SAME—INJURY TO PERSONS ON TRACK—ACTION FOR—EVIDENCE.

In such case, evidence that other boys than plaintiff had been in the habit of jumping on the cars, and "rocking and scaring the mules," was immaterial, and should have been excluded.

4. SAME.

In such case it is proper for plaintiff, to exhibit in evidence the boot worn by him at the time he was injured, for the purpose of showing the indentations made thereon, as tending to prove that the brake was not applied, but that the wheel rolled over the plaintiff's foot; there being other evidence that, when the brakes are applied, the car-wheel will not revolve, but will slide along the rail.

5. SAME—LIABILITY FOR NEGLIGENCE—DUTY TO EMPLOY CAREFUL DRIVERS—INSTRUCTIONS.

In such action a charge that if, by failure of the company to employ skilled and prudent drivers, any one is injured, the company is liable, and also that, though the driver might have been careless or imprudent at other times, that would not render the defendant liable, unless, on the occasion of the injury sued for, such driver was careless, reckless, and imprudent, is argumentative and improper.

6. NEGLIGENCE—DEGREE OF—PLEADING AND PROOF.

Where the complaint charged gross negligence, that term embraces all lesser degrees of negligence, and the plaintiff is not precluded from recovering for a lesser degree of negligence than that charged.

Commissioners' decision. Appeal from district court, Cooke county.

Action by Reese A. Hays, a minor, by his next friend, L. R. Hays, against the Gainesville Street-Railway Company, for personal injuries. Judgment was entered on a verdict for defendant, and plaintiff appeals.

E. A. Blanton and Hill & Hill, for appellant. *Patter & Hughes*, for appellee.

MALTBIE, J. Reese A. Hays, the appellant, a boy 11 years old, was seriously injured by reason of the wheels of one of the cars of the Gainesville

¹To constitute such contributory negligence as will defeat recovery, it must be the proximate and not the remote cause of the injury. By "proximate cause" is intended an act which directly produced, or concurred directly in producing, the injury. By "remote cause" is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Troy v. Railroad Co.*, (N. C.) 6 S. E. Rep. 77. Mere negligence will not prevent recovery, unless it were such that but for that negligence the misfortune would not have happened, nor if defendant might, by the exercise of care on its part, have avoided the consequences of the plaintiff's negligence. *Ayers v. Railroad Co.*, (Va.) 6 S. E. Rep. 552; *Railway Co. v. Lee*, *id.* 579.

Street Railway running over his foot, under the following circumstances: Appellant, in company with a number of other boys, was returning from school along North Dixon street, in the city of Gainesville, over which appellee had constructed its street railway, and was engaged in operating its cars. Hays was in the street on the west side of appellee's track, going in the direction of his home, which was south-east of the track. At the same time, one of appellee's cars was approaching from the north, drawn by a mule, going in a slow trot. Hays and a boy named Purdy were playing; the former running along, and within a few feet of the street-car track, closely pursued by Purdy, who was about to overtake him, when Hays turned suddenly to the left, colliding with the mule drawing the car, striking the mule about the shoulders, causing him to shy, which caused Hays to fall. The mule moved on, drawing the car over Hays' foot and ankle, fracturing the bone, and causing much pain and suffering. It was shown that from the shoulders of the mule to the front wheel of the car is a distance of 11 or 12 feet, and there was evidence tending to show that, by applying the brakes attached to this car, it could have been stopped within a space of 6 feet. There was also evidence tending to show that the driver was careless and incompetent, and that he struck the mule a sharp blow with his whip just as appellant fell to the ground, though all these facts were disputed. The ordinances of the city of Gainesville, under authority of which appellee's road was constructed, require that all drivers of street cars shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or running towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible, and that each driver shall have a whistle, and, on the approach of danger to any person, animal, or vehicle, shall give an alarm. The collision occurred near the point where the appellant was in the habit of crossing the track in going to and returning from his home. He did not see or hear the car, though he could have done so had he listened or looked. The reason that he did not see the mule in time to avoid the collision was that he was looking back at his pursuer. The trial resulted in a verdict and judgment for the appellee. Alleged errors in the charge of the court, and in admission and rejection of evidence, are relied on for a reversal of the judgment. The controlling question in this as in almost all other cases of personal injury is as to which party is guilty of negligence contributing proximately to the injury.

Negligence is a relative term, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances usually impose. The degree is not the same in all cases, but may vary according to the danger involved in the want of vigilance. Cooley, Torts, 630. To illustrate, it would involve little or no want of care to cross a road or street on foot used exclusively for ordinary travel, without looking either way for persons on horseback or in vehicles, because usually there is but little danger in so doing; while it would be gross negligence to cross a railroad track over which many trains of cars are accustomed to pass every hour in the day, without using the utmost vigilance and circumspection. In determining whether it is an act of negligence to go upon a street-car track, the frequency of the passage of cars, their usual rate of speed, whether many people are accustomed to cross at that particular place, whether there is a duty imposed by law upon the drivers to keep a lookout, and give warning of approaching danger, and the like circumstances, may be taken into consideration. In the present instance, the ordinance under which appellee was incorporated made it the duty of the car-driver to keep a vigilant lookout for all persons approaching the track, and to stop the car on the first appearance of danger; and a failure to perform this duty would of itself be an act of negligence. But the district court, for the purposes of the trial, considered the term "negligence," as applied to appellee, as synonymous with an intention on its part to inflict

an injury on appellant. In the second paragraph of the charge the jury are told that if plaintiff was injured through the carelessness of the driver of defendant, or by the willful or intentional act of such driver, as charged in plaintiff's petition, to find in his favor. The allegations on the subject, briefly stated, are to the effect that the injury complained of was inflicted through the negligence of defendant, and do not authorize the charge. And, again, after giving a detailed statement of the acts leading to the injury, the petition charges that it was inflicted through the gross negligence of defendant. The term "gross negligence" includes all lesser degrees of negligence; and a charge in a petition that an act was done through gross negligence would not limit the right of recovery, if otherwise entitled, to an injury inflicted by the willful or intentional act of another. Negligence is of a negative character, and implies a want of care. In order for an act to be negligent, it is never necessary that it should be done through design, though it is said that an act may be so grossly negligent that it may be presumed to have been willfully or intentionally done. The sixth paragraph of the charge is as follows: "Although you may believe from the evidence that the driver of said street-car was guilty of negligence which contributed to the injury in question, still, if you further find from the evidence that the plaintiff was also guilty of negligence which directly contributed to the injury, then the plaintiff cannot recover in this suit, unless the jury further find from the evidence that the negligence of the driver of said street car was malicious and willful or wantonly reckless, showing an utter disregard for plaintiff, and that the negligence of plaintiff was but slight, as will hereinafter be explained to you." In seventh paragraph of the charge the jury is again told that if plaintiff was guilty of contributory negligence that he cannot recover, unless the injury was caused by the willful, wanton, or malicious act of the driver. In eighth paragraph the court charges: "By the term 'slight negligence,' as used in sixth section of this charge, is meant the absence of that degree of care and vigilance which persons of extraordinary vigilance and foresight are accustomed to use under similar circumstances." The effect of these instructions was to preclude plaintiff from a recovery unless he exercised extraordinary prudence and foresight to avoid the injury. If the injury was the result of the negligence of appellee, there is no rule of law that requires that appellant should have used more than ordinary caution to shield himself from the consequences of the contributory negligence. We are also of the opinion that the proposition announced in paragraph 6 and repeated in paragraph 7 of the charge, to the effect that, if plaintiff was guilty of contributory negligence, he cannot recover, unless the car-driver willfully or intentionally inflicted the injury upon him, should not have been given except upon the theory that the driver failed to discover plaintiff's peril in time to avoid injuring him by the use of such means as a prudent and careful man would have employed under the same circumstances; for, if the driver could have then avoided the injury after discovering plaintiff's peril, his want of ordinary care was the proximate cause of it, and defendant would be liable for damages. The reason why a person who is guilty of negligence contributing to his own injury cannot recover, is because the policy of the law will not ordinarily permit one to recover who his himself at fault; but, although the negligence of such person may contribute to his own injury, yet if the person inflicting it discovers the peril of the other in time, by the reasonable exercise of the means at hand, to have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit a recovery, notwithstanding the injured party was guilty of contributory negligence. *Railway Co. v. Weisen*, 65 Tex. 447. On account of the prominence given in the charge to the doctrine that appellant could not recover if guilty of contributory negligence, unless the injury was inflicted willfully, wantonly, or maliciously, we do not think it likely that the jury understood paragraph 10 to be

a qualification of the doctrine before announced and emphasized, though doubtless so intended by the court. We think that when it becomes necessary, in a charge to a jury, that a doctrine given should be limited or qualified, that the qualification should follow the main proposition as nearly as convenient, in order to prevent any confusion in the mind of the jury. If, taking into consideration the age of appellant, and all of the other facts and circumstances of this case, he was guilty of contributory negligence in going on to appellee's track,—and of this we express no opinion,—we do not think appellee would be liable if the driver did not in fact discover appellant in time to have prevented him from being run over, and such failure was no more than ordinary negligence.

In paragraph 13, the court, after charging that if, by the failure of the street-car company to employ skillful and prudent drivers, any one is injured, that the company is liable, further charges that the fact that a driver might have been at other times careless or imprudent would not render the company liable in this action, unless, on the occasion of the injury sued for, such driver was careless, reckless, or imprudent. While the proposition embraced in this charge may be sound logic, still it is argumentative, and improper to be given in charge to a jury by a court. The evidence was conflicting as to whether the driver was negligent on this occasion; and his negligence on former occasions, if such was proven, was a circumstance to be considered by the jury with the other evidence in the case in determining whether he was negligent or not on the present occasion. Parties are, under the laws of this state, entitled to have juries consider all evidence submitted to them without any suggestion or comments whatever from the court. The statute contemplates that such legal propositions, and such only, as are applicable to the facts of the case, should be submitted by the court to the jury in language and terms suited to their capacity; and the jury must be left to determine the facts, unbiased by any intimation of the court as to the weight of the evidence.

A number of rulings in reference to the admission and rejection of testimony are assigned as erroneous, but it is not deemed necessary to notice any except two. The court, over an objection that the evidence was immaterial, and did not confine the investigation to the occasion of the injury, permitted the defendant to prove that other boys than the plaintiff had been in the habit of jumping on the cars, and rocking and scaring the mules. The objection should have been sustained. The testimony was clearly inadmissible, and was calculated to distract the attention of the jury from the true issues of the case. During the progress of the trial, plaintiff offered in evidence the boot worn by him at the time he was injured, for the purpose, as stated by counsel to the court, of exhibiting the indentations made thereon for the inspection of the jury, as tending to show the car-wheel ran over the plaintiff's foot, and that the brake was not applied; there being other evidence before the jury tending to show, when the brakes are applied, a car-wheel will not revolve, but will slide along the ground. The boot and indentations were excluded on an objection for immateriality. In this there was error. Physical facts are always admissible; and, when the object itself can be brought into court and exhibited, it is more satisfactory than a description of it by witnesses that have inspected it outside of court.

For the errors indicated, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

MACK *et al.* v. BLOCK *et al.*

(Supreme Court of Texas. May 8, 1888.)

1. FRAUD—JUDGMENT NOTE—CONSIDERATION.

Where a debtor gives his note, with an agreement allowing 10 per cent. interest and attorney's fee if the note has to be sued on, for aggregate indebtedness, in which is included a debt due to a third party, the assumption of this debt by the payee is a sufficient consideration for the agreement to pay 10 per cent. interest and attorney's fee, and the mere giving of the note, being for a just debt, is not fraudulent or a badge of fraud as to other creditors.

2. SAME—CONFESSION OF JUDGMENT—NOTICE.

In an action to set aside a judgment by confession, on the ground of intent to defraud creditors, a charge to the effect that, if the jury find that the maker of the judgment note was insolvent at the time the note was given, and gave it to defraud other creditors, and that if the payee knew of such insolvency, and intent to defraud, then the judgment would be void as to other creditors, is not in conflict with a charge to the effect that, if the payee had knowledge of such facts regarding the finances of the debtor as would have put a prudent business man on inquiry, and if such inquiry, when made, would have led to knowledge of such insolvency, then the payee would be chargeable with notice of such insolvency.

Appeal from district court, Bexar county.

Action by Mack, Stadler & Co. *et al.* against Block, Oppenheimer & Co. to set aside a judgment by confession on the ground of fraud against other creditors. There was judgment for defendants, and plaintiffs appeal.

The sixth special charge asked by plaintiffs was as follows: "If you find from the evidence that Porst was insolvent when he executed said note, and that Block, Oppenheimer & Co., or their agent, knew the fact, or might have known it by the exercise of ordinary care and diligence, such as ordinarily prudent business men would exercise under similar circumstances; and if you further believe that said note was antedated for the purpose of giving advantage to said Block, Oppenheimer & Co., and if you believe that the contracts and debts existing between Porst and said Block, Oppenheimer & Co., at the time said judgment note was made, were changed, and that debts not due and not bearing interest were included in said judgment note, providing for interest on the whole; and if you further believe that an attorney's fee of ten per cent. on said sum was added in said judgment note, and that no such stipulation existed in the notes and accounts that made up the consideration of said note; and if you find that said judgment note was substituted by said Porst at the request of said Block, Oppenheimer & Co., and that they thereby acquired an advantage over other creditors; and if you find that said Block, Oppenheimer & Co. procured their own employed and paid agent to be named in said judgment note as attorney of said Porst to waive service, confess judgment, and consent that execution issue as provided in said note; and if you believe that all these things were done by said Porst, and were procured and accepted by said Block, Oppenheimer & Co., the said Porst being insolvent, and intending thereby to give said Block, Oppenheimer & Co. preference and advantage over other creditors, and to hinder, delay, and defraud other creditors, and that Block, Oppenheimer & Co. knew of such intention, or could have known the same by the exercise of reasonable care and diligence,—then said note, judgment, and sale would be void as against the plaintiffs, and you will find for plaintiffs."

Robertson & Williams, for appellants. *Labatt & Noble* and *Wadder & Upson*, for appellees.

STAYTON, C. J. This is a suit by Mack, Stadler & Co., and two other firms, creditors of F. A. Porst, to set aside a judgment obtained against Porst by Block, Oppenheimer & Co., by confession. Block, Oppenheimer & Co. caused a stock of goods belonging to Porst to be seized under an execution that issued under the judgment which the appellant seeks to have set aside on the

ground that it was rendered by confession, with intent to hinder, delay, or defraud the other creditors of Porst. After the appellees caused their execution to be levied on the stock of goods, the appellant firms each caused writs of attachment to be levied on the same goods, which, under agreement made subsequently to the levies, were placed under the control of appellees for sale, the proceeds to be disposed of in accordance with the results of this suit. The appellants have obtained judgments foreclosing their attachment liens, subject, however, to the prior lien of appellees. There is no claim that the debts on which each party base their claims are not just debts against Porst. It is claimed, however, that a part of the claim of appellees on which they obtained judgment for \$12,254.07 embraces some interest and attorney's fees which were inserted in the note on which the judgment was obtained fraudulently. On November 11, 1884, appellees obtained their judgment by confession in the district court for Bexar county on the following instrument:

"\$11,118.51.

GALVESTON, TEX., November 3, 1884.

"One day after date I promise to pay to the order of Block, Oppenheimer & Co. eleven thousand and one hundred and eighteen and 51-100 dollars at their office in Galveston, Tex., for value received, with interest at ten per cent. per annum from date until paid, and with an attorney's fee of ten per cent. should judicial proceedings be used in collecting; and I hereby authorize W. H. Howard, or any attorney at law, to accept service, waive process, and appear for me in any court having jurisdiction of the amount due, in any county in the state of Texas in which the holder of this note may elect to bring suit, during the term of court when this note matures, or at any other time after maturity, and confess judgment in favor of the legal holder hereof for the amount remaining unpaid, and said ten per cent. attorney's fees, together with all costs and expenses attendant upon collection. Execution upon such judgment to issue *instantly*. If suit is brought in any court against me by any party before the maturity of this note, this note shall thereupon mature and become payable, and an affidavit to that effect by the holder or owner hereof, his agent or attorney, shall be sufficient evidence of the fact of such suit having been brought.

[Signed] F. A. PORST."

It is claimed that this instrument was not executed on the day it bears date, but there is no evidence to show that this claim is true. At the time that instrument was executed Porst was indebted to appellees on note due November 1, 1884, \$2,975.85, with interest at rate of 10 per cent. after maturity, and on open account the further sum of \$6,042.66. This open account was comprised of several items of indebtedness, in amount and falling due as follows: \$4,573.26, due November 8, 1884; \$31.20, due November 9, 1884; \$61.24, November 26, 1884; \$873.02, January 1, 1885; \$43, December 13, 1884; \$59.62, November 22, 1884; \$84.90, January 22, 1885; \$232.87, December 31, 1884; and \$83.55, February 28, 1885. At the time the instrument was executed Porst was indebted to Miller & Sayers in the sum of \$2,700, which, under agreement of all parties, was assumed and subsequently paid by appellees, and that went into the instrument of date November 3, 1884.

The assumption of the indebtedness to Miller & Sayers was a sufficient consideration for the promise to pay interest and attorney's fees on the sum for which the instrument was executed, which was but the aggregate of the indebtedness of Porst to appellees after they assumed the payment of the sum due to Miller & Sayers. Before the appellees took the judgment by confession against Porst, one of his creditors had brought an action against him and obtained judgment, and caused an execution to be levied on a part of his stock. The purposes for which the instrument of date November 3, 1884, was executed, were to consolidate and have evidenced by it the indebtedness and promise to pay; to secure further right on account of the assumption of the debt due to Miller & Sayers; and, further, to give to the appellees a means by which they might protect themselves should this become necessary. The

last was probably the leading purpose, and, the debt being just the mere execution of the instrument as stated by the court, was neither fraudulent nor a badge of fraud. Forst might have made a valid mortgage with or without power to sell to secure the debt. He might have sold to the appellees the entire stock in payment of their debt, it not exceeding in value the sum due them, if this had been in good faith; and we do not see that his placing it within the power of the appellees to acquire a judgment and execution through which they could, whenever they deemed it necessary for their protection, secure a lien on the property, contravenes any rule of law. The court instructed the jury correctly as to the facts that would render the transaction between Forst and the appellees fraudulent as to the creditors of the former, and at request of the appellants, in considering the insolvency of Forst as a matter to be considered on the question of fraud, instructed the jury that "if Block, Oppenheimer & Co., at the dates alleged, had knowledge of such facts regarding Forst's financial condition as would put an ordinarily prudent business man on inquiry, and if such inquiry, if instituted, would have led to such knowledge of the insolvency of Forst, if you find that he was insolvent, then Block, Oppenheimer & Co. would be chargeable with notice of such insolvency." With these charges before the jury it is claimed that the court erred in giving the following paragraph of the charge: "If you find from the evidence that F. A. Forst was insolvent, and unable to pay his debts at the date when the said F. A. Forst executed the judgment note for \$11,118.51 in favor of Block, Oppenheimer & Co., and that said firm knew of such insolvency; and if you find further from the evidence that said Forst made and delivered said judgment note with the intent to give a fraudulent preference and advantage to said Block, Oppenheimer & Co. and other creditors, and with specific intent to delay, hinder, and defraud other creditors of said F. A. Forst of and from what they were or might have been entitled to; and if you find further that Block, Oppenheimer & Co. knew of this fraudulent intent of Forst,—then the execution and sale thereunder would be void as against the plaintiffs in this suit, and in such contingency the plaintiffs would be entitled to a verdict in their favor." The objection urged to this paragraph of the charge is that it required appellees to have actual knowledge of the insolvency of Forst, and of this intent in making the instrument to give a fraudulent preference. The charge did not inform the jury that actual knowledge was necessary, and, looking to the entire charge, we think it improbable that the jury could have understood otherwise than that the appellees were held to have knowledge of such facts and intents as could have been ascertained by the making of such inquiry as a prudent person similarly circumstanced would have made. It may be conceded that Forst was insolvent, and that he executed the instrument of date November 3, 1884, with intent that through it the appellees might obtain a preference over other creditors, and that these facts were known to appellees, and still the transaction would not be fraudulent within the meaning of the law if the purpose was solely to secure the payment of a just debt.

The sixth charge requested by appellants, in so far as it was correct and free from misleading matter, was embraced in the charges given, and it contained propositions which would have induced the jury to believe that issues were before them upon which there was no evidence to warrant a finding for appellants. The charge asked would also have tended to induce the jury to believe that appellees had no right, in any manner, to change the extent of Forst's obligation to them in consideration of their assumption and payment of the debt due from Forst to Miller & Sayers, and for these reasons the charge was correctly refused.

The eighth, ninth, and tenth assignments of error are as follows: "The court erred in not presenting to the jury the material issues in the case as prayed for by plaintiffs in their special instructions." The verdict and judgment.

ment are against the evidence and against the law, and should be set aside and a new trial granted. "The court erred in overruling plaintiffs' motion for new trial, for the reasons assigned in said motion." There were 11 grounds urged for new trial. These assignments are too general to require consideration.

We find no error in the judgment, and it will be affirmed.

HOUSTON & T. G. RY. CO. v. TEXAS & P. RY. CO.

(Supreme Court of Texas. May 8, 1888.)

1. PUBLIC LANDS—GRANT TO RAILROAD—DESIGNATION OF LAND.

A designation of lands under act Tex. Feb. 4, 1854, incorporating the Memphis, El Paso & Pacific Railroad Company, and granting it all vacant lands within eight miles on each side of the extension line of its road, is sufficient which describes the line of the road as extending from a given point, a certain course and distance, to another point, and affords all information necessary for the exact location of the line, though no actual survey was made, under section 15 of said act, which provides that all the vacant public land within eight miles of each side of the extension line of said road shall be exempt from location or entry from and after the time when such line shall be designated by survey, recognition, or otherwise.

2. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—RAILROAD LAND GRANTS.

Act Tex. Feb. 4, 1856, granting the Memphis, El Paso & Pacific Railroad Company all vacant lands within eight miles of the extension line of its road, upon which the company invested its money, is a contract within the protection of that clause of the United States constitution prohibiting a state from passing any law impairing the obligation of contracts, and was therefore not affected by Const. Tex. 1869, art. 10, § 5, declaring said lands open to purchasers, settlers, locators, and holders of genuine certificates.

Commissioners' decision. Appeal from district court, Travis county.

Action by the Houston & Texas Central Railway Company against the Texas & Pacific Railway Company, to try title to certain real estate, and for damages. There was judgment for defendant, and plaintiff appeals.

Prendergast & Hewlett, for appellant. *Leake & Henry*, for appellee.

ACKER, J. Appellant brought this suit in trespass to try title to about 100 sections of land, which it claims by virtue of locations and surveys made in 1878 under valid land certificates issued to it. It was admitted that the surveys were made and field-notes returned in the manner and within the time prescribed by law. Appellee claims the land by virtue of the act of the legislature of February 4, 1856, incorporating the Memphis, El Paso & Pacific Railroad Company, subsequent acts of the legislature relating to lands granted to railroad companies, and locations and surveys made for it under valid land certificates in 1877, upon which patents were issued. It was admitted that all of the land lies within eight miles of the central line of the Memphis, El Paso & Pacific Railroad Company's reservation, as shown by its designation and map filed in the general land-office and in the office of the district surveyor for Bexar land-district. It was also admitted that the appellee, by contract and purchase in 1872, and by act of the legislature of May 2, 1873, became the owner of the properties, franchises, and rights, including the land reservation of the Memphis, El Paso & Pacific Railroad Company. Appellant relies upon two points for reversal of the judgment, and contends (1) that the description given of the reservation in the maps and designation filed in the general land-office and in the office of the district surveyor of Bexar land-district, in 1857, is insufficient; (2) that the reservation was forfeited by the provision of section 5, art. 10, of the constitution of 1869.

The charter of the Memphis, El Paso & Pacific Railroad Company, granted by act of the legislature of February 4, 1854, contains the following provision: "Sec. 15. * * * All the vacant public lands within eight miles on each side of the extension line of said road shall be exempt from location or entry from and after the time when such line shall be designated by survey,

recognition, or otherwise. The lands hereby reserved shall be surveyed by said company, at their expense, and the alternate or even sections reserved for the use of the state; and it shall be the duty of said company to furnish the district surveyor of each district through which said road may run with a map of the track of said road, together with such field-notes as may be necessary to the proper understanding and designation of the same." On February 17, 1857, the Memphis, El Paso & Pacific Railroad Company caused to be filed in the office of the district surveyor of Bexar land-district a map and designation of the central line of its reservation through said district. The written designation notified the surveyor that the reservation included eight miles north and eight miles south of the designated line. The maps and designation were also filed in the general land-office on June 20, 1857. The central line of the reservation is described in the map and designation as follows: "Commencing on the boundary line between the Bexar and Milam land-districts at a point due east of the south-east corner of a survey of land number 4, made in the name of Jas. H. Carothers, according to the map and records of Bexar land-district in the general land-office; thence in a straight line south, 77' west, to a point 8 miles south of the south-east corner of New Mexico; thence due east to the Pecos river." The constitutional convention of 1869 adopted "An ordinance granting lands to purchasers, to actual settlers, and locators of genuine certificates, within the limits of the Memphis, El Paso & Pacific Railroad reserve," which the ordinance does not describe otherwise than by name. The act of May 2, 1873, contains the following provisions: Sec. 5. "That the public lands heretofore reserved from pre-emption, location, and survey for the benefit of the Memphis, El Paso & Pacific Railroad Company, in what is known as the 'Memphis, El Paso & Pacific Railroad Reservation,' and as designated by the maps, plats, and field-notes now on file in the general land-office, commencing on the eastern boundary line of the state, in Bowie county, and thence westwardly to the twenty-third meridian of longitude west from Washington, are hereby continued to be reserved from pre-emption, location, or survey by the holder of any land certificate or other land claim, for the benefit of the said Texas & Pacific Railroad Company, and for the benefit of the school fund; and, where the public lands therein have not already been sectionized, said company shall sectionize the same, and return the field-notes and maps to the general land-office: * * * provided, that nothing herein contained shall be so construed as to affect or impair the legal rights of third persons." Sec. 6. "That the said Memphis & El Paso reservation, from the twenty-third meridian of longitude from Washington to the Rio Grande river, as designated by the field-notes, maps, and reports from the different surveyors of the several land-districts of the state on file in the general land-office, is hereby continued to be set aside and reserved from pre-emption, location, and survey for the benefit of said Texas & Pacific Railway Company and the school fund." The act proceeds to set aside an additional width of 40 miles on each side of the center of the reservation, so as to make 80 miles from twenty-third meridian west to a point south of the south-east corner of New Mexico, and opposite. After passing that point, the reservation of 80 miles is continued to the Rio Grande, bounded north by New Mexico, "the same to include the Memphis & El Paso reservation hereinbefore mentioned," to continue till 1880: "provided, that nothing in this section shall impair or affect the rights of any person or persons heretofore legally acquired within said reservations." The map and designation have been on file in the general land-office since 1857, and the sufficiency of the description of the reservation has been repeatedly recognized by both the legislative and executive departments of government. The charter does not require a line to be run or surveys to be made as a condition precedent to the reservation taking effect, but expressly gives effect to the reservation from and after the time when such line shall be designated "by survey, recognition, or other-

wise." Had the legislature intended that the line should be actually run before the reservation should take effect, it would not have authorized the line to be designated "by recognition or otherwise." The description given in the map and designation affords the information necessary for the exact location of the line and identification of the boundaries of the reserve. We think the court did not err in holding that the description was sufficient.

The charter of the Memphis, El Paso & Pacific Railroad Company, granted by act of the legislature of February 4, 1854, in which the lands were granted and the reserve created, and upon which the company acted and invested its capital, is a contract within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts; and this contract was not affected by the provision of section 5, art. 10, of the constitution of 1869. *Davis v. Gray*, 16 Wall. 216.

The judgment of the court below being in accord with the conclusions here expressed, we are of opinion that it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, and judgment affirmed.

RUSSELL v. HUNNICUTT.

(*Supreme Court of Texas. May 8, 1886.*)

EVIDENCE—DECLARATIONS OF SURVEYOR—HEARSAY.

Plaintiff employed a private surveyor to survey a tract of land, to ascertain its boundaries. This surveyor had not made the original survey, nor was he present when it was made. During the course of his work he made numerous declarations, to persons who were present and assisting him, of his opinion as to identity of lines and corners. *Held*, that these declarations were merely hearsay, and not admissible in evidence, although the surveyor had died before the trial.

Commissioners' decision. Appeal from district court, Blanco county. *A. O. Cooley*, for appellant. *R. H. Ward*, for appellee.

COLLARD, J. H. L. Conn had once been surveyor of Blanco county, but not since 1870. Subsequently he did private surveying, and in 1882 or 1883 he surveyed the Roland Hunnicutt two-thirds of a league for plaintiff below (appellee) to ascertain its boundaries. The original survey was made in 1856. Quite a number of persons were along when the survey was made by Conn,—the plaintiff, his son, and others. The declarations of Conn, of his opinion as to identity of lines and corners while making the survey, were admitted in evidence on the trial as sworn to by plaintiff, his son, and others, who were present. The testimony of one Beauchamp will illustrate the character of the evidence, and we quote from it for that purpose: "I knew H. L. Conn. He is now dead. About three years ago I went with Conn, Jas. B. Hunnicutt, W. R. Hunnicutt, Daniel Brown, Cicero Woodard, and some others to what is claimed as the N. W. corner of the R. Hunnicutt, and the north-east corner of the E. Marshall, survey No. 175. Conn said, after looking at it, he was not satisfied it was the proper corner, and we went west, measuring distance of the E. Marshall survey, and found a corner which Conn said looked to be the north-west corner of the Marshall, and the north-east corner of the J. Duel, survey 172. Conn said it corresponded with the field-notes. From there we went south, measuring, until Conn said we had run the distance called for in the field-notes of the Marshall survey, and found a corner which Conn said was the south-west corner of the Marshall, and the south-east corner of the Duel, surveys. We then ran east, until Conn said we had run the

distance called for in the Marshall field-notes, and failed to find any corner. Having looked for it awhile, and not finding any corner, a stone mound was made for the south-east corner of the Marshall. We then ran east until Conn said we had run the distance called for on the Hunnicutt. We failed to find any corner, but some further east found a mound; didn't find any bearing trees. The country around has been burned off and the timber destroyed. Next morning we went north from the mound, and, after going about half a mile, found an old marked line which Conn said was the east line of the Hunnicutt survey. Going on the line 300 or 400 varas, we found a corner which Conn said was the corner of the Friedlander survey. I ran the corners mentioned, but have no personal knowledge as to whether they corresponded with the field-notes or not; only know from what Conn said. I have no idea how many varas were run each time, or as to correctness of measurement, except what Conn said. I and others carried the chain." It is not shown that Conn had made the original survey, or that he had any knowledge of the facts stated by him, nor is it shown that he intended to do more than merely express his opinion. If it had been shown that he made the original survey, or was present when it was made, or that he was in such a position as to know the truth of his declarations, they would have been admissible, he having died before the trial. The declarations of a chain-carrier who assisted in making the original survey, or of the surveyor who located the land, deceased at the time of the trial, would be admissible. *Speer v. Coate*, 3 McCord, 229; *Sutherland v. Keith*, Id. 258. Field-notes of the original survey by the surveyor who made them, if they are proved to be in his handwriting, he being dead, would be admissible as his declarations. *Stroud v. Springfield*, 28 Tex. 665. One who has been the owner of a survey is presumed to know his own boundaries, and his declarations as to boundaries, made after he has parted with his title, and when he has no interest in favor of either party, are admissible after his death; and so would the declarations of one in possession while pointing out the boundary to which he claimed. *Hunt v. Evans*, 49 Tex. 316. But what a surveyor said was a boundary, without proof that he knew the fact, would be too vague and uncertain. *Welder v. Carroll*, 29 Tex. 335. In the case of *Hunnicutt v. Peyton*, 103 U. S. 864, the following rule is given: "In questions of private boundary, declarations of particular facts, as distinguished from reputation made by deceased persons, are not admissible, unless they are made by persons who it is shown had knowledge of that whereof they spoke, and who were on the land in possession of it when the declarations were made. To be evidence, they must have been made when the declarant was pointing out or marking the boundaries, or discharging some duties relating thereto." The court also held that, as the case before them was from Texas, if a different rule from the above prevailed in Texas, and had become a rule of property, such rule would be enforced. The court then reviewed *George v. Thomas*, 16 Tex. 74; *Welder v. Carroll*, 29 Tex. 317; *Evans v. Hart*, 34 Tex. 111; *Smith v. Russell*, 37 Tex. 247; and *Stroud v. Springfield*, *supra*; and conclude that "it is quite obvious the rule in Texas is not different from that which we have endeavored to show is the general American rule,—the guarded rule we have heretofore stated." We find nothing in our decisions since the last case from this state cited by the supreme court of the United States at variance with the doctrine there announced. *Hurt v. Evans*, 49 Tex. 316, is the last case in this state bearing upon the question, and we have shown that it does not change the law as before established; and hence we conclude that the declarations of Conn were inadmissible, because he is not shown to have had such knowledge of the facts as the law requires to entitle them to any standing as evidence. His declarations as to distances then measured by him would be a part of the *res gesta*, and of course admissible for what they might be worth; but his statements of identification of corners and lines are clearly inadmissible.

For the reasons given above, the judgment should be reversed, and the cause remanded for a new trial.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, and judgment reversed and cause remanded.

BROWN *et uxor*. v. BRIDGES *et al*.

(*Supreme Court of Texas. May 8, 1888.*)

1. SHERIFFS AND CONSTABLES—WRONGFUL LEVY—LIABILITY FOR.

In an action for personal injuries to plaintiff, a married woman, inflicted while defendants were making a levy on her husband's exempt property, an instruction that "if, by the seizure and stopping of the wagon and team, the plaintiff was seriously injured in her person," the jury should allow her actual damages, is erroneous, since it is not necessary to plaintiff's right of recovery that her injuries should be serious.

2. SAME—DEFENSE—EVIDENCE.

In such an action, evidence on the part of defendants tending to justify the suing out of the attachment is inadmissible; the issues being not as to a wrongful suing of the writ, but as to an illegal levy upon exempt property.

3. DAMAGES—EXEMPLARY—RATIFICATION OF WRONGFUL LEVY.

In such case, if the levy was oppressively made, and the conduct of the officer was malicious or oppressive in respect to plaintiff, and the creditors, knowing the facts and the injury, ratified the acts of the officer, they would, equally with him, be liable in exemplary damages; and acceptance by them of any benefit in consequence of the levy, with knowledge of the facts, would amount to such a ratification.

4. SAME—REMOTE DAMAGES.

In such case, defendants are not responsible for any damages to plaintiff not the natural and proximate result of the injury, nor for such as resulted from her own want of care after the injury.

Commissioners' decision. Appeal from district court, Williamson county.

C. A. Brown and his wife sue for bodily and mental injuries to the wife, alleged to have been inflicted upon her by defendant Bridges at instance of defendant Smith, then present, their action being advised and ratified by other defendants Rucker and Montgomery; Smith acting also in capacity of agent for last-named defendants. Injuries are charged to have been inflicted while defendants were attempting to make an illegal and wrongful levy, under writ of attachment by defendants, upon a wagon and team, exempt property,—the wife being in the wagon at the time, peaceably on a journey in a public road; and she alleges that, by forcibly and suddenly stopping the wagon, she was injured in person, and greatly frightened, she then being far advanced in pregnancy. The attachment suit was brought by defendant A. H. Smith upon accounts aggregating \$84.40. Plaintiffs allege that Brown did not owe Smith the amount, but that \$16.25 of the amount was an account due Rucker and Montgomery, who assigned the same to Smith for the purpose of attaching for the benefit of Rucker and Montgomery; Smith merely acting as their agent for collection of the account. Defendants deny generally, and allege that the accounts were assigned to Smith for a valuable consideration, and that he became subrogated to the right of the original owners, and entitled to collect the same. There was a trial by jury, and verdict and judgment for defendants. Plaintiffs appeal.

G. W. Glascock and T. W. Stratton, for appellants. Fisher & Townes, for appellees.

COLLARD, J., (*after stating the facts.*) The lower court, in the tenth paragraph of the charge, instructed the jury that "if, by the seizure and stopping of the wagon and team, the plaintiff was seriously injured in her person, the jury would find * * * actual damages," etc. This was error. There is no authority requiring that a personal injury inflicted in the commission of an unlawful act should be serious, to entitle the injured party to damages.

The extent of the injury is a question for the jury, to be considered by them in estimating the amount of damages to be awarded, but not in determining the right to recover in some amount. An injury might be so slight and trifling as to deserve no compensation of itself; but, when it is the result of a trespass *vi et armis*, the jury should be left to assess the damages according to the attendant circumstances of aggravation or mitigation. Nominal damages would at least be recoverable. 2 Greenl. Ev. §§ 84, 270; *Champion v. Vincent*, 20 Tex. 811. In this case the constable was making an illegal levy upon property exempt from forced sale. He was guilty of a trespass; was seizing a wagon and team that he had no right to take by authority of the writ. If, by such seizure, Mrs. Brown was injured, she would be entitled to recover damages commensurate with her injuries; if Smith was acting with the constable, directing or aiding him, he would also be liable; and if Rucker and Montgomery procured Smith to act for them in the attachment proceeding, and, knowing the facts of the seizure and the injury to Mrs. Brown, ratified the acts of the officer, they would be liable, (*Gilleland v. Drake*, 36 Tex. 677; *Erwin v. Bowman*, 51 Tex. 518;) or if Rucker and Montgomery, or either of them, knowing the acts and conduct of the officer, ratified the same, they would be liable in consequential damages. If the levy was oppressively made, and the conduct of the officer was malicious or oppressive in respect to Mrs. Brown, and Smith directed it, aided or encouraged it, and Mrs. Brown was thereby injured, both of them would be responsible in exemplary damages; and if Rucker and Montgomery, or either of them, knowing the facts and the injury, ratified the acts of the officer or of Smith, their liability would be the same as that of the officer. If Rucker and Montgomery, or either of them, accepted or derived any benefit under the levy, or as a consequence of it, knowing the facts, or after they, or either of them, had been notified of the facts, they would be deemed to have ratified.

The court instructed the jury substantially that defendants would not be responsible for any injury to Mrs. Brown not the natural and proximate result of the injury, and that such as resulted from her own want of care after the injury could not be considered in estimating damages. This charge was correct.

The questions and answers allowed by the court, over plaintiffs' objections, tending to justify the suing out of the attachment, were improper. There was no issue as to the wrongful suing out of the writ. The issue was of an illegal levy upon exempt property, and injury to Mrs. Brown committed in the seizure. The exceptions to the questions and answers should have been sustained. Proof that Brown was giving cause to his creditors to attach his property was no defense for levying the writ upon exempt property in such a way as to injure Mrs. Brown. The judgment should be reversed and remanded.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, and judgment reversed, and cause remanded.

WOOLDRIDGE v. EASTLAND COUNTY.

(*Supreme Court of Texas*. May 11, 1888.)

EMINENT DOMAIN—COMPENSATION—CONSTITUTIONAL LAW.

In 1877 the commissioners' court caused a public road of the third class to be laid out across lands which plaintiff subsequently purchased. In 1886 the commissioners' court classed the road as second class, and ordered the removal of the gates which had been erected at the entrances to plaintiff's lands. Held, that this was a taking for public use, and imposing additional burdens upon plaintiff, for which, under the seventeenth section of the Texas bill of rights, he was entitled to compensation.

Appeal from district court, Eastland county.

J. T. Hammonds, for appellant.

WALKER, J. It is shown by the record that in 1877 the commissioners' court made an order appointing a jury to lay out and mark a public road of the third class between points named. It seems that the road was laid out, but no report can be found or subsequent action of the court establishing the road as so laid out. However, the road was used by the public, and such use was well known to plaintiff. In 1882 to 1883 plaintiff bought lands, one tract of 320 acres, and one of 640 acres, adjoining and between which the road ran. The road also occupied part of the 640-acres tract for the remaining distance. In 1885 the commissioners' court classed the road as second class, and ordered the opening of gates which had been erected at the entrances into the lands of plaintiff. None of the statutory proceedings were taken to ascertain the damages, and compensate plaintiff for the increased burden consequent upon the change. The action of the county commissioners, for which alone the county would be liable, only contemplated a third-class road. If it was actually appropriated under this order, then the plaintiff, purchasing subsequent to such appropriation, would take the land subject to the easement existing at his purchase. *Day v. Chambers*, 62 Tex. 190. The subsequent public use for a less period of time than would give a right by prescription would not appropriate the way used beyond that of a third-class road. *Franklin Co. v. Brooks*, 68 Tex. 680, 5 S. W. Rep. 819. The action of the commissioners' court in 1885, in establishing the road as a second-class road, was a taking of the land of plaintiff, and imposing additional burdens upon him, without compensation. Theseventeenth section of our bill of rights provides that "no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless with the consent of such person; and when taken, except for use of the state, such compensation shall be first made or secured by a deposit of money." Const.; *Hamilton Co. v. Garrett*, 62 Tex. 602. The plaintiff had a right to adequate compensation, at least, for the increased burden imposed by the change from a third to a second class road. The denial of this below was error. The record does not furnish the basis for an entry of judgment in this court, and the judgment is reversed and remanded.

FORDYCE v. DIXON *et al.*

(*Supreme Court of Texas. May 11, 1898.*)

1. RECEIVERS—ACTIONS AGAINST—LEAVE OF COURT.

Where permission has been obtained from the United States circuit court to bring an action against its receiver, the failure of the plaintiff to reobtain permission on the resignation of such receiver, and appointment of another, is not such error as to require a reversal of the judgment, in the absence of exceptions or assignment of error.

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—ABATEMENT OF ACTION.

Although the damages to be recovered for personal injuries to a married woman would be community property, the cause of action does not cease on the death of the husband pending the action.

3. APPEAL—REVIEW—ASSIGNMENT OF ERROR—FAILURE TO SIGN.

Under Texas supreme court rule 97, requiring an assignment of error to be signed by the party or his counsel, one not so signed cannot be considered.

Error from district court, McLennan county.

Clark, Dyer & Bollinger, for plaintiff in error. *Alexander & Winter*, for defendants in error.

STAYTON, C. J. This action was originally brought by W. M. Dixon, with leave of the circuit court of the United States, against W. R. Woodward, receiver, appointed by that court to conduct the business of the Texas & St. Louis Railway Company, to recover damages for injuries alleged to have been

received by his wife while a passenger on the train operated by the receiver. Woodward resigned, and the plaintiff in error was appointed to the receivership in his stead, and made party defendant. Dixon died pending the action, and his wife, in her own right, and as next friend for their minor children, prosecuted the action to final judgment. No exceptions were taken and acted upon to the making of parties plaintiff or defendant, and a judgment was rendered in favor of the plaintiffs. There is no statement of facts, and the assignments of error are not signed by counsel or the plaintiff in error. Rule 97 requires an assignment of error to be signed by the party or his counsel, and one not so signed cannot be considered. In this state of the record only errors fundamental can be considered. Although the damages to be recovered for injuries to the wife would have been community property, the cause of action did not cease upon the death of the husband. The wife and children doubtless succeeded to such rights as were held by the husband, and if they were not the proper parties to prosecute the existing cause of action, a matter which need not be considered, objection should have been made in proper time and manner. The charge of the court shows that the recovery was restricted to such cause of action as would survive the death of the husband. The permission of the circuit court of the United States to bring the action against its receiver would apply to the receiver appointed on the resignation of the receiver acting at the time the permission was given. If, however, this were not so, and it will be conceded that such permission should have been reobtained, the failure to get this would not be such error as to require a reversal of the judgment, in the absence of exceptions urged at the proper time and in proper manner, and in the absence of assignments of error.

There is no error apparent on the record requiring a reversal of the judgment, and it will be affirmed.

GARRETT *et al.* v. JOBE *et al.*

(*Supreme Court of Texas. May 11, 1888.*)

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE OF.

W. held a tract of land under a contract of purchase, upon which, at his wife's death, in August, 1881, there was due \$125. His father, J., also held a tract under bond for title, and owed about \$400 on the purchase price. In May, 1881, W. and J. entered into a parol agreement for an exchange of these lands, each agreeing to pay the balance due on the tract taken by him in exchange, and they took possession accordingly. J. made valuable improvements on the tract which he received, and paid the balance due on it. After his wife's death, W. obtained deeds to both tracts, and subsequently, at J.'s request, conveyed the tract received by J. in the exchange, to third parties. After W.'s death his children brought an action to recover one-half of this tract, claiming that their father's deed conveyed only his own interest, and that their mother's interest descended to them. *Held*, that the deed made by W., although made after the death of his wife, vested complete title in the grantees, and that plaintiffs could not recover.

Appeal from district court, Johnson county.

This was a suit for partition, brought by E. V. and B. Jobe, by their next friends, against J. M. Garrett and others. There was a trial to the court, and judgment for plaintiffs. Defendants appeal.

Davis & Plummer, for appellants. *J. W. Brown*, for appellees.

STAYTON, C. J. J. W. Jobe was the father of W. P. Jobe, and the former died in 1883, leaving several children. The latter died in 1885, leaving 10 children, who are the plaintiffs in this case, and seek to recover as heirs of their mother an interest in a tract of 65 acres of land conveyed to their father by a deed of date November 6, 1882. Their mother died in August, 1881, and the evidence renders it probable that at the time of her death the land was held under an executory contract to purchase, for there was \$125 due on the purchase money after her death; and, although she and her husband lived for

a time on the land, no deed was made to him until after her death. They built a small house, and cleared five or six acres of land. In the year 1872, J. W. Jobe bought 98 acres of land, then unimproved, and on which he made improvements, which increased the land in value about nine dollars per acre. He held the land under a bond for title, and owed about \$400 on the purchase money. On October 2, 1882, the persons from whom he purchased deeded this land to W. P. Jobe. It is shown that in May, 1881, J. W. and W. P. Jobe entered into a parol agreement for an exchange of lands, under which the former was to have the land in controversy, and pay the balance of the purchase money due on it, and the latter was to have the 98 acres which the father held under bond for title, and to pay the \$400 still due on the purchase money. After this agreement was made the parties occupied the lands which, under it, they were each to have, and on that in controversy J. W. Jobe made permanent and valuable improvements. The evidence tends to show that he paid the balance of the purchase money due on it. This verbal contract was testified to by many witnesses, most of whom were of the family, and there can be no reasonable doubt of its existence or terms. It was shown that W. P. Jobe repeatedly promised to convey the land in controversy to his father, and seems to have delayed doing so for want of proper description of it. He is also shown to have expressed regret that a conveyance was not made before the death of his wife. W. P. Jobe was living on the 98 acres of land, under a different contract, at the time the contract for exchange of lands was made; and his father was occupying the land in controversy under the same contract. A short time before the death of J. W. Jobe he requested his adult children to convey the land in controversy to his two minor children, A. P. and N. S. Jobe, assigning reasons for this most natural and commendable. In pursuance of this request the adults, including W. P. Jobe, on November 23, 1883, made a deed conveying the land in controversy to the minors. This conveyance, it is conceded, passed whatever interest W. P. Jobe had in the land, but it is claimed that it did not convey the interest which his children now claim, through inheritance from their mother. The appellees also claimed that the separate means of their mother was used in part to pay for the land, but there is no evidence entitling this claim to serious consideration. The cause was tried without a jury, and judgment was rendered in favor of the plaintiffs for one-half of the land. Holding, as did W. P. Jobe, the land in controversy under some kind of a contract that did not vest in him the title, and the payment of the purchase money being necessary before he could have acquired title, we are of the opinion that he had the power to make such a contract as he made with his father, and, had this been in writing, there would probably have been no controversy between the parties. There seems not to arise any question of homestead, for at the time the verbal agreement for exchange of lands was made, and, from that time until the death of his wife he, with his family, resided on the 98 acres which he was to receive, and did receive, in exchange for the land in controversy. So far as the record shows, the appellees hold the 98 acres of land through inheritance from their father and mother; but, notwithstanding this, they now seek to hold one-half of the 65 acres, which was in part at least paid for by their grandfather. The price for the interest held by their father and mother was paid in the exchange, and their grandfather entered upon it, and made such permanent and valuable improvements as would have entitled him to have the verbal contract specifically performed. Under these facts we are of the opinion that the deed made by their father, although made after the death of their mother, vested title in A. P. and W. S. Jobe. The judgment will therefore be reversed, and here rendered in favor of the appellants. It is so ordered.

CITY NAT. BANK OF FORT WORTH v. MARTIN.

(Supreme Court of Texas. May 8, 1888.)

1. BANKS AND BANKING—COLLECTIONS—NOTICE—TELLER.

Where a note is left with the teller of a bank for collection, and the bank receives the money therefor, but the teller deposits the amount in his own name, the bank has notice as to the ownership of said note through its teller, and is liable to the true owner, although said note was payable to the order of said teller.

2. SAME—ACTIONS AGAINST—EVIDENCE.

The declaration of a deceased bank teller that he had lent plaintiff's money, made at the time of exhibiting to plaintiff a note therefor payable to himself or order, when corroborated by the statement of the makers of the note that the teller said the money belonged to an outside party, is sufficient to prove plaintiff's ownership of the note in an action against the bank for the amount paid to it on said note.

3. APPEAL—REVIEW—OBJECTIONS WAIVED.

Where the record shows no objection to the admission of evidence, it must be presumed that none was made.

Commissioners' decision. Appeal from district court, Tarrant county.

Action by appellee, D. C. Martin, against the City National Bank of Fort Worth, appellant, to recover the amount collected by defendant's teller, John Nichols, on a note made by Boaz & Battle. Upon the trial by the court without a jury, the following facts were found: "(1) That on 1st day of October, 1884, the plaintiff had deposited to his credit with the defendant bank the sum of \$1,525.00, and on that day drew his check on the bank in favor of John Nichols for the sum of \$1,594.19, which check was not charged against the plaintiff, but was, after the death of Nichols, in August, 1885, found among the private papers of Nichols; (2) that on the 1st day of November, 1884, said Nichols drew against plaintiff a check for \$1,500.00, signing plaintiff's name to said check without authority, which was charged against the plaintiff; (3) that on the 1st day of December, 1884, plaintiff deposited with the defendant the sum of \$1,300, and on the 16th December, 1884, the sum of \$500, which sum was received by said John Nichols as acting teller of defendant bank; (4) that on making the last-named deposit, plaintiff informed said Nichols that he was desirous of drawing his money, and requested Nichols to assist him in loaning the sum; (5) that afterwards, in January, 1885, plaintiff called at the bank, and was informed by Nichols that he had loaned \$1,500 of plaintiff's funds to Boaz & Battle, and exhibited to plaintiff a note for \$1,500, signed by said Boaz & Battle, payable to John Nichols' order, at defendant bank, and indorsed by said Nichols and others, and informed plaintiff that he took said note for the money loaned, and plaintiff thereupon left the note with defendant for collection when due; (6) that on 27th day of June, 1885, and before the maturity of the note, the makers, Boaz & Battle, went to the bank for the purpose of paying said note, and gave to said Nichols a check on the Traders' National Bank, payable to the order of defendant, for the sum of \$1,588.50, the amount of said note and accrued interest; (7) that on 29th of June, 1885, said check was paid to defendant by said Traders' National Bank; (8) that said Nichols, who was still the acting teller of said defendant bank, received said check, and delivered to said Boaz & Battle said note; (9) that, upon receiving the check of said Boaz & Battle, said Nichols made a deposit check in his name for the amount of said check, and the same was entered on the books of the bank to the credit of said Nichols on his individual account; (10) that, during the period covering said transactions, Nichols was a director, vice-president, and acting teller of defendant bank, and in his capacity of teller was authorized by defendant to receive and pay out money of the bank; (11) that each and all the transactions between plaintiff and Nichols, with reference to plaintiff's funds, were had at the bank, and at said Nichols' place as teller, and that the payment of said note by Boaz & Battle was made to said Nichols, as an officer of the bank, by a check drawn

in favor of defendant upon another bank; (12) that said Nichols was largely indebted to the bank, and had at divers times misappropriated the funds of the bank, and of its depositors, by concealing check and deposits made by depositors."

Uray & Stanley, for appellant. *Hogsett & Greene*, for appellee.

MALTBIE, J. John Nichols was the receiving and paying teller, also a director and vice-president, of appellant, the City National Bank of Fort Worth, and died insolvent on 17th day of August, 1885, a defaulter to the bank in the sum of \$30,000. During the year 1884, and up to the time of Nichols' death, the appellee, D. C. Martin, was a customer of the bank, and in the month of December deposited with it the sum of \$1,800; Nichols receiving it for the bank. At the time of making this deposit, Martin requested Nichols to assist him in making a loan of this money. In January, 1885, Martin called at the bank, and was informed by Nichols, who was then occupying his place as teller, that he had loaned \$1,500 of the money, and at the same time exhibited to Martin a note for that amount, signed by Boaz & Battle, payable to John Nichols, or order, at appellant bank, indorsed by Nichols and others in blank. Martin directed Nichols to hold it for collection; the understanding of Martin being that Nichols was to hold the note in his capacity of agent of the bank. On 27th of June, Boaz & Battle called on Nichols at the bank, and gave him a check on the Traders' National Bank, payable to the order of appellant, for the sum of \$1,583.50, in payment of this note and accrued interest. This check was paid to the bank on 29th. Nichols received the check from Boaz & Battle, and delivered their note to them. Nichols then made a deposit check in his own name for the amount of the check so secured, and caused the same to be entered on the books of the bank to his individual credit. The bank never accounted to appellee for this note, or the \$1,500 that Nichols claimed that he had advanced of appellee's money for the note. After these transactions had occurred, appellee, not knowing of them, authorized Nichols to extend the time of the payment of the note till fall, upon payment of the interest. Soon after this Nichols represented to appellee that he had collected the interest, and extended the time of the payment of the note. Appellee, upon the strength of these representations, drew several small drafts on the bank for the interest that he supposed had been collected on the note, which were paid by Nichols, and suppressed without being reported to the bank. No officer of the bank except Nichols was informed of any of these matters; but appellee did not discover that there were irregularities about the transactions until after the death of Nichols. Upon this state of facts the court rendered judgment in favor of appellee for the amount of the note and interest. It is no part of the business of a bank to loan money for the public or for individuals; and, in the absence of proof that appellant was engaged in such business, it must be presumed that Nichols, in making the loan of appellee's money, was acting outside of the scope of his authority as agent of the bank, and no liability would attach to the bank for the acts of Nichols in making the loan. In this case the complaint is not in reference to the making of the loan, but that the proceeds of the loan were appropriated by the bank to its own use after it had notice, through Nichols, that the money belonged to appellee. It is insisted, in the first place, that there is no competent evidence that the note in controversy was the property of appellee; and, in the second place, it is insisted that, if the note was shown to belong to appellee, there is no evidence that appellant had notice of this fact, and that it had a right to apply the money in its possession to the credit of Nichols in payment of his defalcation. The declarations of Nichols, at the time he exhibited the note to appellee, were not objected to, so far as the record shows; and it must be considered by this court that no objection was made in the court below, though it is claimed in the brief of counsel that there was; and any objection that could

have been made to the admission of the evidence must be held to be waived. Parties have the right to object or not, as they may see fit, to the admission of testimony that may be offered during the progress of a trial. If they fail to do so, the testimony is to be weighed by the court or jury, and such probative force should be given to it as it may be entitled to. Any other rule would lead to great confusion and uncertainty in determining causes upon appeal. The question, then, is, was the evidence sufficient to satisfy a reasonable mind that the note was the property of appellee? Nichols certainly knew to whom the note belonged. It was payable to his own order, and indorsed by himself in blank. The declarations of Nichols were corroborated by Boaz & Battle to the extent that, at the time the loan was made, Nichols stated to them that the money belonged to an outside party. So there can be no doubt of the sufficiency of the testimony on that point. The note about which the declaration was made then being in the possession of Nichols, and payable to his order, the presumption was that it belonged to him, and for that reason the declaration was against his interest when made, and, he having competent knowledge of the subject, and having been shown to be dead, the evidence was admissible on this ground. 1 Greenl. Ev. 198, § 147. At the time of these declarations, appellant had no interest in the subject-matter, but its claim attached long subsequent thereto.

It clearly appears from the testimony that appellee was the owner of the note, and that he delivered it to Nichols as agent of the bank for collection. It is objected that Nichols had no authority to receive the note for collection in behalf of the bank; his business as teller being to receive and pay out money over the counter. Let it be conceded that the duties of a teller, by the rules of banking, are thus limited. It was shown that Nichols on other occasions had made collections for the bank. But, if it had not been shown, it is a well-known fact that the collection of money for others is a part of the regular business of all banks; and when a bank opens its doors for business with the public, and places officers in charge, persons dealing with them in good faith, and without notice of any want of authority in such officer, and the act done is in the apparent scope of the officer's authority, whether the officer was actually clothed with such authority or not, the party so dealing would be protected. *Bank v. Bank*, 10 Wall. 650. If a bank does not wish the public to deal with any particular one of its officers at its regular place of business in a particular line of that business, it would be its duty to so notify the public in some effectual way. The public certainly could not be expected to know, without being informed, that a person that was in the habit of daily receiving and paying out money in sums great and small had no authority to receive a note for collection, or receive the money for it when offered at the counter. It may be that no one except the bill collector was authorized to make collections in this bank, or to receive notes for collection. Still it would be most unreasonable that an ignorant third party, who had acted in good faith, should suffer in consequence of this rule. At the time Nichols received payment of the note in controversy, he was acting for appellant in the apparent scope of his authority, and knew, to an absolute certainty, that the money belonged to appellee, the knowledge of which, we think, under the circumstances, must be imputed to the bank. And, having held him out to the world as worthy of confidence, it would be monstrous to allow it to profit by the frauds that he was thus enabled to perpetrate. There is no doctrine of the law better settled than that a corporation or other person is liable for the frauds of its agents perpetrated in the scope or apparent scope of their authority. If the bank had received the money without being chargeable with notice that it belonged to appellee, it might have been entitled to hold it; but such is not the case, and we think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

MOODY *et al.* v. CARROLL.

(Supreme Court of Texas. May 15, 1888.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—PARTNERSHIP AND INDIVIDUAL CREDITORS.

A general assignment by a firm of all partnership and individual property, for the benefit of all firm creditors accepting it, is not void, as against creditors of the individual members of the firm, since such creditors, though not named in the assignment, can enforce their rights by suit against the assignee, without having the assignment declared void.

2. SAME—EXPENSES AND TAXES.

An assignment is not void because it directs the assignee to pay, first, all expenses, rents, taxes, and assessments due and to become due on lands until sold.

3. SAME—RESERVATION OF RESIDUE OF ESTATE.

A deed of assignment, requiring the residue of the estate, after all debts of every kind have been paid or satisfied, to be returned to the assignors, reserves no benefit in fraud of creditors, and is not void.

4. SAME—SALES ON CREDIT.

Under the Texas statute of 1883, relative to assignments for the benefit of creditors, which provides that no fraudulent act, intent, or purpose of assignor or assignee shall defeat the assignment, an assignment is not void because it authorizes the assignee to sell on a credit.

5. SAME—PREFERENCES.

Under said act, a power conferred on the assignee, by a deed of assignment, to pay any balance in his hands after discharging the debts of accepting creditors to the other creditors *pro rata*, although void, does not render the assignment void.¹

6. SAME—RIGHTS OF CREDITORS—GARNISHMENT.

Property transferred to an assignee by a valid assignment for the benefit of creditors cannot be reached by garnishment until the trust has been fully executed.

7. COSTS—ON APPEAL—GARNISHEE.

Under Rev. St. Tex. art. 219, providing for the allowance of costs to a garnishee when the proceedings against him are dismissed on answer, when the garnishee is an assignee whose trust has not been executed, and the proceedings are dismissed on this account, it is proper, upon appeal, to allow the garnishee compensation to be included as costs, and to compel the garnishing creditors to pay costs of appeal, as well as the costs below, although the garnishment proceedings are, by order of the supreme court, allowed to stand until the trust should be fully executed.

Commissioners' decision. Appeal from district court, Denton county; A. H. FIELDS, Special Judge.

Garnishment proceedings by W. L. Moody & Co., appellants, against J. A. Carroll, appellee, the assignee for the benefit of creditors of the firm of Fain, Peery & Shelton, to collect a debt due from said firm.

Owsley & Walker, for appellants.

COLLARD, J. The principal question for our determination in the case is, is the assignment made by Fain, Peery & Shelton to J. A. Carroll, for the benefit of creditors, void on its face? It is a general assignment of all partnership and individual property of every kind for the benefit of all creditors of the firm, providing for such creditors as accept under it, requiring bond of the assignee, and in all its provisions indicating that the intention was to assign under the statute. When such an assignment is made, it comes under the statute, and must be executed in the manner provided by the statute, even though some of its terms may be at variance with the law. The law becomes a part of the deed, and will control the assignee in the distribution and management of the estate. He becomes an officer of the law, and must be governed by it under directions of the court. *Fant v. Elsbury*, 68 Tex. 6, 2 S. W. Rep. 866; *Schooler v. Hutchins*, 66 Tex. 328, 329, 1 S. W. Rep. 266. The creditors can compel the assignee to conduct the administration as the law prescribes, and can maintain their rights in the courts, whether the instrument of assignment designates them or not. It does not appear that

¹On the subject of the validity of preferences in assignments for the benefit of creditors, see *Talbot's Assignee v. Ewalt*, (Ky.) 7 S. W. Rep. 630, and note.

there were any creditors of the individual members of the firm, but, if there were, we do not understand the law to require us to hold the assignment void. They would be included by the law, and could enforce their rights, whatever they might be, by suit against the assignee, without disturbing the assignment or having it declared illegal.

It is contended that the assignment is void because it provides that the assignee is authorized to sell the property on a credit. If any clause in the deed could be so construed, it would not for that reason be held void. The creditors can compel the assignee to administer the estate for the best interest of all concerned. The question was before the supreme court in *Keller v. Smalley*, 63 Tex. 516. Justice STAYTON in that case said: "Cases may arise in which for many reasons sales on a credit would best subserve the interests of all, and in such case the creditors could compel the assignee so to sell; and on the other hand cases may arise in which it would be to the advantage of creditors that the property should be sold for cash, and in such case the assignee who might desire or intend to sell on credit could be compelled to sell for cash. The rules by which the validity of assignments not statutory are to be determined have not conclusive application to assignments made under the statute." The court referred to the amended act of 1883 as authority for the decision in which it is declared "that no fraudulent act, intent, or purpose of the assignor or assignee shall have the effect to defeat the assignment, or deprive the creditors consenting thereto from the benefits thereof, but any such fraudulent act, intent, or purpose on the part of the assignee shall be sufficient for his removal." The foregoing amendment contains only the principles that were announced in 1882 by the supreme court in the case of *Blum v. Welborne*, 58 Tex. 162, 163, where it is held that "no act of the assignor or assignee, or of both, at the time the assignment is made, or preceding it, but in contemplation of it, done with intent to defeat, delay, or defraud creditors, will authorize a creditor to treat the assignment as void," etc. The amended act of 1883 (sixth section) is then only declaratory of the law as it was before. We are not called upon to add any additional argument for holding that an assignment conferring the power upon the assignee to sell the property on a credit will not render the assignment void. It is settled by the authorities referred to. The estate will be managed according to the best interests of the creditors, regardless of the direction given in the assignment. *Schooler v. Hutchins*, 66 Tex. 329, 1 S. W. Rep. 266. It has also been decided that property fraudulently conveyed, or debts fraudulently secured and preferred in contemplation of insolvency, will not vitiate the assignment. *Blum v. Welborne, supra*. The statute itself is explicit upon the question. It provides that "all property conveyed or transferred by the assignor previous to or in contemplation of insolvency, with intent or design to defeat, delay, or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment." The assignee, or, in case of his neglect or refusal, any creditor of the estate, may sue and recover the property, and subject it to the assignment. This statute needs no interpretation; it is full authority for holding that any attempt on the part of Fain, Peery & Shelton to prefer creditors, by sale of property or deeds of trust in contemplation of assignment, or at the time it was made, would not vitiate the assignment. The sales and preferences so made would be void if the beneficiaries knew of the fraudulent intent, or had reason to believe it. See section 9 of the act in relation to assignments, (Gen. Laws 1879, p. 59.) No injury could result to the creditors. They could set aside such preferences by suit.

It is claimed that the assignment is void because it directs the assignee to pay, first, all expenses, rents, taxes, and assessments due and to become due on lands until sold. The law would require the assignee to pay all expenses of the execution of the trust, and all taxes due and to become due upon the property while it was in his hands; also the rents to become due for such

time. These matters are costs, and must be first paid. The rents due would be a preferred claim upon the rented property, and, if properly probated, would have to be first paid after costs and expenses out of the proceeds of property rented. The direction as to payment of such rents would not necessarily be void. As to such claim the assignee would be governed by the law of rent liens, the probate of the claim, and the time in which it was probated. The language of Mr. Justice STAYTON in *Schooler v. Hutchins, supra*, 329, is here applicable. He says: "If, however, the deed of assignment, attempted to confer powers which, under the law, an assignee could not legally exercise in the execution of the trust, this would not be sufficient reason for holding the assignment invalid. When an assignment is made under the statute, the rights of creditors vest, and they can compel the assignee to exercise the powers which the law expressly or by implication confers upon him, as they can restrain him if he attempts to exercise powers which the law does not confer upon him." The same may be said of the direction in the deed to pay any balance that may be in the hands of the assignee after discharging the debts of accepting creditors to other creditors *pro rata*. The assignee cannot execute such power; the law makes the excess subject to garnishment. Section 8, Act 1879. The power expressed in the deed is void, and cannot be enforced. It will be so treated without rendering the whole assignment void. It will be the duty of the assignee to execute the trust according to law, ignoring the illegal power conferred upon him.

It is also claimed by appellants that the deed is void because it requires the residue of the estate, after all debts of every kind have been paid or satisfied, to be returned to the assignors. This only directs the assignee to do what the law requires him to do. It reserves no benefit to the assignors to the detriment of the creditors. It is not fraudulent, and cannot affect the execution of the deed of assignment.

We have reviewed every objection to the assignment that need be noticed, and our conclusion is that it is not void, and there was no error in the court's so holding. Such being the case, no creditor could, by process of attachment or garnishment, take the assigned estate or any part of it out of the hands of the assignee, and compel its application to the payment of his debt. After the trust has been fully executed, if there should be any excess, non-accepting creditors may have it applied by garnishment. Until then they cannot interfere with the assignment proceedings. The answer of the assignee was sufficient to entitle him to a discharge from any claim of the garnishing creditors until the trust was fully executed according to law; but the garnishment proceeding should be allowed to stand until accepting creditors are satisfied or paid, and so give plaintiffs any precedent rights they may have over other garnishments against any fund or property that may remain in the hands of the assignee after he has executed the trust, and an order should be entered to that effect. *Lovenberg v. Bank*, 67 Tex. 448, 2 S. W. Rep. 874. This, however, was not the object of the garnishment or of this appeal, and hence we conclude the appellants should pay the costs of this appeal, the costs of the court below, and the \$200 awarded the garnishee as compensation to be included as costs. Rev. St. art. 219.

The judgment of the lower court is reformed and affirmed accordingly.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reformed and affirmed.

COOK v. POLLARD et al.

(Supreme Court of Texas. May 15, 1888.)

1. ATTACHMENT—INTERVENTION—RIGHTS OF SUBSEQUENT ATTACHING CREDITORS.

A petition on intervention in an attachment suit by a portion of the subsequent attaching creditors, which seeks to have the claim of the first attaching creditor

declared fraudulent as to all subsequent attaching creditors, and to have the fund distributed among the latter according to priority of their liens, does not warrant a judgment declaring the claim of such first attaching creditor fraudulent as to creditors, and directing that a sufficient amount of the fund that would otherwise have gone to the full payment of his claim be applied to the satisfaction of the claims of the intervenors, and the remainder applied to the claim of such first attaching creditor, as such judgment ignores the non-intervening attaching creditors.

2. SAME—PARTIES.

All creditors whose interests are to be affected by the decree should be made parties to an intervention in an attachment suit which seeks to have the claim of the attaching creditor therein declared fraudulent as to all subsequent attaching creditors, and to have the fund distributed among the latter according to priority of their liens.

Commissioners' decision. Appeal from district court, Lamar county.

Appellant, Philip H. Cook, on January 2, 1885, instituted suit against O. H. Pollard, one of the appellees, upon a promissory note made by Pollard for \$3,000. Appellant at the time sued out a writ of attachment against the property of the said Pollard, and caused the same to be levied upon a stock of goods in the city of Paris belonging to the defendant in the suit. Immediately thereupon eighteen other attachments were sued out, and successively levied upon said stock of goods, all subject to appellant's levy.

By order of the judge of the Sixth judicial district, upon application of appellant, the goods were, on the 20th day of January, 1885, sold by the sheriff of the county as perishable property, and brought the sum of \$6,500, which sum, less \$448, the amount of his costs and expenses, the sheriff paid into the hands of the clerk of the district court of said county to abide the determination of the suit. At the term of the court next ensuing, and before judgment, (appellee Pollard having been cited, and having failed to answer,) appellees H. T. Simon & Morse, and Max, Judd & Co., who were the fourth and fifth attaching creditors, and who had obtained judgments on their respective claims in the county court, filed each a motion and petition for intervention in the suit, upon the grounds that appellant's suit and attachment was upon a fictitious debt and that the attachment was intended for the purpose of hindering, delaying, and defrauding Pollard's creditors. None of the other attaching creditors joined in the intervention, or were sought to be made parties to the suit. The petitions of intervenors were excepted to on the grounds (1) that intervenors had not given bond as in case of injunctions; and (2) that the other attaching creditors have not joined, and have not been made parties to the suit. The exceptions were overruled, and appellant excepted to the ruling of the court. The appellants having pleaded a general denial to intervenors' petitions, the cause came on for trial without a jury, and the court gave judgment against Pollard, in favor of appellant, for his debt and costs, but also adjudged that he take nothing by reason of his attachment, and ordered that the fund in the hands of the clerk as the proceeds of the attached goods be distributed among the other attaching creditors, as far as it would go, in the order of their respective attachments, to which judgment appellant excepted, and filed a motion for a new trial, upon the grounds, among others, that the court erred in overruling the exceptions to intervenors' petition, and that the judgment was not supported by and was contrary to the evidence. The court overruled this motion, but amended the judgment, and ordered and decreed that the intervenors should be paid the amounts of their judgments and costs from the funds in the hands of the clerk, and that appellant should be paid from said fund the amount of his judgment, interest, and costs, less the amount so decreed to be paid therefrom to intervenors. To this ruling and amended judgment appellant excepted, and gave notice of appeal to the supreme court.

R. R. Gaines, for appellant. *Hale & Baldwin*, for appellees.

COLLARD, J., (after stating the facts.) The intervention of appellees Simon & Morse, and Max, Judd & Co., in the attachment suit of appellant, v.8s.w.no.6—38

Cook, against O. H. Pollard, was to have set aside and canceled the note sued on by Cook as a fraudulent and fictitious claim, and to have the proceeds of the goods levied on by Cook applied to the claims of other attaching creditors according to the priority of their attachment liens. Intervenor sued in their own names for the benefit of such subsequent attaching creditors without making them parties. The court rendered judgment for intervenors, declaring Cook's note fraudulent, rendered judgment for Cook for the whole of his note against Pollard, but applying a sufficient amount of the proceeds of the sale of the goods, that would otherwise have gone to the full payment of Cook's debt, to the satisfaction of the claims of the intervenors. After such deduction from Cook's claim, the residue of his claim was ordered paid out of the fund in the hands of the clerk, who held the proceeds of the sale of attached goods. Thus no benefit of the intervention was given by the decree to other attaching creditors besides the intervenors. We think there was fundamental error in the decree. The pleadings of intervenors did not warrant the judgment. The object of the bill was to have the Cook claim declared fraudulent as to all the attaching creditors subsequent to Cook, and to have the fund distributed among them according to priority of their respective attachment liens. The judgment did not grant the relief prayed for, but a wholly different relief, as upon a suit by intervenors for their own exclusive benefit. The result was materially different from the one sought, depriving several creditors whose attachments were subsequent to those of intervenors from a participation in the benefits of the suit that they would have received had the judgment of the court followed the pleadings and prayer of the bill. The judgment will have to be reversed.

The appellant, Cook, excepted to the intervention because the proper and necessary parties were not before the court; and it is claimed by appellant that all the creditors for whose benefit the suit was brought by intervenors were necessary parties. The general rule is that all persons interested in the object and purpose of a suit must be made parties. There are exceptions to the rule; as, in estates of deceased persons, suit may be maintained by one or a few creditors, for themselves and for other creditors, against the legal representatives of the estate, to have assets applied to payment of their debts, (1 Story, Eq. Jur. 99,) and in such case a creditor who claims a priority over other creditors by mortgage can sue in his own name for all the creditors. Upon the principle that such other creditors can come at any time before the succession is closed, and have their rights adjusted, it has been decided in this state that one creditor can maintain a creditors' bill to set aside a fraudulent conveyance by a deceased person, and subject the property so conveyed to be applied as assets of the estate. *Nix v. Dukes*, 58 Tex. 96. In a suit like the one at bar, where the decree is to be final, where priority of attachment liens of creditors is to be determined, and the fund actually and conclusively applied to their respective debts, we think all the creditors whose interests are to be affected by the decree should be made parties. Where the interest of a person is necessarily affected by a suit, he is a necessary party, whether he is to be benefited or not. *Hall v. Harris*, 11 Tex. 300; *Hall v. Hall*, Id. 526; *Channel Co. v. Bruly*, 45 Tex. 6. Especially is the law strict to require all interested persons to be made parties when the question between them is as to priority of liens. *Delespine v. Campbell*, Id. 628; *Rodriguez v. Trevino*, 54 Tex. 198.

The attaching creditors whose interests will be affected by the suit of intervenors must unquestionably be made parties. To hold the contrary would be contrary to the entire tenor of decisions in this state. It is proposed by the decree to finally settle the rights of all the lienholders, and to apply the fund, as so determined, to their debts. This cannot be done unless they are before the court. It is settled in this state that subsequent attaching creditors can maintain a suit by intervention in order to protect their interests in the at-

tached property, and to set aside the judgment for fraud, (*Nenney v. Schluter*, 62 Tex. 328; *Grabenheimer v. Rindskopf*, 64 Tex. 49;) and no bond is required of the intervenors for such purpose.

We are of opinion that, on account of the errors pointed out, the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

LYNCH v. ORTLIEB *et al.*

(*Supreme Court of Texas. May 15, 1888.*)

LANDLORD AND TENANT—LEASE—EVIDENCE.

In an action by a tenant against his landlord for injury to goods of the former, caused by the falling of a wall of the leased building, the admission of evidence that an agent of defendant, who made the contract of lease, represented to plaintiff at the time the lease was executed that the building was safe and secure, is reversible error, as, there being no allegation of fraudulent representations or concealments on the part of defendant, the rights of the parties must be determined by the written lease.

Commissioners' decision. Appeal from district court, Dallas county.

Action by Alex. Ortlieb & Co., the lessees of a building, against James D. Lynch, the lessor, to recover for injury to the goods and business of plaintiffs, caused by the falling of a wall of the leased building. The charge given and referred to in the fourth assignment of error is as follows: "If you believe from the evidence that, at the time plaintiffs leased the second story of defendant's building from defendant's agent, A. F. Hardie, said agent represented to plaintiffs that the walls of said building were safe and substantial; and if said representation was then untrue, the east wall of said building being then defective and unsafe; and if, after plaintiffs went into possession of said second story, they discovered that the east wall of the lower story of said building was unsafe; and that thereupon they notified defendant's said agent of its unsafe condition; and if said agent then promised to repair it, and make it safe; and if he failed to do so; and if, on account of his said failure, said east wall fell, and thereby the goods of plaintiffs were injured; and if you find further that, when said agent Hardie was notified of the unsafe condition of said wall, he promised plaintiffs to make the wall safe; and if plaintiffs relied on the promise of said agent, and were thereby induced to leave their goods in the second story over said wall; and if, by being so left in said second story, they were damaged by the fall of said wall,—then you will find for the plaintiffs, the actual damages that they have suffered by reason of the falling of said wall." Judgment for plaintiffs. Defendant appeals.

Chas. Fred Tucker, for appellant. *A. L. Lathrop* and *H. G. Robertson*, for appellee.

ACKER, J., (*after stating the facts.*) Appellant, J. D. Lynch, owned a two-story business house in the city of Dallas, and on the 30th day of January, 1880, entered into a written lease for the second story of the building, to appellees, for a term of two years, beginning February 20, 1880. Appellees paid rent up to April 1, 1880, and went into possession of the leased premises, and began business as wholesale dealers in notions. The written contract of lease contains no covenant or representations as to the safety or condition of the building. On April 1, 1880, a portion of the wall of the lower story of the building fell, causing damage to appellees' goods. This action was brought against the landlord, Lynch, to recover compensation for the damage thus sustained. On the trial appellees were permitted, over objection of appellant, to testify that Hardie, agent for Lynch, who made the contract of lease with them, represented to them at the time the lease was

executed that the building was safe and secure. The objection was upon the ground that appellees "sought, by the evidence, to vary and enlarge the written contract of lease by adding a parol covenant of warranty as to the condition and character of the building." The contract having been reduced to writing, and executed by the parties, they are presumed to have stated in the writing just what each party undertook to do, and their respective rights and liabilities must be determined from the language of the instrument itself. If the language of the instrument was ambiguous or uncertain, parol evidence might have been offered for the purpose of explaining what the language used actually meant. The instrument contains no warranty as to the condition or character of the building, and the effect of the evidence was to fix upon appellant the liability arising upon such a warranty, thus changing in a very material manner the rights and liabilities of the parties. The only covenant contained in the lease is upon the part of appellees, that they would keep the premises in repair. There is no implied warranty upon the part of the landlord that the premises are fit for the purposes for which they are leased. If the tenant desired to hold him responsible for the insecurity of the building, they should have had such a covenant incorporated in the lease. There is no allegation of fraudulent representations or concealments upon the part of the landlord, and, in the absence of such allegation, parol evidence cannot be offered of any representations or warranties made by him not embraced in the written contract of lease. It seems, indeed, that such allegation could not consistently be made, for it appears that appellees examined and inspected the building for themselves before the contract of lease was entered into. The lower story of the building was not in the possession of appellant. It was occupied by tenants, and it clearly appears that the insecure condition of the wall was produced by the uses made of the adjoining premises, which were not owned by nor under the control of appellant. We think the court erred in overruling the objection and admitting the evidence, from which it follows that the court erred in giving the charge relating to that evidence, and complained of in the fourth assignment of error. *Hughes v. Sandal*, 25 Tex. 162; *Self v. King*, 28 Tex. 552; 4 Wait, Act. & Def. 235; 1 Tayl. Landl. & Ten. § 381; Wood, Landl. & Ten. 320, 324; Abb. Tr. Ev. 526. We deem it unnecessary to discuss other points presented by appellant.

For the errors indicated, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

MCCORKLE *et al.* v. TEXAS BENEVOLENT ASS'N.

(Supreme Court of Texas. May 15, 1888.)

1. INSURANCE—MUTUAL BENEFIT—FORFEITURE—ESTOPPEL.

Where a member of a benefit association, relying upon the promise of the manager to draw upon him for assessments, and, being misled by the fact that such drafts have been twice made upon him, is suspended because of non-payment of an assessment for which no draft was made, and is unable to be reinstated for the reason that his health has become impaired, the association is estopped from insisting upon a forfeiture.

2. SAME—NOTICE BY MAIL.

Under by-laws of a benefit association providing that notice shall be given of assessment due before there shall be a forfeiture of the association benefits, notice to a member put in the mail, directed to him, but not shown to have reached him, is insufficient to support a claim of forfeiture.

Commissioners' decision. Appeal from district court, Travis county.

Action by Mary J. McCorkle and her minor children upon a benefit certificate of the Texas Benevolent Association. Judgment for defendant, from which plaintiff appeals.

Walton, Hill & Walton, for appellant.

MALTBIE, J. The appellants are the widow and minor heirs of Calvin McCorkle, and are entitled to recover of appellee the sum of \$5,000 on a benefit certificate in the Texas Benevolent Association, unless Calvin McCorkle, at the time of his death, had forfeited his right to membership in the association on account of non-payment of dues. R. B. Parrott was the general manager of the corporation, and under its by-laws was authorized to collect all moneys due the association from its members, with power to appoint deputies for this purpose. It was also made the duty of the manager to keep all accounts between the association and its members, to notify all members when contributions are due, receipt for all money paid, and keep a roll of all members in good standing. The by-laws provided that "notice of such contributions shall be sent to each; and every member failing to pay such contributions within thirty days from date of notice shall forfeit his or her claim to any and all benefits of the association." By a subsequent paragraph it is further provided that "any person who shall fall in arrear for dues or contributions, after thirty days' notice, shall cease to be in good standing, and shall forfeit all rights and claims to any and all benefits of the association; but such member can be reinstated by applying for proper form to the business manager, being duly examined by a regular physician, and found by him in sound health," etc. It will be seen that the manner of sending the notice is not prescribed, and we think the sections of the by-laws in reference to notices set out above, fairly construed, must be held to mean that notice shall be given of an assessment before a failure to pay shall work a forfeiture of the rights and benefits of a member, and that the mere sending of a notice by mail, unless it is received, would not work a forfeiture. Courts should not construe a clause in a policy of insurance so as to entail a forfeiture, unless it is plain that such construction is correct. The appellee claims that Calvin McCorkle forfeited all right to any benefit as a member of the association on account of his failure to pay a mortuary assessment levied on the 7th of April, 1883, and that he was never reinstated as a member. It having been shown that McCorkle was a member of the association in good standing, it devolved upon appellee to show that his rights had been in some way forfeited. In order to show such forfeiture, R. B. Parrott, the association's manager, testified that notice of the mortuary assessment of April 7, 1883, was duly mailed to all members, including Calvin McCorkle; that he was suspended on 7th of May by operation of law; and that he had never been reinstated. The fact of mailing the notice to McCorkle was the only testimony relied on to show that he had notice that the assessment had been levied. A letter from McCorkle to R. B. Parrott, dated October 17, 1883, strongly tends to show that no notice of the assessment was ever in fact received by him. The question rises whether the mailing of the notice is sufficient to work a forfeiture of appellants' rights. In the case of *Castner v. Insurance Co.*, 60 Mich. 277, 15 N. W. Rep. 452, the language of the charter being that the member is to be "notified, by the secretary or otherwise, either by circular or verbal notice," it was held that it was necessary that a member should have actual notice of an assessment before he could be deprived of his right to protection under his policy. In that case the court say: "In principle, it is not easy to distinguish the nature of the required notification from the office and object of the service of process, and there would seem to be as much reason for real notice in the case in question as in the case of an action. The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of persons insured, eventuate in wide-spread loss and injustice." The rule laid down by the Michigan court we think is fair and just to both parties, and should be followed. To deprive a person of his property rights without any notice is contrary to reason, and such a claim should not

be enforced by the courts unless the terms of the contract plainly require it. As before stated, we are of opinion that the by-laws in question, construed as a whole, do not require a member to be suspended, unless he is in some way notified that an assessment has been made against him. No reason is perceived why an association such as this, which purports to have been organized for the mutual protection of its members, which acts through its regular officers under a charter and by-laws, and resorts to assessments on its living members to procure funds to discharge its obligations to its officers, and such of its members as may die, should not be governed by the rules of law that are applied to ordinary life insurance companies. And it is said that the courts have with great uniformity applied to associations such as this the rules and principles applicable to the contract of life insurance. May, Ins. § 550a, p. 843, and authorities cited in note.

It is claimed by appellant that the Texas Benevolent Association is, by its own acts, and the acts of its officer and business manager, estopped from denying the membership and good standing of Calvin McCorkle at the time of his death; and in support of their proposition they introduced in evidence a letter from Calvin McCorkle to R. B. Parrott, under date of October 17, 1883, as follows: "DE. CAPT.: I received a notice, printed, to be filled out for reinstatement in T. B. A., which I am at a loss to understand. I received a notice of dues from your office, and at once paid it to Mr. Chadwick here, who said he would remit it with his own he had to send. I have received no other demand on me from T. B. A., and cannot understand why I am suspended. I am anxious to retain my membership, and so expressed to you, and, as I thought, it was understood between you and I that you would draw on me through bank at any time that I was in arrears or likely to be. Believing that we understood each other in this arrangement, I have not taxed my memory with payments. Let me hear from you. Your friend, CALVIN MCCORKLE." In reply to this letter, under date of 19th, R. B. Parrott, as manager of the association, after stating the amount of McCorkle's indebtedness, and also that a renewal could be effected by paying this sum, and furnishing a certificate of health according to a blank form inclosed, proceeds as follows: "Our promise to draw on you at sight was, of course, made in good faith; but, with our large and rapidly increasing membership, the noting of individual points has become utterly impossible. Notices, in the first place, are sent 30 days in advance, and it is taken for granted that all payments will be met. While the assessment is pending, our office force is kept constantly busy; and, as the greatest rush comes in closing up of an assessment, there would be little opportunity of running through our entire set of books, and follow individual instructions. Moreover, were we to comply with every request to draw at sight, and parties fail to protect, the business manager, becoming personally responsible in the premises, would be ruined by a single assessment." It was also shown that Parrott had on two occasions drawn drafts on McCorkle to cover assessments against him, which were duly honored. In rebuttal of this, Parrott testified that, at the time McCorkle became a member, he fully explained the by-laws of the association to him, and impressed upon him the necessity of making prompt remittances. He further testified that McCorkle then said to him: "If I fail to remit, you draw on me,"—to which the witness replied that, as business manager of defendant association, he could not make any such arrangement, and that, if he drew on him at all, it could only be as an individual, and that the witness could not and would not obligate the association to do any such thing. The witness is positive that he never drew on McCorkle except when specially requested by letter or telegram, and that he never had any individual arrangement for drawing money even in the individual capacity of the witness for assessments or dues. It will be seen, from the extract above, that while the manager of appellee, in his testimony on the trial, qualifiedly admits that he may have made an arrangement to draw

on McCorkle for his dues and assessments, he attempts for the first time to make it appear that he made it, if at all, in his individual capacity; whereas, in his previous letter to McCorkle, he admits, without qualification, that he did promise to draw, and that the promise was made in good faith, but it had become inconvenient of performance. It may be conceded that Manager Parrott informed McCorkle that the association would not be bound by any drafts that he might draw on McCorkle, and yet McCorkle may well have relied on the promise that he would draw. A reasonable construction of the declaration of Parrott to the effect that the company would not be bound by any draft that he might draw on McCorkle is that, if McCorkle failed to pay the draft, the company would not be bound by reason of the fact that Parrott had drawn it, but that McCorkle would be in the same attitude, in reference to the company, as though no draft had been drawn. It seems that McCorkle was a traveling man, residing in Austin, but that he was absent from home much of his time; and an arrangement by which Parrott, in his individual capacity, should draw on McCorkle to meet assessments, or in anticipation of them, would, we think, be in the apparent scope of the authority of appellee's general manager. It is clear that McCorkle was misled by representations made by the manager of appellee in furtherance of its business; that he relied on the representations, and, in consequence thereof, failed to pay his mortuary assessments, that he would otherwise have paid, and that he was for that reason suspended; and that, after his suspension, it was impossible to comply as to appellee's requirement that he should furnish a certificate of health, for the reason that his health had become impaired; but he did offer to pay up all dues. In view of these facts, we are of opinion that appellee is estopped to insist that, at the death of McCorkle, he had forfeited his benefit certificate in the association. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conforming thereto, his policy will not be forfeited, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. *Insurance Co. v. Eggleston*, 96 U. S. 577; *Appleton v. Insurance Co.*, 59 N. H. 544 *et seq.* In this instance, in addition to his promise to draw, Parrott had actually drawn two drafts on McCorkle, which had been honored; and the association should not be permitted to profit by the failure of its manager to carry out his agreement in reference to its business.

For the errors indicated, we think the judgment should be reversed and remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

WALKER, J., not sitting.

WINSOR v. O'CONNOR.

(Supreme Court of Texas. January 31, 1888.)

PUBLIC LANDS—LOCATION OF CERTIFICATE—TITLED LANDS—EFFECT OF SUBSEQUENT LOCATION—CONST. TEX. ART. 14, § 2.

One Burrell located a land certificate in 1838, but the patent by mistake was issued to Barrett. Defendant purchased the interest of Burrell, and held possession since 1876. *Held*, under Const. Tex. art. 14, § 2, which provides that "all genuine land certificates heretofore or hereafter issued shall be located, surveyed, and patented only on vacant and unappropriated public domain, and not upon any land titled, or equitably owned under color of title, from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land-office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him," that such located land was "titled," and a subsequent location thereof made in 1884 was void, though the Barrett patent was afterwards canceled.

Appeal from district court, Victoria county.

S. R. Fisher, for appellant. *Glass & Callender*, for appellee.

STAYTON, J. This is an action of trespass to try title brought by the appellant, who claims under locations made by him July 15, 1884, under which surveys were made September 19 of same year, which with the certificates were filed in the general land-office, September 18, 1885. The certificates were valid, and owned by the appellant. A valid head-right certificate, No. 99, was issued by the board of land commissioners for Jefferson county to David Burrell, on March 5, 1838, which was afterwards recommended by the board appointed to detect fraudulent land certificates. Under this certificate, a patent issued to the grantee for the quantity of land authorized by it. That land is situated in Jefferson county, and still held under the patent. In 1841, all the reports of the boards appointed under the act approved January 29, 1840, entitled "An act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants," having been filed in the general land-office, were printed in one volume, a copy of which has since been used in that office for convenient reference, to avoid handling the more cumbersome originals. This copy was not printed by authority, but as a matter of mere convenience. In this printed collection of the reports, certificate No. 99 appeared to have been issued to David Barrett instead of David Burrell; and in September, 1874, application was made, in the form prescribed by law, for a duplicate of certificate No. 99, issued to David Barrett, and on the 15th of that month the commissioner of the general land-office issued duplicate certificate No. 32-100 to David Barrett, under this application. The appellee purchased that duplicate certificate, but some of the transfers through which he claimed seem to have been forgeries, and he caused the same to be located on the lands in controversy, had the surveys made on November 16, 1874, by the surveyor of the county in which the land is situated, and the field-notes, with the duplicate certificate, were returned to the general land-office on December 31, 1874. The locations and surveys were made on two tracts of land, and on one of them a patent issued to "David Barrett," on July 11, 1876. That patent covered the land in controversy. O'Connor, having ascertained that the duplicate certificate, under which he was claiming the land, was issued without authority, on November 18, 1885, voluntarily surrendered to the commissioner of the general land-office for cancellation the patent issued to "Barrett," and on the same day it was canceled. On November 27, 1885, O'Connor located other valid land certificates, owned by him, on the land, and under this location a survey was made, and the field-notes, with the certificates, within the time prescribed by law, were returned to the general land-office, where they, as well as the certificates and field-notes filed by the appellant, yet remain, both parties claiming the land. The cause was tried without a jury, and a judgment entered for the defendant. Conclusions of law on the agreed facts are not found in the record, except as indicated by the general judgment entered.

The leading question arising on the facts is whether, the land being covered by the patent to Barrett when Winsor made his files and surveys, they fell within the prohibition contained in section 2, art. 14, of the constitution. By that section of the constitution it is provided, among other things, "that all genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled, or equitably owned under color of title, from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land-office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him." That appellant had notice of the "Barrett" patent at the time he made his locations and surveys there is no question. No case has been before this court

rendering the construction and application of this provision of the constitution necessary, although it has been noticed in several cases, when invoked to illustrate the meaning of the words "public domain" and "unappropriated public domain." The facts of this case, however, call for its construction and application; for while it is apparent that a location, survey, and patent under the duplicate certificate issued to Barrett could not convey an equitable ownership to O'Connor, yet it is claimed on the one side and denied on the other that the patent which issued to Barrett, and existed at the time Winsor made his locations and surveys, within the meaning of the constitution, gave to the land in controversy the character of "land titled." If this be true, the appellant acquired no right through his locations and surveys. It is urged that the "Barrett" patent was void, and that it was not intended to withhold from location, survey, and patent lands covered by such a title; and that it was only intended, by the provision of the constitution referred to, to protect persons holding under patents or other instruments evidencing right which for some reason not appearing on the face of the title was voidable. If the words "land titled," as used in the constitution, do not apply to lands other than such as are held under patents in every respect valid, or under patents good against every one except the state or some person having a right that attached prior to the issuance of a patent, then the proposition asserted must be sustained; but if the words, as used, embrace all land covered by that evidence of right which the state gives through a patent, then the locations and surveys under which the appellant claims must be held invalid. The more general meaning of the word "title" is the evidence of a right which a person has to property, and as this is complete or incomplete so stands the right. This is the sense in which the word is used in the section of the constitution preceding that under consideration, which declares that "there shall be one general land-office in the state, which shall be at the seat of government, where all land titles which have emanated or may emanate from the state shall be registered, except those titles the registration of which may be prohibited by this constitution." The thing here directed to be registered is evidently the evidence of the right. The word is used in the same sense in section 4, art. 13, of the constitution, which forbids the registration or deposit of titles issued prior to the 13th day of November, 1835; for the prohibition therein contained relates to evidences of right which might have been recorded in the county where the land was situated, might have been archived, or which, but for the prohibition, might yet be deposited in the general land-office, recorded, delineated on maps, or used in evidence. It is used in the same sense in section 2 of article 13, and in section 6 of the same article, which provides that "the legislature shall pass stringent laws for the detection and conviction of forgers of land titles." There may be instances in the constitution in which the word "title" signifies the right to property, and not the instrument which evidences the right, but, if so, this is shown by the context. Land is said to be "titled" when a patent is issued which on its face is evidence that the state has parted with its right, and conferred it on the patentee. For reasons not appearing on the face of the patent, the grant may be void or voidable, but the land embraced in it is nevertheless "land titled."

The act of February 5, 1850, provided "that no certificate of land, land warrant, or evidence of land claim of any kind whatever, shall hereafter be located upon any land heretofore titled or surveyed within the limits of the colonies of Austin, De Witt, and De Leon, and the commissioner of the general land-office is hereby prohibited from hereafter issuing a patent on any location hereafter made for any of the lands described in this act; and should any patent be hereafter issued for the same, or a part thereof, contrary to the provisions of this act, the same shall be null and void." Pash. Dig. art. 809. In the case of *Truehart v. Babcock*, 51 Tex. 177, it appeared, or was claimed, that a grant of two leagues, a part of an eleven-league concession, within Aus-

tin's colony, and titled by him as *empresario* in 1831, was void, because the consent of the executive of the Mexican nation was not given to the grant, and that for this reason the land was subject to location. If the facts were as claimed, the land being within the coast leagues, the grant, under repeated decisions of this court, was void. In that case, as in this, it was claimed, if the grant was void, that the land embraced within it was not "titled," within the meaning of the statute; but this court said: "That this land had been 'titled or surveyed' is not questioned; but the old grant to Miguel Muldeon is claimed to have been null and void because within the littoral leagues, and had never been approved by the federal executive of Mexico. The title under which the plaintiff claims was subsequent to the act of February 5, 1850. The legislature, by the express terms of this act, prohibited such subsequent locations in most emphatic language, and declared them null and void, without any limitation, exception, or reservation as to the validity of subsisting prior grants. Should the courts ingraft exceptions upon a statute thus intended to quiet title, they would encourage that litigation which it was the very obvious intention of the legislature to prevent." The following cases, though not presenting identical facts, assert the same rule of construction: *Summers v. Davis*, 49 Tex. 554; *Westrope v. Chambers*, 51 Tex. 188; *Bryan v. Crump*, 55 Tex. 10. The act of congress of March 2, 1807, differed in no material respect from the act of February 5, 1850, above quoted, but the words, "lands for which patents have previously been issued," were used in the act of congress where the words, "heretofore titled," are found in the act of February 5, 1850. The language used in those two statutes has the same meaning as the words "land titled," found in the constitution. Under the act of congress, which also prohibited locations on lands already surveyed, the supreme court of the United States has steadily held that the act prohibited the location or patent of lands covered by patents or surveys, although these may have been void. *Jackson v. Clark*, 1 Pet. 638; *Galloway v. Finley*, 12 Pet. 298; *McArthur v. Dun*, 7 How. 270; *Niswanger v. Saunders*, 1 Wall. 438. In the case last cited it was said: "When a survey is void for circumstances not appearing of record on its face, and which must be proved by extrinsic evidence from different sources, then a second enterer cannot be heard to adduce such proof, because he is met by the statute, and not allowed to obtrude on the existing survey by a second location. He can obtain no interest in the land to give him a standing in court. The government can justly say to him, 'You are a stranger, and must stand aside; this land is withdrawn from location; you cannot be heard.' * * * Where the entries, surveys, and patents had been made to dead men, and were void, of course, for want of a grantee, yet this court held that the act of 1807 applied, and that a second entry on the first survey was void." It was insisted in some, if not all, the cases we have cited, that the statutes to which we have referred had reference to imperfect, and not void, titles, but in the case of *Galloway v. Finley* the court replied: "The legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent been issued, the government would not have had any title remaining, and a second grant would have been void of course. Something more, undoubtedly, was intended than the protection of defective, yet valid, surveys and patents. This is not denied, but the argument insists only irregularities were intended to be covered. It is difficult to conceive how an irregular patent could exist unless it passed no title. We will not perplex the decision with supposed cases of irregular surveys, but examine the act of congress, and ascertain its effect as regards the grant in question. It is fair upon its face, and we will not look behind it for irregularities. * * * The statute is general, including by name all grants, not distinguishing between void and valid; and the plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none." The same rule is asserted in the case of *Stubble-*

field v. Boggs, 2 Ohio St. 219. The prohibition found in the constitution, against the location, survey, or patent of "land titled," as fully defines a location, survey, or patent, on such land, of legal force or effect, as would an express declaration that they shall be deemed void. This court in the case of *Cattle Co. v. State*, 68 Tex. 526, 4 S. W. Rep. 865, in considering the effect of the constitutional provision under consideration, as bearing on the question of what is to be deemed "vacant and unappropriated public domain," held that lands covered by void titles did not constitute a part of the public domain subject to location, and that such lands, within the meaning of the constitution, were "lands titled." The question was not directly involved in that case, but we believe the conclusions there reached to be correct. In the case of *Decourt v. Sproul*, 66 Tex. 368, there is language which may be construed to hold that land covered by a void grant is subject to location, but the facts of that case did not call for the decision of that question; for the land which was sought to be appropriated by a settler was held under a patent held not to be void. The cases cited by appellant do not reach the question involved in this case. *Hanrick v. Dodd*, 62 Tex. 91, simply holds that a forged paper purporting to be title is no title at all. *Atkinson v. Ward*, 61 Tex. 387, holds that a forfeited location does not give equitable ownership under color of title from the sovereignty of the soil, and that, when a location has ceased to have effect, the land may be located and patented to another person. *Miller v. Brownson*, 50 Tex. 583, holds that a location made under an unrecommended land certificate did not confer any equitable ownership which would withdraw the land from appropriation by some other person. When land is not "titled," the constitution does not prohibit its location unless it be "equitably owned under color of title from the sovereignty of the state." The locations and surveys under which the appellant claims having been made while the land was not subject to location were void, and the subsequent cancellation of the Barrett patent does not give them effect. *Woods v. Durrett*, 28 Tex. 436; *Sherwood v. Fleming*, 25 Tex. Supp. 427; *Patrick v. Nance*, 26 Tex. 301; *Kimmell v. Wheeler*, 22 Tex. 85. We do not understand this to be questioned by the appellant.

These views being decisive of the case, it is not necessary to consider the other questions presented. There is no error in the judgment, and it will be affirmed.

BITTER v. CALHOUN.

(Supreme Court of Texas. April 24, 1888.)

1. MORTGAGE—FORECLOSURE—STATUTE OF LIMITATIONS.

On a plea of the statutes of limitations in an action to foreclose a mortgage, where it appears that the debt secured is barred by limitation, and no facts are stated that would prevent the statute from running, a foreclosure is properly refused.

2. SAME—POWER OF SALE—AGENT.

A mortgage empowering the mortgagee, "his heirs, executors, administrators, and assigns, to sell the premises therein conveyed, in case of default; and, as attorneys for the mortgagor, to make and deliver to the purchaser a good and sufficient deed to the land," confers a personal trust, and the contingency upon which the mortgagee's legal representatives could act not having arisen, and no assignment of the note or mortgage having been made, the mortgagee has no power to appoint another to make a sale of the land as his agent.

3. EVIDENCE—DOCUMENTS—DEED—ABSTRACT OF TITLE.

In an action to cancel a deed, where defendant claims title through plaintiff, the deed of plaintiff's grantor is admissible in evidence, although no abstract of plaintiff's title was filed when it was demanded by defendant.

4. PRACTICE—ADDITIONAL FINDINGS—WHEN FILED.

The court may make any additional findings that are warranted by the law and the evidence at any time during the term, even after its conclusions have been filed.

Commissioners' decision. Appeal from district court, Comal county.

J. H. McLeary, for appellant. *J. D. Gunn*, for appellee.

MALTBIE, J. Mrs. E. P. Calhoun brought suit on May 10, 1884, to cancel a deed from Charles Sauer to Ludwig Kepler, dated May 6, 1874, for 166 acres of land, and also a deed from Kepler to the appellant, Henry W. Bitter, to the same land, dated April 22, 1879. The petition alleges that Mrs. Calhoun had been in the adverse possession of the land described in her petition ever since the 6th day of May, 1874. The land in controversy is part of a larger tract of 366 acres, upon which appellee settled before the war, and upon which she has had a homestead ever since, though the 166 acres form no part of the homestead. It appears that on 24th of September, 1872, appellee executed a note to appellant for the sum of \$136.65, due at 12 months, and, to secure its payment, executed a mortgage, with power of sale, to appellant. The mortgage provides that, if default is made in the payment of the above-mentioned sum of money, it shall be lawful for Henry Bitter, his heirs, executors, administrators, or assigns, to sell the premises therein conveyed at public auction, according to law, and, as the attorneys of Eliza P. Calhoun, make and deliver to the purchaser a good and sufficient deed to the land, and retain out of the proceeds of the sale enough to satisfy the note, and pay over the balance, if any, to the mortgagor. Under this power, appellant assumed to appoint Charles Sauer his attorney in fact, by an instrument in writing, to sell and convey the land in dispute. Sauer sold the land to Kepler for \$41.50, and executed a deed to him for the same. Kepler did not pay the purchase money, and afterwards conveyed the land to appellant, who claims under this title, and, in the event that his title should be deemed invalid, prays judgment for the amount of the note, and that the mortgage on the land sued for be foreclosed, and the land be declared to be sold in satisfaction of the note.

There are numerous assignments of error, but only such will be noticed as are necessary to a disposition of the case. Appellant's cross-bill shows that the note sued on matured on 24th of September, 1873, and no facts are stated that would prevent the statutes of limitations from running. Appellee's exception on account of limitation to the enforcement of the note sued on was properly sustained, (*Coles v. Kilsey*, 2 Tex. 554;) and, the debt being barred, the court had no power to decree a sale under the mortgage.

An abstract of title can only be required in an action of trespass to try title, or, in other words, when there is a contest as to title between two or more parties claiming, to some extent, under different source of title; the purpose being that either party may inspect the title of his adversary, so that he may come to the trial prepared to overthrow it if he can. Appellant's title was derived immediately from appellee, and we are of the opinion that the court did not err in admitting the deed from H. G. Henderson to James Calhoun in evidence, though an abstract of the title had been demanded, and never had been filed; the question at issue being whether the title derived from appellee was valid.

It is the right of either party, at any time during the progress of a trial, or even after the trial is over, if during the term of the court, to request the judge to make additional findings of law or fact; and it can be no objection that he may already have made his findings if the law and evidence warrant additional ones. Courts should seek light from every available source; and, if the suggestion of counsel is the law of the case, no court would be justifiable in disregarding it. Hence we conclude that the court did not err in making additional findings, at the request of plaintiff's counsel, after it had filed its conclusions. If the appellant's title was invalid, it was proper for the court to decree its cancellation. An injury may be presumed from the assertion of a hostile title; but in this instance it was also proven that the fact that appellant's deeds were on record prevented appellee from selling the land.

The controlling question in the case is whether appellant's title is valid. Powers must be strictly construed, and nothing will be left to implication except what is necessary to their execution. The appointment of the appellant,

his heirs, executors, administrators, or assigns, to sell the land, was a personal trust and confidence reposed in the judgment and integrity of the class named, and there is no power of substitution given to make sale of the land, and the appointment of Charles Sauer to do so was without authority. *Tuck. Bl. Comm.* 105; *Story, Ag. § 13*; *Hill, Trustees*, 279, 734; *Smith v. Sublett*, 28 Tex. 169. It has even been held that where an estate is vested in a trustee upon trust that he, his heirs, executors, administrators, or assigns, shall sell, the word "assigns" will not authorize the trustee to assign the estate to a stranger; nor, if assigned, can the stranger execute the power. 2 *Perry, Trusts*, § 495. Appellant was intrusted to make sale of the land. The contingency upon which his legal representatives could act had not arisen, and he made no assignment of the note or mortgage, but assumed to appoint Charles Sauer to act as his agent in making sale and conveyance of the land. The only excuse he gives for not acting himself is that he had advertised the land for sale, and was sick, and could not attend in person. There is no emergency shown why the sale should take place on the day advertised, or that any one would sustain an injury by a postponement of it to a future day. The land sold for an inadequate price. Appellant, if present at the sale, could have bid for the property, and was interested in making it bring the amount of the note. This, among other things, may have conducted to his appointment as trustee to make the sale. At all events, he had no authority to delegate his power to another, and the sale and conveyance by Sauer was without lawful authority, and is of no effect. There is no evidence in the record that appellee ever ratified or confirmed the sale; but, on the contrary, it is shown that she at all times claimed the land as her own. We deem it proper to add that there was no objection raised in the court below to the cancellation of the deeds in controversy on the ground that the money due on the note had not been paid or tendered into court; and are of opinion that the judgment should be affirmed.

STAYTON, C. J. The report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

GOFF v. JONES *et ux.*

(*Supreme Court of Texas. May 1, 1888.*)

1. SPECIFIC PERFORMANCE—WHEN LIES—HOMESTEAD.

The specific performance of a title-bond to convey a homestead, entered into by a husband and wife, can be enforced against the husband if, at any time before the bond should become barred, such homestead is abandoned, and a new one acquired.

2. VENDOR AND VENDEE—RIGHTS AND REMEDIES—CORRECTION OF MISTAKE.

Where a title-bond describes the land to be conveyed as being 92 feet front, and the purchaser accepts the bond with the understanding, which is a material inducement to the purchase, that the 92-foot front included a dwelling on the east end and 8 feet passway still east of the house, when in fact it did not, the purchaser is entitled to a correction of the bond, and parol evidence is admissible to prove the mistake.¹

Commissioners' decision. Appeal from district court, Travis county.

Action by James B. Goff against Charles G. Jones and his wife, Cammie A. Jones, to enforce the specific performance of a contract and title-bond for the conveyance of certain homestead property, or, in default, for damages. Judgment for \$215 damages, and costs, against C. G. Jones, and for costs in favor of Cammie Jones. Plaintiff appeals.

¹As to the mistakes against which equity will relieve, and the proof necessary to obtain the reformation of a written instrument, see *Fehlberg v. Cosine*, (R. I.) 13 Atl. Rep. 110, and note; *Frederick v. Henderson*, (Mo.) 7 S. W. Rep. 186; *Rousseau v. Lambert*, (Ky.) Id. 923; *Clark v. Roots*, (Ark.) 6 S. W. Rep. 728; *Kornegay v. Everett*, (N. C.) 5 S. E. Rep. 418; *Worsley v. Insurance Co.*, (Iowa,) 38 N. W. Rep. 161.

James B. Goff, for appellant. *Walton, Hill & Walton*, for appellees.

COLLARD, J. It was decided by this court on a former appeal of this case that the bond for title of Jones and wife to Goff to convey their homestead could not be enforced by a bill for specific performance. The decision was made upon the ground that the wife could only convey the homestead by deed executed and acknowledged by her in the manner required by the statute, and that her privilege to retract the sale continued until the acknowledgment was taken, which was the final act of sale on her part. She cannot contract beforehand in reference to her right to retract so as to deprive herself of the right. 63 Tex. 248. The record in the case, as it was then presented, required the court to pass upon the power of the court to enforce performance of a title-bond of the husband and wife to convey the homestead while still occupied as a homestead. After the case was reversed and sent back, the plaintiff, Goff, amended his petition, setting up that defendants had erected a new dwelling as a homestead on two lots east of the land sold, as it was their intention to do at the time the bond was executed, and had, about the 15th day of July, 1888, seven days after maturity of the bond, in pursuance of their original intention, moved from and abandoned the premises sued for as constituting any part of their homestead, and had moved on, adopted, and made said dwelling-house on the two lots their homestead; since which time the premises sued for have constituted no part of their homestead, and have not been used in any way for homestead purposes. These allegations present a totally different question from the one before the court on former appeal. The question now is, can the husband be compelled to execute the bond, the old homestead being abandoned, and a new one being acquired? The premises are community of the husband and wife, and no longer constitute any part of the homestead. His deed alone would convey the property, and, if he execute the deed called for in the bond, it would convey the title. Should he be protected from a performance of his contract? The constitution of the state declares that the owner, if a married man, cannot convey the homestead without the consent of the wife, given in such manner as may be prescribed by law. Article 16, § 50, State Const. There was a similar provision in the constitution of 1845, (Pasch. Dig. p. 65, art. 7, § 22,) which was discussed by the supreme court in *Brewer v. Wall*, 23 Tex. 589, and the conclusion reached that a title-bond, executed to convey the homestead by the husband, the wife joining without privy examination and acknowledgment, could be enforced after the death of the wife, all legal obstacle to its performance being removed. Mr. Justice BELL, in delivering the opinion, says: "It is true that a husband is not at liberty to alienate the homestead during the wife's life without her consent; but we cannot perceive that a bond executed by him in his wife's life-time, conditioned that he will convey his homestead with a perfect title at a future time, would be a void instrument in contemplation of law. We think such a bond would be binding upon the husband, and that, upon a breach of it, damages might be recovered against him by suit upon the bond. Undoubtedly a bond to compel the wife to convey at a future time would be void because it would be an undertaking to do an unlawful thing. But a bond to make title at some future day to a certain tract of land, the same being the homestead of the obligor and his wife and children, would not be an unlawful undertaking. Such a contract might be entered into in the confident expectation that the wife would fully make the necessary conveyance, or it might be entered into with the intention to acquire another homestead before the time elapsed for the performance of the bond. It is true that, while the premises which the party might so undertake by his bond to convey remained the homestead of the obligor and his wife, the courts would not decree a specific performance of the bond. But if the wife should die before the time expired for the performance of the bond, or if before the expiration of that

time the obligor in the bond and his wife should acquire another homestead, then the courts might decree specific performance, because every legal obstacle to a specific performance would be removed." The doctrine in *Brewer v. Wall* was approved in *Cross v. Everts*, 28 Tex. 534, 535, and had the facts of the case shown that the old homestead had been abandoned, and a new home acquired, the rule would have been enforced; but, because the old homestead had not been abandoned, the court held the case did not come within the rule. See, also, *Jordan v. Godman*, 19 Tex. 274, and *Thomp. Homest. & Ex.* § 483 and following.

From the foregoing authorities, we are of opinion the title-bond sued on could be enforced against Charles G. Jones if the facts alleged as to abandonment of the old homestead and the acquisition of the new one are true. At the time fixed by the bond for its performance according to the allegations of plaintiff's amended petition it could not have been enforced, because at that time the property was still the homestead; but that is immaterial. We think if it was abandoned, and a new homestead was acquired, at any time before the bond should become barred, the suit for specific performance could be maintained. If, however, the facts alleged are not true, Goff can maintain his suit for damages against Jones for breach of the conditions of the bond; in which case the measure of damages would be the amount expended by Goff with consent of defendant, in good faith, under the contract of sale, and the difference in the contract price and the value of the premises at the time of performance of the bond, excluding from such value at the time of performance any additional value the improvements made by Goff may have given to the premises. *Kempner v. Heidenheimer*, 65 Tex. 587.

Recurring to the main question in this case, the right of specific performance of the title-bond, we must note the distinction made in our present constitution between sales of the homestead and mortgages, liens, deeds of trust, and deeds with a condition of defeasance. Such liens and mortgages can never become valid, and a deed involving a condition of defeasance is void. Const. 1876, art. 16, § 50. There is no such provision respecting conveyances or contracts to convey. Had there been such a provision, we could not have held the title-bond enforceable against the husband under the allegations made. Under the constitution of 1845, there was no such provision as to mortgages and liens upon the homestead, and hence it was held that, while a mortgage executed by the husband and wife upon the homestead could not be enforced as long as the property retained its homestead character, it could be foreclosed in a suit against the husband alone after the homestead had been abandoned and a new one acquired. *Stewart v. Mackey*, 16 Tex. 56. The constitution of 1876 prescribes a different rule. Under it a mortgage upon the homestead can never become valid. We note the distinction to prevent a misconception of the principle decided in the case before us as to enforced performance of a title-bond to convey the homestead by suit against the husband after the property has lost its homestead character, concerning which there has been no change in the organic law or statutes. See section of constitution of 1869 cited, and Rev. St. art. 560. We conclude the court erred in sustaining defendant's exceptions to that part of plaintiff's petition asking specific performance of the bond against Charles G. Jones on the ground of abandonment of the old and acquisition of the new homestead.

The only remaining question in the case is, should the title-bond be corrected so as to include the 16 feet not embraced in the description of the bond? Plaintiff alleges that there was a mistake in the description in the bond,—92 feet front on College avenue instead of 108 feet; that he bought the ground from the Green line on the west to include the dwelling and 8 feet passway on the east of the dwelling; that the fact that the ground was to include the dwelling and the 8-foot passway was a material inducement to the purchase; that Jones assured him 92 feet was the distance to include the premises,

and he accepted the bond with that understanding, when in fact 92 feet front does not include the dwelling by 8 feet on the east end and the 8 feet passway still east of the house. We think the allegations, if true, entitle plaintiff to a correction of the bond, and that the facts alleged may be established by parol. The court should have heard the proof, and, if the facts were as alleged, relief should have been granted by a correction of the description. *Raines v. Calloway*, 27 Tex. 685.

We are of opinion the judgment of the court below ought to be reversed, and the cause remanded for a new trial.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

MORGAN v. SMITH *et al.*

(Supreme Court of Texas. May 8, 1888.)

1. TAXATION—ASSESSMENT—SALE—DESCRIPTION OF LAND.

S. and C. each owned an undivided half interest in a 640-acre survey. S. made no rendition, and paid no taxes thereon for 1881, but C. paid the taxes on 320 acres. The assessor returned on list of unrendered lands for 1881 as follows: "Owner's name, unknown; abstract number, 319; certificate number, 259; number of acres, 640; acres unrendered, 320." The land was duly advertised and sold, and the tax collector gave the purchaser a deed conveying 320 acres off of the west end of the survey, described by metes and bounds. *Held*, that the deed did not convey title to any part of the survey.

2. SAME—EQUITY.

The purchaser claimed that as S. owned one-half of the land, and failed to pay taxes due on it, an assessment and sale of the number of acres he owned in the survey invested the purchaser with his interest, and subrogated him to an undivided one-half interest in the land with C. *Held*, that this could not be sustained; a purchaser at a tax sale is not entitled to the assistance of a court of equity to aid a defective sale or conveyance.

3. SAME—SURVEY NUMBER.

The failure of the assessor, in listing property, to give the survey number of the grant, when it can be ascertained, as required by Rev. St. Tex. art. 4711, renders the proceedings invalid.

Commissioners' decision. Appeal from district court, Travis county.

D. H. Hewlett and H. E. Shelley, for appellant. *Carlton & Morris*, for appellees.

MALTBIE, J. On the 1st day of January, 1881, and also at the institution of this suit, W. A. Smith and J. H. Collett, the appellees, each owned an undivided one-half interest in the Sarah Ford head-right 640-acre survey, situated in Brown county, unless the title to Smith's interest, or a part of it, had been, by virtue of certain tax proceedings hereafter considered, divested out of him, and vested in W. C. Morgan, the appellant. The abstract number of the certificate is 319; certificate number, 259; survey number, 20. And by this description J. H. Collett rendered 320 acres in the survey for taxes for the year 1881, valued at \$500. Smith made no rendition, and paid no taxes on any land in the survey for that year, nor did any one else except Collett, who paid the taxes on 320 acres. The commissioners' court of Brown county, at its May term, 1881, levied a tax of 20 cents on each \$100 worth of property for county purposes, and 20 cents on each \$100 worth for jail purposes. The assessor of that county returned, on list of unrendered lands for 1881, as follows: "Owner's name, unknown; abstract number, 319; certificate number, 259; original grantee, Sarah Ford; number of acres, 640; acres unrendered, 320; value, \$500; taxes, state, \$2.00, county, \$2.00, total, \$4.00." The report of the assessor was approved by the commissioners' court. The

land was duly advertised, and sold to appellant for nine dollars, amount of tax assessed and costs. In consideration of this sum, the tax collector of Brown county executed a deed to appellant, conveying 320 acres off of the west end of the survey by metes and bounds. It appeared on the trial, which was by the court without a jury, that the survey was short from 140 to 160 acres. Judgment was rendered for appellees, quieting them in their respective titles. It is claimed by the appellant that, under the facts proven, the collector of Brown county had authority to sell all that portion of the Sarah Ford survey not rendered for the taxes of 1881, and that he is entitled, under his purchase, to a judgment for such portion of the survey as was not included in Collett's assessment. The assessor, in listing the property, failed to give the survey number of the grant, though it was known. This is one of the requirements of article 4711, Rev. St.; and a failure to observe it renders the proceeding of no effect, unless it may be for good cause shown this requirement of the law was not complied with. *Henderson v. White*, 5 S. W. Rep. 374; *McCormick v. Edwards*, 6 S. W. Rep. 92. The purpose of this article is evidently to require such description of the land as will enable the owner or other person interested to know upon what particular tract or parcel of land taxes are demanded, and also to enable the collector, in case of sale, to properly describe the land sold in his deed to the purchaser. It would, doubtless, be a sufficient description, when an entire survey is assessed, to give the owner's name, if known, or, if unknown, say "unknown," together with the abstract number, certificate number, survey number, name of original grantee, and number of acres; but, when only a portion of a survey is assessed, some further description becomes necessary in order to identify the particular portion assessed, as is plainly implied in tenth subdivision of this article. It is settled in this state, whatever may be the rule elsewhere, that a conveyance by a tax collector or sheriff of a number of acres, to be taken out of a larger survey, is void for uncertainty of description. *Wofford v. McKinna*, 23 Tex. 45; *Wooters v. Arledge*, 54 Tex. 397. Had the description followed the assessment, and been consistent with it, as it should have done, though there might possibly have been an additional description also, the deed must have been for 320 acres, to be taken out of a 640-acre tract owned jointly by two persons, one of whom had paid taxes on 320 acres of the land, without anything to show upon what portion of the land the taxes had been paid, and would, under the decisions of this state, be clearly void. The appellant claims, however, that as Smith owned one-half of the land, and failed to pay the taxes due on it, that an assessment and sale of the number of acres he owned in the survey would invest the purchaser with his interest, and that the purchaser would, by virtue of such proceedings, become subrogated to an undivided one-half interest in the land with Collett, or at least to one-half of Smith's interest in the land, whatever it might be; and this, appellant offered on the trial to take. The case of *Sheafe v. Wait*, 30 Vt. 736, seems to support this view; but we think it stands alone. At all events, the great weight of authority is, and always has been, that a purchaser at a tax sale must stand strictly on his legal title, and can under no circumstances call to his assistance the extraordinary power of a court of equity to aid a defective sale or conveyance. If it be said, on the one hand, that the man who fails, through carelessness or indifference, to pay his taxes, is entitled to no favor, it may be said, on the other, that there is no exception in the law in favor of him who fails to pay through accident, mistake, or death; and it seems but just that no one should be deprived of his property without his consent, unless the law prescribed for divesting his title is substantially complied with. When the legislature has laid down certain things to be done, it is not for the courts to say, unless upon weighty reasons, that any of them are non-essential. We are of opinion that appellant has failed to show that he is entitled to any of the land in controversy, and the judgment should be affirmed. There are

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other views of the testimony that would lead to the same result, not necessary now to be considered.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, and judgment affirmed.

TALBERT v. DULL *et al.*

(Supreme Court of Texas. May 8, 1888.)

1. DEED—DESCRIPTION—TRANSFER OF LAND CERTIFICATES.

A transfer conveying a number of land certificates purchased from different persons named, among them, "Juan Diaz, one league and labor, dated 11th May, 1838, No. 519," is admissible as a link in the chain of title, in an action by one claiming land under the patentees by virtue of such certificate.

2. SAME—ACKNOWLEDGMENT—CLERICAL ERROR.

The certificate of proof of a transfer was as follows: "I, John W. Smith, clerk of the county aforesaid, do hereby certify that John O. Truchart, one of the above subscribing witnesses, who, being duly sworn, in due and solemn form, that he, himself, with Andrew J. F. Phelan, signed as witnesses when William Richardson signed and acknowledged the foregoing instrument of writing for the purposes therein set forth." The statute in force (Pasch. Dig. Tex. art. 4978) required that "one of the witnesses * * * shall swear to the signature of the signer, * * * which shall be certified," etc. *Held*, that it was apparent that the word "says" or "said" was inadvertently omitted, and that, even as it stood, it satisfied the requirements of the statute.

3. SAME—SUBSTANTIAL COMPLIANCE WITH STATUTE.

It is sufficient if a certificate of acknowledgment of a deed complies with the statute in substance, although it does not follow the exact language.

4. SAME—ACKNOWLEDGMENT OUT OF THE STATE.

Rev. St. Tex. art. 4806, provides that "the acknowledgment or proof of an instrument of writing for record may be made without this state, but within the United States, before either (1) a clerk of a court of record having a seal; (2) a commissioner of deeds duly appointed under the laws of this state; (3) a notary public." *Held*, that this does not authorize an acknowledgment by a judge of a court of record without the state.

5. EVIDENCE—CERTIFICATE OF COMMISSIONER OF STATE LAND-OFFICE.

Under Rev. St. Tex. art. 2253, authorizing all heads of departments to give certificates to "any fact or facts contained in papers, documents, or records of their offices," which "shall be received in evidence in all cases in which the originals would be evidence," the number of the certificate by which the land in controversy was patented, where that fact does not appear in the patent, is properly proved by the certificate of the commissioner of the general land-office.

6. PRINCIPAL AND AGENT—RATIFICATION—DEED.

Where a conveyance is made by one acting under an alleged power of attorney, a subsequent conveyance to the same grantee by the owner, for the nominal consideration of one dollar, although it does not purport to be a ratification of the act of the alleged attorney, must be presumed to have been intended for that purpose.¹

7. APPEAL—REVIEW—ASSIGNMENT OF ERROR.

An assignment of error, that "the judgment of the court is contrary to the law and the evidence," is too general to be considered.

Appeal from district court, McMullen county.

This was an action to recover an undivided one-half of Survey No. 3, section No. 6, situated in McMullen county, and for partition, brought by A. J. and J. J. Dull against W. W. Talbert. Judgment for plaintiffs, and defendant appeals.

J. M. Eckford, for appellant. T. S. Archer, for appellees.

¹As to what will constitute a ratification by a principal of the unauthorized acts of an agent, and the effect of such a ratification, see *Nichols v. Shaffer* (Mich.) 30 N. W. Rep. 383, and note; *Mining Co. v. Beatty*, (Tenn.) 1 S. W. Rep. 849, and note; *Stillman v. Fitzgerald*, (Minn.) 33 N. W. Rep. 564; *Forcheimer v. Stewart*, (Iowa,) 33 N. W. Rep. 668; *Mortgage Co. v. Henderson*, (Ind.) 12 N. E. Rep. 88; *Metcalfe v. Williams*, (Mass.) 11 N. E. Rep. 700; *Shinn v. Hicks*, (Tex.) 4 S. W. Rep. 486; *Thread Co. v. Manufacturing Co.*, (Pa.) 8 Atl. Rep. 794; *Culver v. Warren*, (Kan.) 13 Pac. Rep. 577; *Merrill v. Wilson*, (Mich.) 33 N. W. Rep. 716; *Schutz v. Jordan*, 32 Fed. Rep. 55; *Hurley v. Watson*, (Mich.) 36 N. W. Rep. 737; *King v. MacKellar*, (N. Y.) 16 N. E. Rep. 301.

GAINES, J. This is an appeal from a judgment in favor of appellees against appellant for the recovery of an undivided half interest in a tract of land patented by virtue of a certificate granted to Juan Ignacio Diaz. The patent issued July 25, 1845, to S. H. Luckie and William McCraven, as assignees, and both parties claim under the patentees. Following the patent, appellees' chain of title is as follows: (1) A deed of partition between Luckie and McCraven, in which the land in controversy was conveyed to Luckie; (2) a deed from Luckie to H. W. Jernigan, and James E. Gatchett; and (3) deeds from Charles A. Jernigan, James T. Jernigan, and Fannie A. Banks, who are admitted to be the sole heirs of H. W. Jernigan to appellees A. J. and J. J. Dull. The appellant claims under a deed from James E. Gatchett to one Sheppard, dated April 15, 1856, and by mean conveyances from Sheppard down to himself; and is shown to have whatever title Gatchett had at the date of his conveyance. This preliminary statement is sufficient for a proper understanding of this opinion upon appellant's assignments of error.

The first is to the effect that the court erred in admitting in evidence the certified copy of the transfer from Richardson to Luckie and McCraven. This conveyance is previous to the issuance of the patent to Luckie and McCraven as assignees, and is not a link in the chain of title essential to be proved, but for the fact that it is referred to in the subsequent deed of partition between Luckie and McCraven, and is necessary to show that the land in controversy was conveyed to Luckie by that deed, as will hereafter appear. It, therefore, becomes important and material evidence. It is insisted, first, that the transfer does not describe the land sued for. This is true; but it does not purport to convey lands. It conveys a large number of land certificates purchased from sundry persons who are mentioned, and names Juan Ignacio Diaz, one league and labor, dated 11th May, 1838, No. 519. The appellees showed by the certificate of the commissioner of the general land-office that the land in controversy was patented to Luckie and McCraven, assignees of Juan Ignacio Diaz, by virtue of headright certificate No. 519, issued to Diaz on the day above named. This shows that the description in the transfer identifies the certificate by date and number, and is therefore good. But it is further insisted that the certificate of proof of the transfer is not in accordance with law. The body of the certificate is as follows: "I, John W. Smith, clerk of the county aforesaid, do hereby certify that John O. Truchart, one of the above subscribing witnesses, who being duly sworn, in due and solemn form, that he, himself, with Andrew J. F. Phelan, signed as witnesses when William Richardson signed and acknowledged the foregoing instrument of writing for the purposes therein set forth." The statute in force at the time this acknowledgment was taken makes the county clerks recorders of their respective counties and provides that "one of the witnesses of the number required by law shall swear to the signature of the signer, or he himself shall acknowledge the same, which shall be certified by the recorder," etc. Pasch. Dig. art. 4973; *Paschal v. Perez*, 7 Tex. 354; *McKissick v. Colquhoun*, 18 Tex. 151; *Howard v. Colquhoun*, 28 Tex. 134. This is clearly a clerical mistake in the certificate. From Devl. Deeds, we deduce the rule "that an inartificial or imperfect statement of a fact required to be stated should not vitiate a certificate." Volume 1, § 517. It has accordingly been held that the omission of a material word does not invalidate an acknowledgment, when it is evidently a mistake and the context in order to give it meaning necessarily supplies the deficiency. *Canal Co. v. Russell*, 68 Ill. 426; *Johnson v. Mill Co.*, 13 Nev. 351; *Dickerson v. Davis*, 12 Iowa, 353, and cases cited. See, also, *Blythe v. Houston*, 46 Tex. 67; *McDonald v. Morgan*, 27 Tex. 503. We think the certificate in question admits of but one construction, which is that the word "says" or "said," or some equivalent term, was inadvertently omitted. But taking it literally as it stands, we think the meaning is sufficiently conveyed that the witness was sworn to the facts therein stated. The

meaning is that he signed the deed as a subscribing witness, and that at the same time the grantor signed and acknowledged the same. We think this sufficient under the statute above quoted, in force at the time the proof was made. These are the only objections urged in the brief to the admission of the transfer in evidence, and these we think not well taken.

The second assignment is that the court erred in admitting in evidence the deed of partition between Luckie and McCraven. This deed was also objected to on the ground that it did not describe the land. It recites that, at the time of its execution, all the certificates transferred to the parties by Richardson had been located, and by it Luckie conveys by name certain tracts to McCraven, and McCraven conveys all other lands located by virtue of these certificates to Luckie. The land in controversy consists of a half league, and lies on the south-west side of the Frio river, and the number of its patent is 61. This land is not named in the deed of partition, but a survey for a half league, made upon the same certificate and lying on the north-east side of the Frio, is named, and its patent is No. 62. It therefore appears that, by reference to the Richardson transfer and the patent, it is made certain that the land in controversy is conveyed by the deed of partition to Luckie. We think the fact that the land in controversy was patented by virtue of certificate No. 519 was properly proved by the certificate of the commissioner of the general land-office. The patent did not show the number of the certificate by virtue of which it issued. Article 2253 of the Revised Statutes authorizes all heads of departments to give certificates to "any fact or facts contained in papers, documents, or records of their offices," and provides that they "shall be received in evidence in all cases in which the originals would be evidence." The certificate in this case comes clearly within this provision. It is a direct fact which is here certified, and not a conclusion, and therefore the certificate comes within the purview of the statute. *Holmes v. Coryell*, 58 Tex. 680.

The objection to the deed from Luckie to Jernigan and Gatchett, on account of the certificate of acknowledgment, is not well taken. The acknowledgment was taken before the clerk of the county court, and, although the certificate does not follow the exact language of the statute, it complies with it in substance. *Monroe v. Arledge*, 23 Tex. 478. The deed from Charles H. and James T. Jernigan to plaintiffs was also objected to by the defendant in the court below, and this objection was well taken. The acknowledgment was taken in the state of Alabama by a judge of probate. Article 4306 of the Revised Statutes provides that "the acknowledgment or proof of an instrument of writing for record may be made without this state, but within the United States, before either (1) a clerk of a court of record having a seal; (2) a commissioner of deeds duly appointed under the laws of this state; (3) a notary public." We find no authority for a judge of a court of record to take an acknowledgment without the state. We presume the attention of the trial judge was not called to the change in the law in this respect which was made by the Revised Statutes. For the error of the court in admitting the deed under consideration the judgment must be reversed. Without this conveyance the plaintiffs failed to show title to a half of the land for which they recovered judgment.

With a view to another trial, we will say that, if the deed in question had been properly admitted, we think the conveyance purporting to be from the Jernigans and Mrs. Banks, by attorney, to plaintiffs, would have been properly admitted, although no power of attorney was legally proved. It appears to be duly acknowledged. The last deed being for the nominal consideration of one dollar, although it does not purport to be a ratification of the act of the alleged attorney, must be presumed to have been intended for that purpose. This is the reasonable deduction from the facts. The ratification would have related back and made good the deed executed by the alleged attorney. *Bank v. Warren*, 15 N. Y. 577. The court did not err in excluding the conveyance

from H. W. Jernigan to James E. Gatchett. It is dated the 20th of December, 1843, and shows upon its face that it was but a mortgage. The assignment that "the judgment of the court is contrary to the law and evidence" is too general to be considered. For the error pointed out the judgment is reversed, and the cause remanded.

RUE v. MISSOURI PAC. RY. CO.

(*Supreme Court of Texas. May 15, 1888.*)

1. RAILROAD COMPANIES—REGULATION BY STATUTE—CONTRACTS WITH EMPLOYEES.

Rev. St. Mo. § 818, provides that no officer or employe of any railroad corporation shall be interested in furnishing supplies to such company, nor in the business of transportation, as a common carrier, of freight or passengers over the works owned, leased, or operated by the company of which he is officer or employe. Plaintiff was stock agent of defendant, a railway corporation existing under the laws of Missouri, and operating a road in Texas; and, while so employed he made a contract with defendant whereby he leased for a term of years certain of defendant's stock-yards in Texas, defendant to pay him one dollar per car for loading and unloading stock, for which he was to furnish forage, to be charged against shippers, and collected by him. *Held*, that the contract of lease was void under the Missouri statute.

2. SAME—RATIFICATION.

Held, also, that, the contract being void in its inception, no act of ratification could make it valid.

Commissioners' decision. Appeal from district court, Grayson county.

This was an action by R. H. Rue against the Missouri Pacific Railway Company to recover damages for breach of a contract of lease. There was a judgment for defendant, and plaintiff appeals.

Hare & Head, for appellant. *R. C. Foster* and *A. E. Wilkinson*, for appellee.

ACKER, J. In the spring of 1881, appellant entered into a parol contract with Hill, the general freight agent of appellee, to become stock agent for appellee at a salary of \$2,000 a year, and to lease from appellee its stock-yards at Vinita and Muscogee, in the Indian Territory, and at Denison and Gainesville, in Texas, for a term of five years, at the annual rental of \$800 per year, payable quarterly in advance; appellee to pay him one dollar a car for loading and unloading stock, he to furnish forage for stock, to be charged against shippers, collected by appellee, and paid to him. A. A. Talmage, general manager of appellee's road, was in Denison when the contract was entered into between Hill and Rue, and assented to it. Appellant immediately entered upon the performance of his duties under the contract, both as stock agent and lessee of the yards, and soon thereafter made a contract with J. S. Talmage, brother of A. A. Talmage, by which J. S. Talmage became the owner of two-thirds interest in the stock-yards contract. On June 1, 1881, that part of the contract relating to the lease of the stock-yards was reduced to writing, and executed in the city of St. Louis, Mo., by being signed, "THE MISSOURI PACIFIC RAILWAY COMPANY, By A. A. TALMAGE, General Manager," and "R. H. RUE;" J. S. Talmage not appearing to be a party to the contract. Appellant continued to operate the stock-yards under his lease, paying rent, and receiving pay for his services from appellee, until in February, 1883, when he received notice from appellee to surrender the yards. Appellant refused to obey this notice, and continued to run all the yards until May 1, 1883, when appellee took forcible possession of the Denison yards, and discontinued all business at the Vinita yards. Appellant continued in possession of all yards named in the contract, except the Denison yards, and continued to operate them down to the time of the trial, and was paid by appellee for his services according to the contract, but appellee refused to receive from appellant the rents due on the contract after

it took possession of the Denison yards. This suit was brought by appellant to recover damages for breach of the contract of lease by depriving him of the division yards, and discontinuing the business at the Vinita yards. The stock-yards were the property of the Missouri, Kansas & Texas Railway Company; appellee being lessee of the railroad, property, and franchises of that company. A. A. Talmage was appointed manager of the Missouri, Kansas & Texas Railway Company on December 1, 1880, and continued in the same position for appellee, when the road came into its hands. Appellant ceased to be stock agent in October, 1882. The written contract of lease executed on June 1, 1881, was offered in evidence by appellant and was objected to by appellee on the following grounds: "Because said instrument is not shown to have been executed by defendant, or by any one by it thereunto lawfully authorized, and because it is not shown to have been executed by any one authorized thereunto by writing; because it does not appear to have been executed by an officer authorized by law, and is not under the corporate seal, and no authority from defendant for its execution is shown; and because the acts shown and relied on as acts of ratification thereof were not done by any person shown to have authority to ratify said instrument; and because said acts were not shown to have been done by any person authorized by writing to ratify the same, nor by any person having authority to ratify the same, given by said corporation or its stockholders, or by its board of directors, nor with any knowledge on the part of said stockholders, nor of said directors, or any one representing said corporation, of the existence or terms of said lease; and because such acts were not in themselves sufficient to constitute a ratification under the circumstances under which they were done; and because said lease is unlawful, beyond the power of the corporation to make, contrary to public policy, and void." The objection was sustained, the lease excluded, and judgment rendered for appellee.

It does not appear from the findings of the court whether the objection was sustained upon a part only or all of the grounds stated. If any one of these grounds was sufficient to support the objection, then the ruling of the court must be sustained. Under the view we entertain of the law of the case, it is not necessary to consider all of them. It is contended by appellant that the appointment of A. A. Talmage to the position of general manager, together with the control exercised by him over the stock-yards by virtue of his office, conferred upon him authority to make the lease. Article 548 of our statutes provides that no state of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing. The lease being for a term of more than one year, to be valid, must have been executed by appellee, or by its agent thereunto authorized by writing. There is no pretense that Talmage ever had any express authority, by resolution of the board of directors or otherwise, to make the lease. We understand the word "thereunto," used in the statute quoted, to mean, unto this or that; that is, the particular thing done. We do not think the power to control and manage the yards, which were necessary appurtenances to carrying on the business of common carrier of stock, carried with it the power to dispose of the yards by leasing them, and throwing over their management and control to another. Appellee owes its existence to the constitution and laws of the state of Missouri, under and by virtue of which it obtained its being, and from which it derived all its powers. Natural persons may make any contract or perform any act not prohibited by law, while artificial persons (corporations) can do only those things which, by express grant or necessary implication, they are authorized or empowered to do by the laws of the state under which their charters were obtained. The laws of Missouri (section 818 of the Revised Statutes) provides that no president, di-

rector, officer, agent, or employe of any railroad corporation operating a railroad shall hereafter be interested in any manner, directly or indirectly, in furnishing materials or supplies to such company; nor shall any such officer, agent, or employe of any railroad company, or any other corporation, owning or controlling or managing a railroad, be interested, directly or indirectly, in the business of transportation, as a common carrier, of freight or passengers over the works owned, leased, controlled, or operated by the corporation of which he is an officer, agent, or employe. That appellant was the stock agent and employe of appellee at the time the contract of lease was executed there is no controversy. It is equally clear to us that, by the term of the contract, he became interested in furnishing supplies (forage for live-stock) to appellee, and that he became also interested in the business of transportation as common carrier over the roads operated by appellee. Under the law, appellee, as common carrier, was bound to transport live-stock, and to furnish forage for their sustenance. The forage, so furnished by appellant, was furnished to the company, and the supplying of forage was an indispensable part of the business of common carrier of that kind of freight. Had the contract been entered into by the president and secretary of the company after resolution adopted by the board of directors authorizing them to make it, and had it been executed with strict observance of all formalities, it would have been void, because it was prohibited by the laws of the state from which appellee derived its existence and its powers. Story, Conf. Law, 174, 175, and note *a*; *Matthews v. Skinner*, 62 Mo., 331; *Black v. Canal Co.*, 22 N. J. Eq. 422. We think this statute of Missouri a wise and beneficent law, and that it applies to all corporations chartered under the laws of that state, without regard to whether the prohibited contract is to be performed within or without that state. We think it wholly immaterial whether the instrument be called a lease or a contract; it was prohibited by the laws of Missouri, to which those dealing with appellee must look to see what contracts it could make. No acts of ratification can validate or make effective that which is void.

We deem it unnecessary to consider other questions presented. We are of opinion that the court did not err in excluding the contract of lease, and that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

GULF, C. & S. F. RY. CO. v. POOL.

(Supreme Court of Texas. May 15, 1888.)

1. PLEADING—EXCEPTIONS—SURPLUSAGE.

Where a pleading contains details which might well have been omitted, but which merely indicate the scope of the testimony to be introduced, they cannot injure the opposite party, and it is not material error to overrule exceptions to them.

2. TRIAL—INSTRUCTIONS—REPETITION.

Where, in an action for negligence, the court, in its general charge, gives the law applicable to the case as made by the evidence, it is not error to reject additional charges requested, as to the duty and degree of care and skill required of defendant, and the conditions of its liability.

3. WITNESS—EXAMINATION—RECALLING.

It is within the discretion of the court to permit a witness to be recalled to correct his evidence previously given.

4. SAME—CROSS-EXAMINATION—LIMIT.

It is within the discretion of the court to require counsel to cease cross-examining a witness upon a matter about which the witness has answered fully several times.

5. DAMAGES—MEASURE OF—NEGLECT—RAILROAD COMPANIES.

In an action for damages to plaintiff's crops and land, caused by the overflow of an embankment on defendant's railway, the measure of damages is the market value of the crops at the time they were destroyed, and the amount of injury to the land, as shown by the testimony.

Appeal from district court, Bosque county.

This was an action by J. B. Pool against the Gulf, Colorado & Santa Fe Railway Company for damages to plaintiff's crops and land by an overflow of water, caused by the alleged negligent construction of a bridge and embankment on defendant's railway. There was a verdict and judgment for plaintiff, and defendant appeals.

W. M. Flournoy, for appellant.

WALKER, J. Appellant was sued by appellee for damages for injury to his land, and crops of cotton and oats, adjoining the track of the railway of appellant, caused by alleged negligence in its construction of a bridge, and an embankment north of the bridge; whereby the waters of Neil's creek were swollen by rain, were thrown over the adjoining fields, washing away the soil, and destroying the growing crops thereon. The petition described the situation of the land, the dimensions of the embankment, the want of culverts and sluices, and the width of space left at the bridge in its construction, and alleged defects; giving also a history of the effect floods had upon the land before the obstruction. The extent of injury to the land is set out, and the acreage, and value per acre of the crops alleged to have been destroyed. The demurrer and exceptions were overruled. The special exceptions applied to the details given, which might have been omitted; but their presence, as indicating the scope of the testimony to be introduced, could have been of no injury to the defendant. There was no material error, then, in overruling the exceptions.

Complaint is urged against the action of the court in interrupting counsel for defendant in the cross-examination of the witness Preston. The explanation given by the judge in the bill of exceptions must be taken as true, "that the court did say that the witness had already answered the question several times, and he thought that was often enough; he thought the witness had been cross-examined fully enough on that point. But the defendant had full liberty and did continue the examination as to other matters. Counsel was stopped because he was persisting in interrogating the witness upon a matter about which he had answered fully several times." In the examination of witnesses the subject lies chiefly in the discretion of the judge before whom the cause is tried. The great object is to elicit the truth from the witness; but the character, moral courage, bias, memory, and other circumstances of witnesses are so various as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to obtain that end. 1 Greenl. Ev. § 481. It does not appear that any injury resulted, or could have resulted, from the action of the judge, in the exercise of his duty, in directing the examination; and his action will not be revised. It was also within the discretion of the court to permit the plaintiff to be recalled to correct his evidence before given.

By the testimony, plaintiff's case was that the railroad track ran north through plaintiff's field, near the Bosque river on the east, and crossing Neil's creek on plaintiff's land. The creek, at the bridge, ran at the foot of a hill on the south; the field rising gradually to the north and east. The bridge spanned the creek from the hill on the south to an embankment thrown up to support the track to the north. The embankment is variously estimated at 7½ feet to 15 feet in height. The track from the bridge descended for a distance from 500 to 700 yards; then ran on a level for about 250 yards; then began an upward grade. The embankment at the creek was only 18 inches or 2 feet high. The water broke over the track about 500 yards from the bridge, and for about 250 yards the embankment and track were washed away; the water running with much force along the west side of the embankment north, (or up hill, as stated by one witness,) and making a passage eastward across the track, destroying totally about 40 acres of cotton on the west, and 14 acres of

oats on the east, of the track. On the west, much soil was washed off; all the loose soil taking the cotton by its roots, leaving the surface in holes. The testimony was conflicting as to the dimensions of the opening at the bridge left for the passage of the waters of the creek. It was in evidence that the creek had been as high before in 1884, 1873, 1872, and 1870. The flood in 1884 was harmless from the backwaters from the Bosque preventing any current. There were no culverts in the embankment. The court charged the jury "that it was the duty of the company to leave sufficient opening [at the track] for the water caused by ordinary rain-falls flowing along said creek, and following the usual course, to escape, so as to prevent the same from causing any injury to the plaintiff's land and crops. But defendant was only bound to provide against such damages as could have been reasonably anticipated, and would not be guilty of such culpable negligence as to make it responsible if it failed to provide against such extraordinary floods as would [not] have been reasonably foreseen by men of ordinary engineering skill and sagacity, required in the construction of such railroads in general. By the expression 'extraordinary floods,' as used herein, is meant such floods as are of such unusual occurrence, as could not have been foreseen by men of ordinary experience and ordinary prudence. Ordinary floods are those, the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen." The liability of want of such care and skill was given. The measure of damages given in the charge was the market value of the cotton and oat crops at the time, if any, they were destroyed, and the injury to the land as shown by the testimony. The jury were also charged that "if they found from the testimony that the bridge and the embankment were properly constructed, having sufficient opening for the escape of the water from ordinary rain-falls, and sufficient culverts and sluices in said embankment for the escape of the water from such rainfalls, * * * or if the injury was caused by an extraordinary rain-fall, to find for the defendant. The verdict was for \$600 damages to the land, and \$470 for the destruction of the cotton and oat crops. The court, in its general charge, gave the law applicable to the case as made by the testimony. There was no error in rejecting the additional charges as to the duty and the degree of care and skill required by the defendant, and the conditions of its liability for damages. The rule for computing damages is not subject to criticism. *Railroad Co. v. Helsley*, 62 Tex. 596; *Railway Co. v. Tait*, 68 Tex. 223; *Railroad Co. v. Johnson*, 65 Tex. 393. The conflict in the testimony as to the sufficiency of the opening left at the crossing of the creek, whether the bridge and embankment were properly constructed, as to whether this was an extraordinary rain-fall, as to the water actually breaking through the embankment, and the flood of water towards and through the break, the destruction and value of the crops, and the extent of the injury to the surface of the land, were all subjects to be passed upon by the jury. The absence of sluices and culverts, alleged in pleadings, and noticed in the charge of the court, could not have injured defendant. A failure to establish his case in part will not affect his rights upon what plaintiff was able to and did establish. The main facts were few, and seemingly well supported by testimony. The embankment did raise the water; the water broke through the embankment; a current flowed northward towards the break, taking the cotton and surface soil in its course, and covering the oat-field on the east of the embankment with mud. The creek had been as high before, and inquiry would have shown it; and ordinary care would have demanded, upon the information, that such floods should have been guarded against. We find no error. The judgment is affirmed.

MISSOURI PAC. RY. CO. v. AYERS.

(Supreme Court of Texas. May 15, 1888.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—FIRES—EVIDENCE.

In an action against a railway company for injury to plaintiff's grass by fires alleged to have been set by sparks from defendant's engine, the evidence showed that defendant's road passed through plaintiff's land; that the fire occurred soon after the train passed; that dry grass and weeds were permitted to accumulate on defendant's right of way at and about the place where the fire occurred; and that at the time and before the fire it was not unusual for defendant's engines to throw sparks and coals of fire on its right of way. The trial court found that the fire occurred through the negligence of defendant. *Held*, that the supreme court, on appeal, could not say that the evidence, although circumstantial, was insufficient to support the finding.¹

2. SAME—MEASURE OF DAMAGES.

In addition to the value of the grass on the ground at the time the fire occurred, plaintiff was entitled to damages resulting from injury to the grass roots, whereby the ground was rendered less productive.

Appeal from district court, McLennan county.

This was an action by J. Q. Ayers against the Missouri Pacific Railway Company for damages to plaintiff's grass caused by fires alleged to have been set by sparks from defendant's engines. There was a trial to the court, and a judgment for plaintiff. Defendant appeals.

Clark, Dyer & Bollinger, for appellant.

STAYTON, C. J. This action was brought to recover damages for injuries claimed to have resulted from fires negligently caused in the operation of appellant's trains, whereby grass was burned, and by injury to the roots the growth of grass was impeded. The fires occurred on several occasions during the months of September, October, and November, 1888. It is insisted that the evidence is insufficient to show that the fires had their origin from sparks or coals escaping from the locomotive of appellant, and it is true that direct proof of that fact was not made, except as to two fires that together consumed only 40 acres of grass. It was proved, however, that the appellant's railway ran through the land appellee had leased; that the fires occurred soon after the trains passed, or usually passed; that dry grass and weeds were permitted to accumulate on appellant's right of way at and about the places where the fires occurred; and that at the time and before the fires occurred it was not unusual for appellant's engines to throw sparks and coals of fire on its right of way. One witness stated that, "both before and after these fires, defendant's engines often threw sparks and coals of fire from smoke-stack and bottom of engine; there was a cut in the road where these fires occurred. I lived in a few hundred feet of the right of way at this point of defendant's road. Grass and weeds grew, and in some places were standing, clear up to the ties where the fire occurred." On this character of evidence the judge who tried the cause found that the fires occurred through the negligence of the appellant, and we cannot hold that the evidence, circumstantial though it was, as to the cause of all the fires except two, was insufficient to sustain the finding. Upon such facts, such would be the conclusion of most minds, in the

¹ Evidence that a defendant railroad company has allowed combustible materials to accumulate on its land, liable to take fire from sparks escaping from passing engines, and to communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the defendant. *Clarke v. Railway Co.*, (Minn.) 28 N. W. Rep. 536; *Railroad Co. v. Benson*, (Tex.) 5 S. W. Rep. 823; *Steele v. Railway Co.*, (Cal.) 15 Pac. Rep. 851. As to the presumption of negligence which arises when a fire is caused by sparks escaping from a locomotive, see *Rose v. Railway Co.*, (Iowa,) 84 N. W. Rep. 450, and note; *Wolff v. Railway Co.*, (Minn.) 25 N. W. Rep. 63, and note; *Butcher v. Railroad Co.*, (Cal.) 8 Pac. Rep. 174, and note; *Tilley v. Railway Co.*, (Ark.) 6 S. W. Rep. 8, and note. That no such presumption arises in the absence of statute, see *Railway Co. v. Hixon*, (Ind.) 11 N. E. Rep. 286.

absence of some evidence showing a likelihood that it otherwise originated. In addition to the value of the grass on the ground at the time the fires occurred, the appellee, under the pleadings and proof, was entitled to receive such damages as resulted from injury to the grass roots, whereby the ground was rendered less productive of grass during his tenancy than it would have been had the fires not occurred. There was some conflict of evidence as to the area burned over, but there was evidence from which the court might have found the burned area greater than he did. The record does not present a case in which this court would be authorized to set aside a finding on the ground that there was not sufficient evidence to sustain it, and, as there is no other ground on which the correctness of the judgment is questioned, it will be affirmed.

BRANCH *et al.* v. HANRICK *et al.*

(Supreme Court of Texas. May 15, 1888.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—DELAY IN CALLING FOR.

Rev. St. Tex. art. 1829, providing that, when letters testamentary or of administration have been granted, "the persons interested in the administration may proceed after any lapse of time to compel a settlement of an estate which does not appear from the record to have been closed," abrogates the rules that the administration is presumed to have been closed, where a considerable length of time has elapsed since the last order was made; and, in the absence of an order of record showing the settlement of an estate, such settlement may be compelled at any time.

2. SAME—WHO CAN COMPEL.

A purchaser of the interest of an heir has the same right to apply for a settlement of the estate and for partition as the heir would have had.

3. PARTITION—BETWEEN HEIRS—JURISDICTION.

Until the administration of an estate is closed, the county court in Texas has exclusive jurisdiction to decree a partition of the lands of the estate among the heirs, when the title is clear as among them, and there are no adverse claims by third persons.

Appeal from district court, Falls county.

Wharton Branch, appellant, *pro se.* J. D. Lum, for Minter, intervenor.

GAINES, J. This is a proceeding originally instituted in the county court of Falls county, by Wharton Branch, one of the appellants here, for the purpose of compelling E. G. Hanrick, who was alleged to be the administrator of the estate of Edward Hanrick, deceased, to make an exhibit preparatory to a partition of the estate. It was alleged that Branch was the owner of a distributive share of the estate; that E. G. Hanrick was appointed administrator thereof in 1867, by said court, and that the administration had never been closed. E. G. Hanrick appeared, and answered that the administration had been closed by lapse of time and by operation of law. Ellen Hanrick, Annie Hanrick, and Elizabeth Clare, joined by her husband, heirs of the intestate, also appeared, demurred, and specially excepted to the petition, and also pleaded specially that no action had been taken in the court in reference to the administration in 10 years, and that there was a suit pending in the district court of Falls county between the heirs for a partition of the estate. Upon hearing in the county court, it was ordered that E. G. Hanrick, as administrator, make and file an exhibit of the condition of the estate. From this judgment he appealed to the district court. J. G. Minter, one of appellants in this court, intervened in the cause after it was appealed to the district court, alleging that he was administrator of the estates of James Hanrick, John Hanrick, and Elizabeth O'Brien, deceased, who with E. G. Hanrick were the sole heirs of Edward Hanrick, deceased, and joined in the application of Wharton Branch. He also alleged that E. G. Hanrick was administrator of the estate of Edward Hanrick, deceased, and that the estate was ready for partition and distribution. In the view we take of the case upon appeal, it is not necessary to notice the

pleadings further. The district court, upon final hearing, denied the application to require the administrator to make an exhibit, and adjudged that the applicant Branch should pay the costs. The judgment recites that the court was of opinion that the application "comes too late," from which it is to be inferred that it was held that, by reason of the time which had elapsed between the last proceeding had in the county court and the filing of the application, the administration must be conclusively presumed to have been closed. There was no action upon the demurrers, and they are deemed to have been waived.

The statement of facts shows that the court-house of Falls county, and a part of the records of the county court, were burned. But an order of court was introduced in evidence dated March 25, 1867, appointing E. G. Hanrick administrator of the estate of Edward Hanrick, deceased; also an order dated April 26, 1867, appointing appraisers of the estate; another dated May 27, 1869, approving the inventory and appraisement; and lastly an order of March 31, 1869, approving an annual exhibit and decreeing a sale of lands. No record evidence was introduced showing any subsequent action by the administrator in the court or by the court itself in regard to the estate; and we think the court was fully warranted in concluding from the testimony that no such action had been taken. There was no direct evidence offered tending to show a settlement of the administration, and the conclusion is inevitable that it was never in fact closed by any formal action of the court. Such being the case, is it to be conclusively presumed that the administration had been closed when the application was filed on August 11, 1885? We think not. More than 16 years had elapsed, since the last order was made, before the application was filed. In *Murphy v. Menard*, 14 Tex. 61, it was held that, under the law in force in 1841, an administration must be presumed to have been closed after a lapse of a much shorter time than is shown in the present case. The same doctrine has been recognized and applied in the subsequent cases of *Portis v. Cummings*, Id. 140, and *Marks v. Hill*, 46 Tex. 345. But we think that the forty-sixth section of the act of August 15, 1870, was clearly intended to abrogate this rule. That section reads as follows: "But when letters testamentary or of administration shall have once been granted, no presumption is admissible which is contrary to the record; and the persons interested in the administration may proceed, after any lapse of time, to compel a settlement of an estate which does not appear from the record to have been closed." Pasch. Dig. art. 5507. This provision is partly copied into the Revised Statutes; the words, "no presumption is admissible which is contrary to the record," being omitted. Rev. St. art. 1829. The object of the omission we need not here determine. The article, as it now stands, applies directly to the case before us, and admits of but one construction. In the absence of an order of record showing the settlement of an estate, such settlement may be compelled at any time. It would in our opinion be competent in a case like the present, where the records had been destroyed, to show this distinction, and to prove by parol that an order closing the administration had been duly entered on the minutes of the court. Any order not so entered would be a nullity. Id. art. 1802. We therefore conclude that the application to compel a settlement did not come too late, and that the court erred in so holding.

The court below did not pass upon the question of the effect of the partition suit pending in the district court at the time this application was filed. We will say, however, that until the administration was closed, the county court had exclusive jurisdiction to decree a partition of the lands of the estate as among the heirs, when the title is clear as among themselves, and there are no complications with third persons, who claim an interest adverse to the estate. Id. art. 3490. And that the plea setting up merely the pendency of the suit in the district court was not an answer to this application, so far as it seeks to compel a settlement of the estate. What the action of the court should be, upon the coming in of the administrator's report and account, we

will not undertake to determine in advance. The facts are not sufficiently disclosed by the record to justify such an attempt. It may be that the interests of the heirs in the lands may be so complicated with that of third parties that a resort to the process of a court of equity may be necessary in order to secure a fair and equitable adjustment and partition. We merely decide now that the court should have compelled a settlement. The application was excepted to on the ground that Branch did not show an interest in the administration. He averred that he owned an interest in the estate, having purchased that of some of the heirs. This he had the right to do, and he was entitled to the same remedies his grantors had previous to the conveyance. His interest was not denied as a matter of fact. The exception does not appear to have been called to the attention of the court, and we infer his interest was not contested. It was not shown by the evidence, but we presume all controversy to it was waived. *Newton v. Newton*, 61 Tex. 511.

For the error of the court which has been pointed out the judgment is reversed and the cause remanded.

PARKER v. FORT WORTH & D. C. RY. CO.

(*Supreme Court of Texas. May 22, 1888.*)

TRESPASS TO TRY TITLE—EVIDENCE—PRIMA FACIE TITLE.

In trespass to try title, the deed under which plaintiff claims, and evidence of his continued possession thereunder until defendant's entry, are admissible, and sufficient to show a *prima facie* title.

Appeal from district court, Wichita county.

Wm. W. Flood, for appellant. J. M. O'Neill, for appellee.

GAINES, J. This was an action of trespass to try title brought by appellant against appellee to recover possession of a tract of land described in the petition, and damages alleged to have accrued from the destruction of timber upon the land, and the construction of a railroad across it. The defendant company pleaded not guilty as to a strip of the land 100 feet wide, extending through the tract and disclaimed as to the remainder. Upon the trial the plaintiff introduced in evidence a deed from Owen S. Jones and others to himself dated the 19th day of May, 1888, to the land in controversy, and thereupon offered to prove by his own testimony that in the month of June, 1888, he took possession of the land under the deed, and made improvements thereon; that he had remained in possession until the defendant entered in May, 1885; and that he had continued in possession of all of the land except that appropriated by defendant for the purposes of its railroad up to the time of the trial. At the same time plaintiff announced that he would offer no further evidence in support of his title until defendant showed some superior title; and thereupon the court excluded the deed, and charged the jury to find for the defendant. Bills of exceptions were properly taken to the rulings of the court. Judgment having been rendered for appellant, and plaintiff appealing, the question arises, did the evidence offered by defendant show a *prima facie* case? In *Alexander v. Gilliam*, 39 Tex. 228, it was held that proof of possession was sufficient evidence of title in the plaintiff to maintain the action of trespass to try title against a mere wrong-doer. The principle was very clearly recognized in the case of *Wilson v. Palmer*, 18 Tex. 592. The decision of the question was, however, not necessary to the determination of that case. But it was expressly held in *Kolb v. Bankhead*, 18 Tex. 229, that the plaintiff was entitled to recover in trespass for cutting timber by proof of the deed under which he claims and possession thereunder, down to within a short time before the trespass was committed. See, also, *Linard v. Crossland*, 10 Tex. 461. The ruling in *Alexander v. Gilliam*, *supra*, is in accordance with that of the supreme court of the United States in the case of *Burt v. Panjau*, 99

U. S. 180, and is supported by the great weight of authority. *Bird v. Lisbroas*, 9 Cal. 1; *Nagle v. Macy*, Id. 426; 2 Whart. Ev. §§ 1333, 1334; Abb. Tr. Ev. 692; 2 Greenl. Ev. § 618, and cases cited in these authorities. It follows from what we have said that we think the court erred in excluding the plaintiff's deed and testimony, and in holding them not sufficient *prima facie* evidence of title.

The judgment is accordingly reversed, and the cause remanded.

MILES v. KINNEY *et al.*

(Supreme Court of Texas. May 22, 1888.)

WRITS—CITATION—NOTICE OF PLAINTIFF'S CLAIM.

Rev. St. Tex. art. 1215, requires that, where all the defendants reside in the county in which the suit is brought, the citation shall state the "nature of the plaintiff's demand." Plaintiff brought an action against J. & C. to recover certain land, and also made his grantor, M., a party defendant, alleging that M. conveyed with covenants of warranty, and praying that, in the event his title failed, he might have judgment against M. for the purchase money. The citation was as follows: "The nature of the plaintiff's demand is * * * for the title and possession of [describing the property,] for damages in the sum of \$500, for costs, and general relief." Held, that this was insufficient to apprise M. of the nature of the relief sought against him, and that a judgment by default against him was error.

Error from district court, Tom Green county.

Mays & Wright, for plaintiff in error.

GAINES, J. This suit was brought by defendants in error Kinney, Jager, and Carlisle against Jackson & Carter, also defendants in error, to recover certain lots in the town of San Angelo. Plaintiff in error, Miles, was also made a party defendant in the court below, plaintiffs alleging as to him that he had conveyed the lots to them by deed with covenants of general warranty, and praying that, in the event their title failed in the suit, and they did not recover the lots against the other defendants, they have judgment against Miles for the purchase money paid by them to him for the property, with interest thereon. A citation was issued and served. Defendants Jackson & Carter answered, and upon the trial they had judgment in their favor. Defendant Miles having made default, judgment was rendered against him on the alleged warranty. He brings the case here by writ of error, and assigns that the citation was insufficient to authorize the judgment against him. All the defendants were alleged to reside in the county in which the suit was brought. The statute requires in such a case that the citation shall state the "nature of the plaintiff's demand." Rev. St. art. 1215. The citation in this case contains the following statement: "The nature of plaintiff's demand is as follows, to-wit: For the title and possession of lots numbers six (6) and fifteen, (15,) in block P, Miles' addition to San Angelo, Tom Green county, Tex., for damages in the sum of five hundred dollars, (\$500,) for costs, and general relief." This is sufficient to apprise the defendants that they were sued for the recovery of the lots, and for the damages resulting from the trespass upon them; but was not sufficient to notify Miles that the plaintiff sought to recover of him on his warranty in the event they failed to establish their title to the property. The nature of the suit may be stated in the citation in very general terms, (*Pipkin v. Kaufman*, 62 Tex. 545; *Railway Co. v. Burke*, 55 Tex. 323,) but each defendant must be notified of the character of the demand against himself. The case before us illustrates the reason of the statutory rule. Here, according to the allegations of the petition, Miles had sold the lots to the plaintiff by a deed of general warranty. The citation advised him only that he was sued by his grantees for a recovery of the property. He had no grounds upon which to resist that demand, and might reasonably have concluded to give no attention to the suit, and to permit judgment to go against him by default. We

think, therefore, that the citation was not sufficient to warrant the judgment against Miles.

For the error of the court in rendering judgment by default against him without a citation which stated the return of the demand upon which it was obtained, the judgment is reversed, and the cause remanded.

ROBERTS v. McCAMANT.

(*Supreme Court of Texas. May 25, 1888.*)

1. JUDGMENT—COLLATERAL ATTACK.

In a suit to enjoin an execution issued from justice's court, it appeared that judgment had been rendered therein against plaintiff for \$18, disallowing his counter-claim for \$22, and that the county court had dismissed an appeal therefrom on the ground that, the judgment being for less than \$20, it had no jurisdiction to review the same. *Held*, that the judgment of the county court, although erroneous, was conclusive until set aside, and could not be thus collaterally attacked.¹

2. JUSTICES—JURISDICTION—EXECUTION—COSTS ON APPEAL.

Where an appeal from a judgment in justice's court is dismissed by the county court for want of jurisdiction, the justice has no authority to issue execution for costs incurred in the county court.

Appeal from district court, Jones county.

Suit to enjoin the collection of an execution issued from a justice's court, brought by W. E. Roberts against A. S. McCamant. Judgment for defendant. Plaintiff appeals. Rev. St. Tex. 1879, art. 1638, relating to appeals from justices' courts, is as follows: "Any party to a final judgment in the justice's court may appeal therefrom to the county court, where such judgment, or the amount in controversy, shall exceed twenty dollars, exclusive of costs, and in such other cases as may be expressly provided by law."

Jones & Cunningham, for appellant.

GAINES, J. The appellant brought this suit in the court below to enjoin the collection of an execution issued from the justice's court upon a judgment in favor of appellee McCamant against him. A preliminary injunction was granted, and the writ issued and served, but, upon final hearing, exceptions to the petition were sustained, the injunction dissolved, and the suit dismissed. The petition alleged that McCamant brought a suit in the justice's court against Roberts, the plaintiff in this suit, to recover the sum of \$18, to which the latter pleaded a counter-claim of \$22; that upon the trial in that court McCamant obtained a judgment for the amount of his claim, from which Roberts perfected an appeal to the county court, but that the county court dismissed the appeal for the want of jurisdiction. It is further averred that thereafter the justice issued execution upon the judgment for the amount originally recovered by McCamant, and for all costs incurred in the suit both in the justice's court and in the county court.

It is assigned that the court erred in sustaining the exceptions to the petition. In support of his assignment appellant insists that, the amount of his counter-claim being over \$20, an appeal lay to the county court, and that, an appeal having been perfected, the judgment of the justice's court was thereby vacated. It is believed that these propositions are sound. It is held that when an appeal is properly taken from the judgment of a justice's court, that it operates to avoid the judgment, and that a subsequent voluntary dis-

¹ Respecting the grounds on which a judgment may be collaterally attacked, see *McCarter v. Nell*, (Ark.) 6 S. W. Rep. 781, and note; *Nicholson v. Nicholson*, (Ind.) 15 N. E. Rep. 223; *Decker v. Decker*, (N. Y.) Id. 807; *Comer v. Bray*, (Ala.) 8 South. Rep. 554; *In re Newman's Estate*, (Cal.) 16 Pac. Rep. 887; *Davis v. Robinson*, (Tex.) 7 S. W. Rep. 749; *Fowler v. Brooks*, (N. H.) 13 Atl. Rep. 417; *Harwood v. Wylie*, (Tex.) 7 S. W. Rep. 789; *Lyons v. Hamner*, (Ala.) 4 South. Rep. 26; *Brittain v. Mull*, (N. C.) 6 S. E. Rep. 832.

missal in the county court does not restore it to validity. *Bender v. Lockett*, 64 Tex. 566; *Moore v. Jordan*, 65 Tex. 395. If, however, it be a case which cannot be appealed, or if the law for perfecting appeals be not complied with, we are of opinion that the judgment remains in force, and upon a dismissal by the county court, on the ground that it has not acquired jurisdiction of the case, it is the duty of the justice to issue execution upon the original judgment at the instance of the party in whose favor it is rendered. It seems to us that Roberts was entitled to his appeal, and he alleges in his petition that it was perfected. But the county court had jurisdiction to determine these questions, and it appears from the petition that it did determine that it did not have jurisdiction of the case, and dismissed the appeal on that ground. The judgment of the county court may be erroneous, but it is none the less conclusive until set aside by proper proceedings, and estops the appellant from saying that the case had been properly appealed. It follows, as we think, that the justice was authorized to issue execution for the amount, and the costs of his court. But we know of no authority for his issuing judgment for the costs which were incurred in the county court. To that extent the execution was clearly illegal, and we are therefore of the opinion that the court erred in sustaining the demurrers to the petition. The exceptions should have been overruled, and if upon the trial the plaintiff had established the allegations of his petition the injunction should have been perpetuated as to the execution, and the defendant enjoined from causing to issue another execution from the justice's court for the county court costs.

For the error pointed out the judgment is reversed and the cause remanded.

BATTE v. BECK *et uo.*

(*Supreme Court of Texas. May 25, 1888.*)

TRESPASS TO TRY TITLE—EVIDENCE—HUSBAND AND WIFE.

In an action of trespass to try title, where defendant's wife claimed under deeds reciting the purchases to have been made with her separate means, and the evidence offered by defendants showed that she derived them from her father, a verdict and judgment in her favor will not be set aside as contrary to the evidence, merely because there was some impeaching evidence.

Appeal from district court, Milam county.

Henderson & Henderson, for appellant. *Ford & Ford*, for appellees.

STAYTON, C. J. This is an action of trespass to try title, brought by the appellant against C. B. Beck and his wife. The appellant claims through a sale under execution against C. B. Beck. Mrs. Beck claims that the land is her separate estate, and the deeds through which she claims recite that the purchases were made with her separate funds. The cause was tried with a jury, and resulted in a judgment for Mrs. Beck. There is no claim that the jury were not correctly instructed as to the law applicable to the case, and the sole ground on which a reversal is sought is that the verdict is contrary to the evidence. The land was bought in May, 1886, and cost \$630. The father of Mrs. Beck died in 1876 or 1877, and the evidence of all the witnesses shows that she received property from his estate. The testimony of Beck and his wife shows that the property so received was sold for \$850, and that with \$630 of this identical money the land in controversy was paid for. There was evidence tending to discredit their statements, but it is not of that character, or of such overwhelming force as to justify this court in setting aside the verdict. The jury doubtless believed the statements of the appellees, and the mere fact that there was evidence tending to throw suspicion upon their testimony is not sufficient to authorize this court to hold that the conclusion of the jury was erroneous. A discussion of the evidence would serve no useful purpose, and will not be attempted. We find no error, and the judgment will be affirmed.

CLUBB, Receiver, v. DAVIDSON.

(Supreme Court of Missouri. June 4, 1888.)

1. CORPORATIONS—OFFICERS—USING POSITION FOR INDIVIDUAL PROFIT.

The president of a packet company having failed to make a contract for his company with the government for carrying the mails, and subsequently succeeding in making such a contract in his own behalf, employing the boats of his company to the extent of its capacity so long as the said company operated boats on that route, but employing other boats when necessary, will be required to use all the facilities afforded by the company, and to account to the company for all money received for the service performed by it, but not for that received for services rendered by the other boats.

2. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Where, in an action against the president of a packet company, to recover money received by him for the company, the trial court gave credence to his testimony that all money received by him for the company had been paid into the treasury, and dismissed the action, the appellate court will not disturb the judgment, no reason for discrediting such testimony appearing.

Appeal from St. Louis circuit court; BARCLAY, Judge.

Patterson & Crane, for appellant. *Given Campbell*, for respondent.

NORTON, C. J. The Keokuk Northern Line Packet Company was, in 1880, and for many years prior thereto, a corporation formed for the purpose of building, purchasing, employing, and using steam-boats and barges for the transportation of freight and passengers upon the Mississippi river. In October, 1880, S. C. Clubb was appointed its receiver, and brought this suit to recover from defendant the money received by him from the United States for carrying the mails on the upper Mississippi river, under two contracts made by defendant, William F. Davidson, while he was president, with the postmaster general. One of these contracts provided for the payment of \$22,464 per annum for carrying the mail in steam-boats six times a week during the season of open navigation, between St. Louis and Keokuk, and return, the service to begin July 1, 1879. The other provided for the payment of \$71,190 per annum for carrying the mails in the same manner six times a week from St. Louis to St. Paul and return, the service to begin on July 1, 1880. William F. Davidson was the contractor in both these contracts. The plaintiff claims in his petition that said contracts were in equity the contracts of the company, and that said Davidson should be required to account for all moneys paid under them. The answer of defendant, after denying the right of the receiver to maintain this suit, and denying that the corporation had any interest in said mail contracts, or either of them, then sets up and avers that all the moneys received by him under said contracts, over and above the expense incurred in receiving and collecting said moneys from the government in 1879 and 1880, were paid to plaintiff, and that said plaintiff received the full benefit of all sums paid defendant, and during the time plaintiff carried said mails. On the trial plaintiff's bill was dismissed, and judgment rendered for defendant, from which the plaintiff has appealed. Waiving the question raised by the answer in reference to the right of Clubb, the receiver, to maintain this suit, two questions are left in the case, the first of which is: Can the defendant, as contractor for carrying said mails, be required to account to plaintiff for what he received under said contract, and, if so, to what extent? The second is: Does the evidence show that defendant has paid to plaintiff all the money received by him under said contracts above the expenses in collecting said moneys from the government in 1879 and 1880? An answer to these questions depends upon the circumstances under which these contracts were made, and the ability of plaintiff to perform the service required in carrying said mails. It appears from the evidence of Davidson that, prior to the 1st of July, 1879, Mr. Rhodes, at that time a director of the company, being authorized by Davidson, as president of the company, went to

Washington to secure a contract with the government for the company to carry the mails between St. Louis and Keokuk, which resulted in a failure to get the contract. Subsequently, at the request of the defendant, Mr. Kerens went to Washington for the same purpose, and also failed to accomplish it. It also appears that about July, 1879, defendant authorized said Kerens to make another application for the company for a contract; which being refused, defendant then made an arrangement to make an application on behalf of defendant, whereby it was agreed that, if defendant could get \$20,000 a year, Kerens was to have the excess over \$20,000 as compensation for his services in obtaining the contract, collecting the money, and making settlements with the government as Davidson's agent, said Kerens acting in that behalf under a power of attorney. This resulted in a contract between the government and Davidson for carrying the mails by boat between St. Louis and Keokuk from the 1st of July, 1879, for which Davidson was to receive \$22,464 per annum. The evidence shows that defendant, having thus become contractor, employed the boats of the Keokuk Northern Line Packet Company to the extent of its capacity to perform the required service, and that he also employed on his own account certain boats of P. S. Davidson, and of the Eagle Packet Company, to fully comply with his contract. This contract terminated the 30th of June, 1880, and during its continuance the plaintiff by its boats carried the mails 76,000 miles, P. S. Davidson's boats about 19,500, and the Eagle Packet Company about 1,500 miles. It appears that, upon the termination of said contract, the plaintiff company, through Mr. Kerens, made application for a new contract to carry the mails from St. Louis to St. Paul, and intermediate points, which being refused, defendant then, through said Kerens, succeeded in obtaining a contract to carry the mails between said points, and was to receive \$71,190 per annum for the service, and said Kerens was to receive a compensation for services rendered and making settlements and collecting from the government all in excess of \$50,000, or 33½ per cent. From the 1st of July, 1880, till the 1st of January, 1881, the evidence tends to show that the plaintiff company carried the mails under this second contract 74,500 miles; P. S. Davidson's boats, 44,500 miles; and the Eagle Packet Company, 3,500 miles. It also appears in evidence that in October, 1880, Clubb, the receiver of the Keokuk Northern Line Packet Company, refused to have anything to do with this contract, but subsequently assented to the use of the boats in carrying the mail. It also appears that the plaintiff company never operated any boats above the city of St. Louis after the 1st of January, 1881, and that the second contract was discontinued on the 31st of March, 1881, and an allowance of one month's pay allowed the contractor on its discontinuance. It appears from the evidence that, under the first contract for carrying the mail from the city of St. Louis to Keokuk, the government paid, for the service performed, about the sum of \$18,000; that this money was collected by Kerens, who, after deducting the charges, paid to Davidson the sum of \$13,056.18. Under the second contract the government paid for the first quarter, ending 30th September, 1880, \$17,570.08, and for the second quarter, ending 31st December, 1880, \$4,333.55. This money was collected by Kerens, and, after deducting his charges, \$14,036.44 was paid to Davidson or his agent. The evidence tended further to show that Davidson, on account of mail pay, had paid into the treasury of the packet company about \$30,000.

That directors and officers of corporations occupy positions of trust, and must act in the utmost good faith, cannot be questioned. They will not be allowed to deal with the corporation funds and property for their private gain. They have no right to deal with themselves and for the corporation at the same time, and they must account for the profits made by the use of the company's assets, and for moneys made by a breach of trust. *Ward v. Davidson*, 89 Mo. 458, 1 S. W. Rep. 846, and cases cited. Davidson, as presi-

dent of the packet company, having endeavored to get these mail contracts for the company, and having failed, was not forbidden by the principle above stated from making a contract in his own behalf for carrying these mails; but, after having done so, his relation to the packet company required that he should use all the facilities afforded by the packet company in performing the contract, and, under the principle above announced, he will not be allowed to make profit out of such use, but will be held to account to the company for all that he received for the service performed by the company in such use. *Oil Co. v. Marburg*, 91 U. S. 587. The evidence in this case shows that the boats of the plaintiff company performed no service in carrying the mails after the 1st of January, 1881; and defendant is not, under the principle above announced, accountable to plaintiff for any sums received by him after that time, either on account of service thereafter, or on account of extra pay allowed for one month after the discontinuance of the contract on the 31st March, 1881.

His liability to plaintiff is to be fixed by the amount of service performed by the boats of plaintiff anterior to the 1st January, 1881, inasmuch as plaintiff performed no service after that time; and thus limiting his liability, if Davidson and Johnston are to be believed, every dollar received by Davidson under these contracts for service performed, not only by the boats of plaintiff, but by the boats of P. S. Davidson and the Eagle Packet Company, was paid into the treasury of plaintiff, leaving defendant bound to said Davidson and the Eagle Packet Company for the number of miles the mails were carried by them respectively. The trial court, having these witnesses before it, gave credence to them, and dismissed plaintiff's bill, and we see nothing in the evidence authorizing us to discredit them, and the judgment is therefore affirmed.

All the judges concurring.

TARLOTTING v. BOKERN.

(*Supreme Court of Missouri. June 4, 1888.*)

1. LANDLORD AND TENANT—TENANCY AT WILL—TENANT'S RIGHT TO NOTICE TO QUIT.
In ejectment, it appeared that defendant leased the premises in controversy to plaintiff, and subsequently, by permission of plaintiff, took possession of the same premises for no specified time. *Held*, that defendant was at least a tenant by sufferance or at will, and was entitled to notice, under Rev. St. § 3073, providing for a written notice of one month to terminate such tenancy.
2. SAME—FAILURE TO PAY RENT—RIGHT OF LANDLORD TO MAINTAIN EJECTMENT.
The fact that rent was due, had been demanded, and was unpaid, does not entitle a landlord to possession, and ejectment cannot be maintained.

Error to St. Louis circuit court, GEORGE W. LUBKE, Judge.

Action of ejectment, brought by Michael Tarlotting against Adelia Bokern. Judgment for defendant. Plaintiff brings error.

M. F. Taylor, for plaintiff in error. *Saml. N. Holliday*, for defendant in error.

BRACE, J. Action of ejectment. Answer, general denial. The defendant was owner of a life-estate in the premises, with remainder to her two daughters. She owed the plaintiff \$300, for which she had given him her note. Plaintiff's title was a lease, read in evidence, from defendant to plaintiff, dated August 10, 1878, to begin at that time, and end when the rent received should pay the \$300 note due from defendant to plaintiff. No rate of rent was agreed upon, but plaintiff was to sublet the premises for the best price he could get, and was to retain no more than \$35 per month, and the excess, if any, was to be paid to defendant. Plaintiff testified that, shortly after the lease was executed, the premises became vacant, and he told defendant to move in, and he would be lenient. It further appeared that she was

to pay the plaintiff \$35 per month on his debt. Plaintiff further testified that he had demanded the rent of the defendant, but had never demanded the possession of the premises, but had sued her on the note in December, 1880, got judgment, and had sheriff levy on the premises described in the lease; that the defendant claimed a homestead exemption, and a part of the premises was set apart to her as such, and the remainder, 60x50 feet, on the rear of the lot, was sold by sheriff, under such execution, to the plaintiff; that subsequently an *alias* execution was issued, and levied on the unsold part of the homestead, and the same was purchased by Judge Laughlin, plaintiff's attorney, who afterwards brought an ejectment suit against the defendant, and he, the plaintiff, was present at the trial to assist against the defendant. The plaintiff authorized his attorneys to do what they could to collect the claim. Defendant testified that she signed the lease. Did not know what it was. Plaintiff told her it was only a renewal of the \$300 note for six months. After the house had been vacant some time, plaintiff told her to move in, and he would not go by the lease, and told her she could pay him as she was able. Has lived in the house ever since. Plaintiff never demanded possession, but wanted his note paid. On cross-examination, she said she understood she was to pay plaintiff \$35 per month. She could not pay that, and he said he would take what she could pay. Records were introduced, showing judgment on the note; sale of the premises, in excess of homestead, under execution, to plaintiff for \$225; sale under *pluries* execution of homestead to Laughlin for \$50; and judgment in favor of defendant in action of ejectment brought by him. The jury, under the instructions of the court, found for the defendant.

The only theory upon which plaintiff could have recovered, was that the lease from the defendant to the plaintiff was a subsisting contract which had not been abandoned. Conceding this to be so, the defendant went into the possession of the premises as his tenant, and, under the testimony, her term was to end at no certain time, and she was at least a tenant by sufferance or at will, whose tenancy could not be terminated against her consent, except by one month's notice in writing, requiring her to remove from the property, which was situated in the city of St. Louis. Rev. St. 1879, § 3078. Until the expiration of her term, she had a right to remain in possession of the premises.

In ejectment, plaintiff cannot recover without showing that, at the time his suit was commenced, he was entitled to the possession of the premises sued for. The fact that rent is due, has been demanded, and is unpaid, does not extinguish the relation of landlord and tenant, determine the tenant's term, or give the landlord a right of entry. The only right these facts confer upon the landlord is to institute a summary proceeding before a justice of the peace against the tenant, requiring him to show cause why possession of the property should not be restored to the plaintiff. Sections 3097, 3098. If the tenant appears, and shows that the rent has been paid, or, on the hearing of the cause, tenders the amount of the rent due, and costs, that ends the proceeding, and the term of the tenant continues. If he does neither, then the justice may render judgment in favor of the landlord for the recovery of the premises, and that judgment terminates the tenancy. Sections 3098, 3100. The plaintiff having failed to show that the defendant's tenancy had been determined in any manner, failed to show that he was entitled to the possession of the premises at the time his suit was commenced, and could not recover; so that, whatever error may have been committed on the trial, he is not prejudiced thereby. The judgment is for the right party, and is affirmed.

All concur.

SCHAD v. SHARP.

(Supreme Court of Missouri. June 4, 1888.)

1. COURTS—JURISDICTION—RECORD IN EJECTMENT—PRESUMPTION.

In ejectment it is immaterial that the record does not affirmatively show the land in question to have been in the county wherein the action was brought; the court, having general jurisdiction, will be presumed to have rightfully exercised it.

2. EVIDENCE—AMENDED PLEADINGS—RIGHT TO READ ORIGINAL PLEADINGS.

Where an action is tried upon amended pleadings, a party may read in evidence the original pleadings of his adversary.

3. LIMITATION OF ACTIONS—ADVERSE POSSESSION—MUTUAL MISTAKE AS TO BOUNDARIES.

Where two adjoining proprietors are divided by a fence, which they erroneously suppose to be the true line, in the absence of any agreement to the contrary, they are not bound by the supposed line, but must conform to the true line, though the land in question has been in actual possession, under such mistake, for more than 10 years.

4. BOUNDARIES—AGREEMENT AS TO—EVIDENCE.

In such case, mere occupation for 10 years by said proprietors, under such mistake, is not sufficient evidence from which to infer an agreement to hold to said fence regardless of the true line.

5. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In actions at law, the supreme court, on appeal, will not pass upon the weight of the evidence.

Appeal from circuit court, Morgan county; E. L. EDWARDS, Judge.

Action of ejectment by John Shad against Preston Sharp, for land in Morgan county. Judgment for plaintiff, and defendant appeals.

A. W. Anthony, for appellant. Druffen & Williams, for respondent.

BRACE, J. This is an action on ejectment to recover possession of a strip of land containing something less than one acre, the ownership of which depends on the location of the line between the N. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of section 26, town 43, range 16, in Morgan county. The petition is in the usual form, the answer a general denial, with a plea of the statute of limitations. The adverse possession was denied in the reply. The case was tried before a jury, and the plaintiff obtained judgment, from which defendant appeals, and urges a reversal upon the grounds which will be noticed in the course of the opinion.

1. The jurisdiction of the circuit court of Morgan county to try the case is for the first time questioned in this court, on the ground that the evidence does not show affirmatively that the land sued for is in Morgan county. Conceding this to be so, it does not follow that the land was not in Morgan county, and that the circuit court of that county did not have jurisdiction. Nothing appearing in the record to show that the land was not in that county, and the circuit court being a court of general jurisdiction, it will be presumed to have exercised its jurisdiction rightfully, and "nothing shall be intended to be out of the jurisdiction of a superior court but which specially appears to be so." *Gates v. Tusten*, 89 Mo. 13; *Huxley v. Harrold*, 62 Mo. 516. Enough, however, appears in this record, on the pleadings and evidence, apart from this presumption, to show that this land was in Morgan county.

2. The case was tried on an amended petition and answer, and on the trial the plaintiff was permitted to read in evidence the former pleadings of the defendant. There was no error in this. *Anderson v. McPike*, 86 Mo. 293; *Dowzlot v. Rawlings*, 58 Mo. 75.

3. In this case the plaintiff and defendant are adjoining proprietors, and purchasers from the same grantor; the plaintiff's deed being dated in June, and the defendant's in December, 1868. At the time the purchases were made there was a fence on a line between the two tracts. The common grantor, Parks, introduced as a witness by the defendant, testified: "When I sold to Schad, the land in the prairie was fenced on the line of German's survey. He was county surveyor, and made the survey for us in 1854. I told Schad, the fence was on the line, or close to it. * * * I made the same state-

ment to Sharp when I sold to him." The defendant did not testify, but it was shown by the evidence that, from the time he went into possession of his land, he occupied and cultivated the same up to this line, until 1880 or 1881, when another survey was made at the instance of Schad, by a surveyor by the name of Miller. The line of this survey ran south of the line of German's survey. Plaintiff claimed that this latter was the true line, and the strip between these two lines is the land in controversy; and on the trial he testified: "Before Miller made his survey I did not claim the land south of the hedge. Mr. German run the line, and I had to take it. * * * I did not claim beyond this line until after Miller's survey. * * * I did not know no line. I could not tell where the line was. I did not claim beyond my fence till I found where the line was, and I claimed to it. I claimed my line as soon as Miller measured it to me." The question, which was the true line, was submitted to the jury on instructions given for the defendant; the plaintiff asking no instructions on that branch of the case except a formal one, directing the jury that, if they found this land sued for to be within the boundaries of the land conveyed to him by Parks, they should find for the plaintiff, unless the defense made out his defense of adverse possession. On the question of adverse possession, the court gave two instructions for the plaintiff, and refused three asked for the defendant, and the action of the court in giving and refusing these instructions is the principal ground of complaint. They may be considered together. The whole evidence tended to show that each of these parties, in the occupation of their lands respectively to the line of the German survey, did so upon the supposition that that was the true line between their tracts, and not with any intention of claiming or holding any land as theirs beyond the true line; and in plaintiff's instructions given by the court the jury were, in effect, told that such occupation and claim of property by the defendant, beyond the true line, would not prevent the plaintiff from showing where the true line was, and his recovery of the land lying between the supposed line and the true line, in the possession of defendant at the commencement of the action, even though such land had been so in defendant's possession for more than 15 years. "It is well-settled law in this state that, where two adjoining proprietors are divided by a fence which they suppose to be the true line, each claiming only to the true line, they are not bound by the supposed line, but must conform to the true line when ascertained." *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 185; *Tamm v. Kellogg*, 49 Mo. 118; *Thomas v. Babb*, 45 Mo. 384. "Their possession, under mistake or ignorance of the true line dividing their premises, and without intending to claim beyond the true line when discovered, will not work a disseizin in favor of either party." *Houw v. Batteen*, 68 Mo. 84; *University v. McCune*, 28 Mo. 481. The instructions given for the plaintiff were in harmony with the principle enunciated in these authorities, were based upon the evidence, and correctly declared the law of the case, and we find no error in either of them that would warrant a reversal, after duly considering the criticisms upon them in some minor particulars not necessary to be noticed in detail. The defendant in the refused instructions, in effect, asked the court to instruct the jury that if plaintiff and defendant took possession of their respective purchases, with the understanding that the German line was the true line of division between their premises, and thereafter, for more than 10 years before the institution of this suit, recognized and acquiesced in it as such dividing line, each claiming, using, and occupying the land on his side up to said line as his own for such period, and there was no agreement that, if said line was not the true line, they would claim to the true line, when established, then the plaintiff cannot recover even though the jury should find that the German line was not the true line. The true principle to be deduced from *Taylor v. Zepp*, 14 Mo. 482; *Blair v. Smith*, 16 Mo. 273, and *Turner v. Baker*, 64 Mo. 218, to which we are cited as authority for these instructions, is thus

stated in *Jacobs v. Moseley*, *supra*: "Where there is a dispute as to the true division line between adjoining proprietors, or the line is uncertain, and they are both ignorant as to its true location, and they fix and agree upon a permanent boundary line, and take possession accordingly, the agreement is binding on them, and those claiming under them." In this case both plaintiff and defendant were ignorant of the true line. The only information they had on that subject was that derived from Parks, who told them "that the fence was on the line, or near to it;" and there is not a *scintilla* of evidence of any agreement between them that the German line should be the boundary line between them. Regardless of the actual location of the true line, and under the authorities *supra* and *Acton v. Dooley*, 74 Mo. 63, such an agreement cannot be inferred from occupation only to that line for a period of more than 10 years under the supposition that it was the true line. We think there was no error in refusing these instructions. In actions at law the supreme court will not pass upon the weight of the evidence. *Webb v. Webb*, 87 Mo. 541.

The judgment of the circuit court is affirmed.
All concur.

WOLFE v. DYER.

(Supreme Court of Missouri. June 4, 1888.)

1. DEED—DESCRIPTION OF PROPERTY—EFFECT OF PUNCTUATION.

The description in a deed was: "The following described tract or parcel of land, the north-east quarter and the west half of the south-east quarter and the east half of the east half of the south-west quarter of section" 36, township 48, range 26,—without any punctuation. The deed contained no statement of quantity, but reserved possession until a fixed time, with certain crops grown on the land that season. By one construction, the deed would convey 160 acres, being the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 36, and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ section 36, and the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ section 36, the lands of which grantors were in possession, and which they surrendered to grantee, including the land in controversy. By another construction, it would convey the N. E. $\frac{1}{4}$ section 36, of which grantors were not in possession, and did not own, and the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ section 36; in all 280 acres. *Held*, that the former construction should prevail.

2. SAME—RECORDATION—NOTICE TO PURCHASERS.

In such case, the deed being recorded, a subsequent purchaser has notice, as the deed itself would lead him to investigate the facts bearing upon its construction.

3. EQUITY—DECREE—EFFECT.

A subsequent mortgagee, for his own protection, paid a prior mortgage, and was by a decree, to which defendant, who was the mortgagor's grantee, was a party, subrogated to the rights of the prior mortgagee; whereupon defendant paid the amount decreed. Plaintiff, receiving a deed to a portion of the land from the mortgagors, and believing the same not included in defendant's deed, brought ejectment. *Held*, that said decree, being for no other purpose than that of subrogation to the lien aforesaid, did not establish title in defendant.

Error to circuit court, Cass county; NOAH M. GIVAN, Judge.

Ejectment by Thomas Wolfe against James D. Dyer, to recover the possession of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ section 36, township 48, range 26, in Johnson county. The action was begun in Johnson county, and transferred to Cass, where there was judgment for defendant, from which plaintiff appealed.

B. G. Thurman and Railey & Burney, for plaintiff in error. *Cockrell & Suddath*, for defendant in error.

BLACK, J. This was an action to recover the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 36, township 48, range 26, in Johnson county. Both parties claim title from Harriet C. Horne, wife of Amos Horne. She owned the property as her general, not separate, estate. The history of the title is as follows: In 1874, Horne and wife made a mortgage on this and other land, in all 160 acres, to secure a debt owing to Johnson county. Thereafter, and in 1879, they made

a deed of trust on the 160 acres to secure a debt to Jacob Taggart. Taggart, in order to protect his deed of trust, paid the prior incumbrances in favor of the county. Horne then paid the debt secured by the Taggart deed of trust, but refused to pay him the amount he had paid in discharge of the county debt. While matters stood in this shape, Horne and wife, by a written contract, sold the 160 acres to the defendant, James D. Dyer, for the agreed consideration of \$2,400; and on the 9th April, 1880, they made a warranty deed to Dyer, intending thereby to convey the 160 acres. This deed was acknowledged and recorded on the day of the date thereof. After this, and before the payment of the purchase money, Taggart brought a suit in equity against Dyer, Horne, and his wife, asking to be subrogated to the rights of the county in the county mortgage for the amount he had paid in the discharge of that debt. The suit resulted in giving him a lien on the land for \$1,045.18. Dyer, with the consent of Horne and wife, paid the amount adjudged to be due Taggart, deducted it from the purchase price, and paid the Hornes the residue. After all this, Dyer concluded there was a mistake in his deed as to the description of the 40 acres now in suit. He requested the Hornes to execute a deed of correction; but, instead of doing this, they made a quitclaim deed of the 40 acres to Wolfe, the present plaintiff, dated in 1884. The defendant in this suit, by his answer, admits possession, and denies the other allegations of the petition. For a further defense, he sets up a mistake by the scrivener in preparing the deed from the Hornes to him as to the description of the 40 acres. He then sets out at length the subrogation decree, and claims that by it title in him is established. The trial court seems to have regarded that decree as fixing the *status* of the title, and as constituting a complete defense to this suit; and in this it erred. In that decree the court did, among other things, find that the Hornes had sold and conveyed the 160 acres to the defendant. It may be conceded that the decree was binding, as between the parties to that suit and those claiming under them, for all the purposes for which it was rendered. But the decree did not establish title in any one. It left the legal title where the pleadings showed the parties had put it. It only subjected the property to the payment of the \$1,045.18. It authorized a sale of the property to pay the debt, but none was ever made. The decree put Taggart in the shoes of the county as to the county mortgage. When Dyer paid the debt, that satisfied the decree. Thereafter, for the purpose of making title, it amounted to no more than a satisfied mortgage. It confers title on no one. There can be no other conclusion.

Though the court may have erred on the matter before considered, still, if the judgment is for the right party, it ought not to be reversed. We feel bound to say, on the undisputed facts of this case, that the deed to the defendant conveys the 40 acres in suit. The description in the deed is as follows: "The following described tract or parcel of land," etc.: "The north-east quarter and the west half of the south-east quarter and the east half of the east half of the south-west quarter of section" 36, township 48, range 26. The description, as it appears in the deed, is without punctuation. To exclude the land in suit, we must understand the words "the north-east quarter" as meaning the N. E. $\frac{1}{4}$ of section 36; but, if we read the description so that the conjunction will connect the words "the north-east quarter" and "the west half," and let both sets of words be modified by "of the south-east quarter," then both parcels are located in the S. E. $\frac{1}{4}$ of the sections, and the defendant gets in all 160 acres, which includes the land in suit. The other reading gives him 280 acres, 160 of which was owned by Neff, and not by Mrs. Horne. If the deed called for quantity, namely, 160 acres, there could be no difficulty. While it does not do this, it contains that which is equivalent thereto. It goes on to say: "Reserving possession of the hereinbefore described premises until the 1st September, 1880; also the whole of the growing wheat crop, and one-third of the corn crop, to be grown on the premises

this season." The deed must be construed as a whole, giving due consideration to every part and portion of it,—words of reservation as well as of grant. While parol evidence cannot be received to prove that the parties intended something different from that which the language of the deed expresses, yet, if the language used in the description is uncertain and doubtful, the practical construction given to the deed by the subsequent acts of the parties may be shown by parol evidence. 2 Devl. Deeds, § 1042. So, in such cases, it is competent to show the actual situation and condition of the land. *Salisbury v. Andrews*, 19 Pick. 252. This deed shows that the land intended to be conveyed was in cultivation, and the inference is that it was in the possession of Horne and wife when the deed was made; and, though described by different subdivisions of the section, it is spoken of in the deed as a "parcel or tract." It is an admitted fact that defendant got possession of the 160 acres from the Hornes in April, 1880, and has had possession ever since; and the undisputed evidence is that the 160 acres, including the 40 in suit, was under fence and in cultivation. What is said on the face of the deed leads to all this information, and it at once sets at rest all doubt arising from the words of the descriptive clause. We think the deed does convey the 40 acres; and that it was intended to do so is conceded by the admissions in the record.

Something is said in respect of notice to plaintiff. He was bound to read the deed in the light of such facts as are before indicated, for the deed itself would lead him to look to them. The judgment is therefore affirmed.

All concur.

DOLLARHIDE v. RUBY *et al.*

(*Supreme Court of Missouri. June 4, 1888.*)

APPEAL—REVIEW—DECISION IN OPPOSITION TO RULING OF APPELLATE COURT.

In ejectment, where the sheriff's deed and other evidences of defendant's title have been before the appellate court in a former case, and held sufficient to pass title from the plaintiff, and where the rulings of the court below have been in direct opposition to what was ruled by the appellate court, the judgment will be reversed, and the cause remanded, that it may be disposed of in conformity with our former opinion, and defendant restored to possession of the premises.

Error from circuit court, Hickory county; WILLIAM O. MEAD, Special Judge.

Action of ejectment by William Dollarhide against Daniel Ruby and others. There was judgment for the plaintiff, and defendants bring error.

Amos Smith, for plaintiffs in error. *T. G. Rechow and Smith, Silver & Brown*, for defendant in error.

NORTON, C. J. This is an action of ejectment to recover possession of the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 36, township 37, range 21, in Hickory county. On the trial, plaintiff had judgment, from which defendants have prosecuted their writ of error in this court. Plaintiff, to sustain his title, put in evidence a deed from John D. Pitts, dated October 2, 1875, conveying to him the land in question. Defendants, to overthrow the title of plaintiff, claimed that all the right, title, and interest of plaintiff had been sold at sheriff's sale on an execution, which issued on a judgment rendered against said plaintiff, Dollarhide, at which sale Amos S. Smith became the purchaser and received the sheriff's deed. In support of this claim, a deed from the sheriff, conveying the land in question to said Smith, dated May 18, 1877, and acknowledged May 26, 1877, was offered in evidence; also an amended deed from said Dollarhide to said Smith by W. D. Harryman, sheriff, executed in November, 1879; also an amended deed executed by the sheriff May 17, 1881. In the case of *Dollarhide v. Parks*, 92 Mo. 173, 5 S. W. Rep. 8, these deeds, as well as the judgment on which the execution issued under which the sale was made, and also the petition in the suit in which the judgment was rendered,

were all before this court, and it was held that they were effectual to pass all the title Dollarhide had in said land to said Smith, and that Dollarhide did not, therefore, have any standing in court. This case was tried before the opinion was rendered in that case, and, the rulings of the circuit court being in direct opposition to what was decided in that case, the judgment is hereby reversed, and cause remanded, in order that the cause may be disposed of, and defendants restored to the possession of the premises, in conformity with the opinion in the above-cited case.

All concur.

SLATTERY v. JONES et al.

(Supreme Court of Missouri. June 4, 1888.)

JUDGMENT—LIEN—PRIORITY—FRAUDULENT CONVEYANCES.

Under Rev. St. Mo. § 2487, declaring conveyances made with intent to defraud creditors clearly and utterly void as against such creditors; and section 3730, making judgments liens upon the judgment debtor's land from the day of rendition,—a judgment rendered after the judgment debtor has conveyed his land in fraud of his creditors is a lien on such land, superior to that of an attachment levied on the land after entry of the judgment, but before levy of execution.

Appeal from circuit court, St. Louis county; THAYER, Judge.
Leo Rasseleur and Dexter Tiffany, for appellant.

Smith & Harrison and Martin, Laughlin & Kern, for respondent.

The attachment, as soon as levied, became a specific lien, with the same effect as if no conveyance had been made. *McKinney v. Bank*, 104 Ill. 180; *Drake, Attachm.* (6th Ed.) § 289; *Lionberger v. Baker*, 88 Mo. 447; *Freem. Judgm.* (3d Ed.) § 350; *In re Estes*, 8 Fed. Rep. 184. A judgment is not a lien on real estate which has, prior to the rendition of such judgment, been conveyed by the debtor in fraud of his creditors. *Rappleye v. Bank*, 93 Ill. 396; *Miller v. Sherry*, 2 Wall. 237, 249; *In re Estes, supra*, 5 Fed. Rep. 60; *Howland v. Knox*, 59 Iowa, 46, 49, 50, 12 N. W. Rep. 777; *Lyon v. Robbins*, 46 Ill. 279; *Freem. Judgm.* (3d Ed.) § 350; *Bump, Fraud. Conv.* (3d Ed.) 571, and note 4; *Bank v. Burke*, 4 Blackf. 141-145; *Wood v. Wright*, 4 Fed. Rep. 511; *Parker v. Freeman*, 2 Tenn. Ch. 612; *Dargan v. Waring*, 11 Ala. 988; *Den v. Hill*, 1 Hayw. (N. C.) 85-109; *Henderson v. Hunton*, 26 Grat. 926-938. Respondent, having first pursued the property, and obtained a specific lien thereon, is entitled to a preference. *George v. Williamson*, 26 Mo. 190; *Jackman v. Robinson*, 64 Mo. 289-292; *Zoll v. Soper*, 75 Mo. 460; *Edmeston v. Lyde*, 1 Paige, 639; *Bridgman v. McKissick*, 15 Iowa, 260; *Burt v. Keyes*, 1 Flip. 72; *Gordon v. Lowell*, 21 Me. 251; *Corning v. White*, 2 Paige, 567; *Miers v. Turnpike Co.*, 13 Ohio, 197; *Weed v. Pierce*, 9 Cow. 722; *Miller v. Sherry, supra*; *Rappleye v. Bank, supra*; *Bump, Fraud. Conv.* (3d Ed.) 570, 571; *Bruce v. Vogel*, 88 Mo. 100.

SHERWOOD, J. This is an equitable proceeding, having for its object the determination of the question whether the plaintiff, Slattery, or the defendant, the German Savings Institution, has the better title to the property in controversy. Briefly told, the facts in the case are these: "John Jones being insolvent and largely indebted, for the purpose of defrauding his creditors, conveyed his property to his wife's trustee in May, 1883. Shortly thereafter, the German Savings Institution, one of Jones' creditors, brought suit on a debt contracted antecedent to said transfer, and recovered judgment thereon January 8, 1884, on which judgment execution was duly issued February 4, 1884, and on that date placed in the hands of the sheriff, returnable to the April term. On this execution a levy was duly made on March 11, 1884, upon the property thus fraudulently conveyed, and the same was duly advertised and sold by the sheriff to the German Savings Institution, and a deed given

and recorded April 19, 1884, and return made in due course to said April term. The German Savings Institution then brought suit with diligence, and had the conveyances of Jones declared fraudulent and void as to creditors. Subsequent to the obtaining of the judgment of January 8, 1884, in favor of said German Savings Institution, and on March 10, 1884, one day prior to the levy of execution thereunder, the plaintiff, Slattery, brought an attachment, and levied the same on the same property, filed notice of his attachment on that day, and followed it by judgment, execution, sale, and deed, recorded in June, 1884, and now claims that the subsequent levy of his attachment gave it a better lien upon the land than the German Savings Institution acquired by its prior judgment, followed in due course by execution and sale and deed. The court below held that a judgment is not a lien upon property fraudulently conveyed prior to its rendition; that such a transfer is not void, but only voidable as against creditors; that the levy of an attachment created a superior lien to the supposed lien of a judgment thus rendered; and decreed the title to be in the plaintiff.

Our statute declares that every conveyance of land made with intent to defraud creditors, etc., "shall be from henceforth deemed and taken, as against said creditors and purchasers, * * * to be clearly and utterly void." Rev. St. § 2497. Further statutory provisions bearing on the point in hand are as follows: "Sec. 2730. Judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered, situate in the county in which the court is held. Sec. 2731. Such liens shall commence on the day of rendition of the judgment, and shall continue for three years." "Sec. 2767. The term 'real estate,' as used in this chapter, shall be construed to include all estate and interest in lands, tenements, and hereditaments liable to be sold upon execution." "Sec. 2361. No execution, prior to the levy thereof, shall be a lien on any * * * real estate to which the lien of the judgment * * * does not extend." "Sec. 2354. The following property shall be liable to be seized and sold upon attachment and execution issued from any court of record: * * * *fifth*, all real estate whereof the defendant, or any person for his use, was seized, in law or equity, at the time of the issue and levy of the attachment, or rendition of the judgment, * * * whereon execution was issued," etc. In his work on Executions, Mr. Freeman observes: "Whoever goes out with an execution to seek the fruits of his judgment is too apt to find that fraud has forestalled him. It then becomes his business to pursue these fruits wherever fraud has taken them; to wrest them from the possession of his adversary, wherever they may be found; and to prepare himself to show that the refuge whence he has wrested them is the refuge of fraud. In many instances the aid of equity is invoked. But, generally, this is unnecessary; for a transfer made to hinder, delay, or defraud creditors, while, as between the parties, it conveys the title, has, as against a creditor proceeding under execution, no such effect. As against the fraudulent transference, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity, not the right to control the legal title, and have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all." *Freem. Ex'ns*, § 136. And though the learned author states that if land be bought with the money of the debtor, and the title taken in the name of another, that in such case the title cannot be reached by execution, but resort must be had to a court of equity, yet he admits that the rule is different in those states where statutes have been enacted which enable creditors to reach the legal title at law. *Id.*; citing, among others, the cases of *Dunnica v. Coy*, 24 Mo. 167; *Rankin v. Harper*, 23 Mo. 579; *Eddy v. Baldwin*, *Id.* 588,—where that doctrine is announced as the law of this state. In *Rankin v. Harper*, *supra*, LEONARD,

J., said: "Our law subjects all that a man has as property to the payment of his debts; and we know of no reason why the trust that results to him who pays the purchase money * * * should not be allowed to result to the debtor for the benefit of his creditors, so as to afford them the speedy and easy remedy of an execution sale." In *Bobb v. Woodward*, 50 Mo. 101, it is declared that it has become settled law in Missouri that upon lands held by a third person in fraud of creditors for the benefit of the debtor, or fraudulently purchased with money of the debtor, and conveyed to his family, there is a resulting trust arising to the debtor for the benefit of the creditors, which may be sold upon execution. It is held to be such an equitable estate as is comprehended in the language of the statute which subjects to sale upon execution "all real estate whereof the defendant, or any person for his use, was seized in law or in equity." To this effect are all the authorities in this state. An author of recognized authority says: "If the creditors obtain judgments against the debtor after the transfer, they acquire liens upon his property, wherever the same are given by law, according to the dates of their respective judgments, in the same manner precisely as if no transfer had been made; for the transfer is a nullity as against them, and the legal as well as the equitable title remains in the debtor for the purpose of satisfying debts." Bump, *Fraud. Conv.* (8d Ed.) 474. This position is abundantly sustained by the authorities. *Jacoby's Appeal*, 67 Pa. St. 434; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Mulford v. Peterson*, 35 N. J. Law, 127, and cases cited; *Eastman v. Schetler*, 13 Wis. 324; *Thomas v. Walker*, 6 Humph. 93; *Thomason v. Neeley*, 50 Miss. 313; *Scouton v. Bender*, 3 How. 185; *McKee v. Gilekrist*, 3 Watts, 230. I find no case in this court where the point has been directly decided in accordance with the cases just cited; but such a decision necessarily results from our statutes and adjudications already quoted. If, as against creditors, the fraudulent conveyance of the debtor is a nullity,—a dead letter, "clearly and utterly void," as the statute puts it,—how is it possible for such a conveyance, even though it be prior in point of time, to balk a creditor's judgment of its customary and binding force and operation? If our statutes are to receive the meaning which their plain language imports, I cannot see how the attitude of this case differs from that of one where the fraudulent conveyance is made subsequently to the recovery of judgment. It is said, however, that, if a conveyance be made by the fraudulent grantee, it would pass a good title to an innocent purchaser as against the alleged judgment lien, and that this circumstance shows that the judgment cannot be a lien against the property. I cannot admit the force of this argument, because similar reasoning would deny the existence of a vendor's or a vendee's lien if the land bound thereby were conveyed to an innocent purchaser. But, suppose the purchaser were not innocent, would the alleged judgment lien bind then? Can it be possible that the lien of a judgment is dependent upon the fact whether the last purchaser be innocent or fraudulent? The considerations which allow the fraudulent grantee of a fraudulent grantor to convey a good title to a *bona fide* purchaser are considerations which exclusively belong to our registry acts, and have no bearing on the question of the existence and validity of the judgment lien. All that the last purchaser, innocent, of course, has to look to, is that the title of his immediate grantor is clear upon the record. He is not bound to search for judgment liens occurring subsequently to the time his grantor acquired title. Moreover, but for statutory provisions requiring that an abstract of the land attached be filed in the recorder's office, it is to the last degree doubtful whether the property of A., fraudulently conveyed to B., and afterwards attached as that of A., would be affected by the attachment lien when subsequently conveyed to innocent purchaser, C. And if the debtor, by reason of the fraudulent conveyance, has no interest to which the lien of a subsequently rendered judgment could attach, it is very difficult to see what interest would be left in him which can be

seized by the subsequent levy of the writ of attachment. It appears to me that the same argument which defeats the one also defeats the other. If there be nothing remaining for the judgment lien to fasten on, how will the attachment lien fare any better? The fact that the judgment lien is a general one, and the attachment lien a specific one, cannot alter the case, or vary the result, since, in either instance there must be something, and that something an interest of the debtor in the real estate, upon which the general binding force of the judgment, or the specific force of the attachment writ, can operate. Now, all the cases in this state show that the debtor, in instances similar to the one at bar, has a leviable interest in the fraudulently conveyed property; and, wherever this is the case, "the right to issue execution, and to satisfy it by the sale of the real estate, ordinarily implies that the judgment is a lien upon such real property;" and, "because the lien of a judgment is inseparably associated with * * * the right to take lands in execution, it follows that there can be no lien except upon such judgments as the plaintiff is entitled to satisfy by levy upon the lands of the debtor." *Freem. Judgm.* §§ 340, 350. Indeed, it is impossible to conceive of a judgment capable of being enforced against real property upon which it is not a lien. *Stadler v. Allen*, 44 Iowa, 196, and cases cited.

In this case it will scarcely be denied that the judgment of the appealing defendant was capable of being enforced by execution against the property of Jones while it remained in the hands of his fraudulent grantee. To deny this would be to deny and to annul the force and effect of our statutes on this subject, and numerous decisions based thereon. The only question here at issue is one of priority between the judgment lien and that of the attachment. But, according to the premises, if the judgment was capable of enforcement, then it must have been a lien. The capability of enforcement being established, presupposes the existence of a lien which is the basis of such capability. Here, then, we have (1) a fraudulent conveyance of real estate, and for that reason void, (2) such real estate liable to be sold, upon execution, as that of the fraudulent grantor and debtor; (3) a judgment rendered against such debtor, which the statute declares shall bind with its lien all real estate, etc., liable to be sold upon execution. When all these things are taken into consideration, it seems to me that there is no room left to doubt that the judgment of the German Savings Institution created upon the premises in controversy a lien, which must be regarded and declared as the elder legal lien; one which cannot be displaced by any junior lien whatsoever. *Freem. Ex'ns*, § 196; *Wakenman v. Grover*, 4 Paige, 23; *Scouton v. Bender*, 3 How. Pr. 185. Nor must it be overlooked that, at the time the attachment of the plaintiff was levied, there was in the hands of the sheriff an execution issued on the judgment of the appealing defendant. This execution, according to the terms of the statute, (section 2361, *supra*,) was a lien also upon the property in controversy; and it is by no means certain that a levy of the execution was necessary in order to a valid sale of that property. *Freem. Ex'ns*, § 280. This court has confessed that the law is silent as to what acts are necessary to constitute a levy on real estate. *Duncan v. Matney*, 29 Mo. 368. When the sale was made under this execution, and a deed made to the purchaser, the deed related to the date of the judgment, (*Bank v. Manard*, 51 Mo. 548,) and cut out all intervening liens and incumbrances, (*Durett v. Hulse*, 67 Mo. 201.)

In relation to the delivery of the execution to the sheriff to hold for further orders, no importance is to be attached to it. The land was sold at the return-term of the writ, and the delay was satisfactorily explained by counsel. But, even had it not been thus explained, there exists no reason why the rights of the defendant should be postponed or subordinated to those of the plaintiff. There was no hinderance of the plaintiff from attaching the property. There is a very wide distinction, in this regard, between liens upon real and those

upon personal property. *Ensforth v. King*, 50 Mo. 479; Bump, Fraud. Conv. 571. Dormancy cannot be affirmed of an execution in regard to a sale of land. Even agreements to postpone the issuance of execution, where land is to be the subject of sale, will have no prejudicial effects on the rights of the creditor, who relies upon his judgment lien, and not upon his execution lien, as is the case where personal property is to be sold. *Freem. Judgm.* § 383.

In conclusion, it has not been thought necessary to review, in detail, the authorities which are opposed to the views here announced, as to a judgment being a lien upon property previously transferred to a fraudulent grantee, for the reason that those views are thought to be best supported by reason and authority, and that they are in consonance with our own statutes and adjudications in relation to matters similar to those involved in this controversy. The result is that the judgment must be reversed, and the cause remanded.

All concur.

CITY OF ST. JOSEPH v. ERNST.

(*Supreme Court of Missouri*. June 4, 1888.)

MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT AND TAXATION—LICENSE OF INSURANCE COMPANY.

Under Rev. St. Mo. 1879, § 4644, delegating to cities power "to license, tax, and regulate * * * insurance companies," an ordinance requiring such companies to procure a license at a cost of \$50 per year to carry on their business is authorized and valid, though a tax on their net income is also imposed.

Appeal from criminal court, Buchanan county; **SILAS WOODSON**, Judge.

The defendant, **Charles F. Ernst**, was tried and fined \$100 for failure to pay the license tax imposed upon insurance companies, and appeals from the judgment against him.

B. R. Vineyard, for appellant. *Ryan & Macdonald*, for respondent.

BLACK, J. The plaintiff is a city of the second class, under the general laws of this state. By an ordinance, duly enacted, it is provided that no person or corporation shall carry on any kind of insurance business in the city, in person or by agent, without a license for such purpose. The amount required to be paid for a license for one year is \$50. The same ordinance makes it unlawful for any person to act as agent for any company not having paid the license. The offender is declared to be guilty of a misdemeanor, and, upon conviction, to be fined not less than \$100. The Fireman's Fund Insurance Company is a corporation duly organized under the laws of the state of California, and for many years has transacted business in the city of St. Joseph. The insurance company neglected and refused to pay the license required by the ordinance, and, notwithstanding this neglect and refusal, the defendant, in November, 1887, solicited business for and acted as the agent of the company. For this violation of the ordinance he was fined in the recorder's court. On appeal to the criminal court, he was again fined in a like amount, and he appealed to this court, and insists that the ordinance is void for want of authority in the city to enact it.

As the case stands here, it must be taken that the city collects the amount charged for the license for revenue purposes. The issuing the license is therefore not the mere exercise of a police regulation, but the exercise of the power of taxation; and this, it is insisted, the city cannot do by way of a license tax. By the fifteenth paragraph of section 4644, Rev. St. 1879, the mayor and common council have power, by ordinance, "to license, tax, and regulate * * * insurance companies and insurance agents," etc. Even the words "to license" may imply the power to tax, when such is the manifest intention; but, taken disconnected and alone, they will not generally confer that authority. *City of St. Louis v. Insurance Co.*, 47 Mo. 150. But here the power to tax, as well as to license, is given in express terms; and there can be no doubt but the city

may collect a tax for revenue, by way of a license, unless there is some other provision of the law which requires us to give a different construction to the words of the charter law before quoted. Sections 6060-6062, Rev. St., concerning the taxation of insurance companies, make it the duty of every foreign insurance company doing business in any city to report annually to the city assessor the amount of premiums collected, deducting return premiums and cash paid for losses in the city. On the amount of such net premiums, taxes are levied for city purposes, as on other property made taxable for municipal purposes. The Fireman's Fund Insurance Company has at all times made an annual report of its net income in the city of St. Joseph, and has paid to the city the tax levied thereon. It is insisted that the power to tax, given the city by the words to "license, tax," etc., should be construed as having reference to the tax which is authorized under said sections 6060-6062; thus leaving the power to license, a police power only. But this cannot be the true construction of the law; for, by another section of the law which constitutes the charter of the city, namely, section 4700, it is made the duty of the city assessor to return to the common council a list of all foreign insurance companies, with the amount of premiums received by each, as returned to him. This list evidently has reference to the returns required to be made by sections 6060-6062. It is perfectly clear that the statute constituting the charter of the city gives to it the power to collect a revenue tax, both by way of a license and on the net income of foreign insurance companies. The law is too plain to be defeated by any process of construction. It could not be contended that because the city has power to tax hotel buildings as property, that, therefore, the power "to license, tax, and regulate hotel and inn keepers," must be construed as a police regulation only; yet such a contention would be just as reasonable as the one made in this case. It is perfectly competent for the state to collect an *ad valorem* tax upon property used in a calling, and at the same time impose a license tax on the pursuit as a condition to the right to carry on the pursuit; and this power may be delegated to municipal corporations. *City of St. Louis v. Green*, 7 Mo. App. 468. We cite this case to the extent it was approved in 70 Mo. 562. *Cooley, Tax'n*, 578. But it is again argued that the tax on the net income is not a property tax. That it is not a property tax within the meaning of the constitutional provision which requires all property to be taxed in proportion to its value must be conceded. *Express Co. v. St. Joseph*, 66 Mo. 678; *Glasgow v. Rowse*, 43 Mo. 479. But this in no manner affects the right of the city to collect the two taxes,—one by license; the other on the net income. Nor can they be said to be duplicate taxation. They are different methods of taxation. The one tax is on the privilege of carrying on the business; the other, on the net income derived from the business. It is just as competent for the legislature to give the city power to exercise these two methods of taxation as it is to give the city authority to collect an *ad valorem* tax and a license tax. Both the license tax and the tax on income are uniform upon the same class of subjects. Foreign and home companies must alike pay the license tax. Home companies must pay a property tax, but, because little of the property of foreign insurance companies is within the jurisdiction of the city, they are required to pay a tax on their net income. There is manifest justice in all this. The ordinance in question is valid, and should be obeyed. The judgment is affirmed.

All concur.

RINEHART v. LONG *et al.*

(Supreme Court of Missouri. June 4, 1888.)

1. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PLEADING—BILL—WHEN NOT MULTIFARIOUS.

Where an insolvent purchased several tracts of land with his own money, but had the deeds made to his wife, and the land was subsequently sold under execution

against the husband, a bill by the purchaser, reciting the facts as to each deed, and asking relief separately, praying that the deeds be set aside as in fraud of creditors, is based upon one general right, and is not multifarious, and the court properly refused to compel plaintiff elect upon which cause of action he will proceed.

2. **SAME—ACTIONS TO SET ASIDE—PLEADING—SUFFICIENCY OF BILL.**

An allegation, in a bill to set aside certain conveyances as fraudulent, that at the dates of the deeds defendant was wholly insolvent, owing some \$14,000, and that his property was wholly inadequate to satisfy his indebtedness, sufficiently shows that defendant had no other property out of which the debts could be made.

3. **SAME—ACTIONS TO SET ASIDE—RIGHTS OF PURCHASER AT EXECUTION SALE.**

A purchaser at an execution sale, in seeking to set aside or defeat a fraudulent conveyance, made by the judgment debtor, occupies the same position and has all the advantages of the judgment creditor.

4. **SAME—ACTION TO SET ASIDE, BY EXECUTION PURCHASER—INADEQUACY OF PRICE AT EXECUTION SALE.**

Inadequacy of consideration is no defense in a suit by the purchaser of land at an execution sale to set aside a prior conveyance as fraudulent, where the land is incumbered, and the judgment debtor disclaimed ownership of the land, and gave notice that whoever bought the land would buy a lawsuit.

5. **SAME—ACTIONS TO SET ASIDE—PROOF OF FRAUD.**

Where lands are paid for by an insolvent debtor, but the deeds are made to his wife, who pays no part of the consideration, the husband owning other real estate, heavily incumbered, which had been sold under legal process, claimed to be invalid by the husband, who had been ousted from such land in an ejectment suit, the conveyances to the wife are fraudulent as to creditors of the husband.

Appeal from circuit court, Randolph county; BURCKHARTT, Judge.

Bill in equity by Stephen C. Rinehart against Sarah F. Long and Joseph Long, her husband, to set aside deeds alleged to have been made to Sarah F. Long for lands paid for with the money of her husband, in fraud of creditors. Plaintiff was purchaser at sheriff's sale on an execution against Joseph Long. Judgment for plaintiff, and defendants appeal.

O. D. Jones, for appellants. *W. C. Hollister* and *E. E. Chesney*, for appellee.

BLACK, J. The defendant Joseph Long purchased three tracts of land,—one from Greenwood in August, 1881, one from Mackey on August 12, 1882, and the other from Brown on the 31st of August, 1882. Deeds of the lands were made to Sarah F. Long, wife of Joseph Long, conveying to her in all 280 acres in Adair county. In December, 1883, the plaintiff recovered two judgments against Joseph Long, one in his own right, for \$956.73, based on a note made in 1877, the other as administrator of Abraham Rinehart for \$1,325.79, based upon a note made in the same year. Both notes were given by Long for borrowed money. Plaintiff purchased the lands described in the several deeds at a sale made under executions issued upon his judgments. He then commenced this suit to set aside the deeds to Mrs. Long, and vest the title in him on the ground that they were made in fraud of the creditors of Joseph Long.

1. The petition, in form, sets out three causes of action, with a prayer for relief to each. The only difference in these counts or causes of action is that one sets out the Greenwood deed, another the Mackey deed, and the third the Brown deed. A petition in equity will not be multifarious where the plaintiff bases his claim for relief on one general right. Hence, where a debtor conveys land in fraud of creditors, and the title has passed by different deeds to different persons, they may all be joined in one suit; for they all have a common interest in respect of the fraud. *Bliss*, Code Pl. (2d Ed.) § 110a; *Tucker v. Tucker*, 29 Mo. 350; *Donovan v. Dunning*, 69 Mo. 436; *Bobb v. Bobb*, 76 Mo. 419. All that is stated in the present petition should have been set out in one cause of action. But it seems the court treated the whole petition as one cause of action, tried the case, and rendered a decree on that theory. We therefore conclude there is no reversible error in overruling the defendant's motion to elect, and their objection to the introduction of any ev-

idence. Conceding that the defendants could raise the objection to the petition in either of these ways, which we do not assert, still the court tried the case as it should have been tried, and we do not see how the defendants could be prejudiced by the unskillful petition.

2. Another objection to the petition is that it does not state facts sufficient to constitute a cause of action, in this: that it does not show that defendant had no other property out of which the debts could be made. The petition states that, at the date of the respective deeds to Mrs. Long, the defendant Joseph Long was wholly insolvent, that he owed about \$14,000, and that his property was wholly inadequate to satisfy his indebtedness. This allegation is sufficient; and especially so in view of the proof, which shows that Mr. Long was then and at all times since has been insolvent.

3. So far as the merits of this case are concerned, but little need be said. The proof shows, beyond all doubt, that the land in suit was purchased by James Long, and that he paid thereon some \$4,400 from money which he received from his father's estate. He had the land conveyed to his wife, who paid no part of the purchase money. He was then insolvent, and is still insolvent. Some \$2,000 of the purchase money was unpaid at the date of the sheriff's sale, and subject to which the plaintiff purchased the property. It is not necessary to cite authorities to show that these deeds to Mrs. Long cannot stand as against then existing creditors. The evidence does show that James Long owned a valuable farm in Knox county; but he incumbered that with two deeds of trust, one in 1875, for \$4,000, and the other in 1877, for \$2,000, and the land has been sold thereunder, and at the date of this trial was in the possession of the purchaser by virtue of a judgment in an ejectment suit. The defendant claims that the sale is invalid, but the land is of no avail for the satisfaction of the debts of the general creditors.

4. The defendants complain because the plaintiff purchased the land in question at the sheriff's sale for the small consideration of \$3,500. This was evidently due to the effort on the part of themselves to place it beyond the reach of creditors. Besides this, and the fact that the property was incumbered for the purchase price to the extent of \$2,000 or \$2,300, the defendant Joseph Long offered proof in this case that he caused his attorney to make public proclamation at the sale, warning persons not to bid, that the land belonged to Mrs. Long and not to him, that he had no interest in it, and that whoever purchased would buy a lawsuit. Inadequacy of consideration is no defense to this action, under such circumstances.

5. Finally, it is contended by the appellants that the plaintiff is a subsequent purchaser, and that he has not made out a case within the rule of *Bonney v. Taylor*, 90 Mo. 64, 1 S. W. Rep. 740. That case is not at all in point here; for it is the well-established law that a purchaser at an execution sale occupies the same position, and has all the advantages of the judgment creditor, when he seeks to set aside or defeat a fraudulent conveyance made by the judgment debtor. *Ryland v. Callison*, 54 Mo. 513; *Lionberger v. Baker*, 88 Mo. 447. Here the plaintiff was, in fact, a creditor in his own right as to one of the debts. The judgment is affirmed.

All concur.

WRIGHT v. HOWE *et al.*

(Supreme Court of Missouri. June 4, 1888.)

PUBLIC LANDS—RAILROAD GRANTS—GRANT IN PRESENTI.

The act of congress of June 10, 1852, granting certain public lands in Missouri to the state, for the purpose of aiding in the construction of the Hannibal & St. Joseph Railroad, passed the title to the state *in present*, though such title was not perfected until the definite location of the road; and the subsequent entry of a portion of such lands in the public land-office, and the grant of a patent thereto, were invalid. Following *Wright v. Gish*, 6 S. W. Rep. 704.

Appeal from circuit court, Livingston county; W. C. SAMUEL, Special Judge.

L. A. Chapman, for appellant. *Thos. E. Turney, Strong & Mosman*, and *C. Mansur*, for appellees.

NORTON, C. J. This is an action of ejectment to recover the possession of certain land in Livingston county, in which judgment was rendered for the defendants, and from which plaintiff has appealed. Plaintiff, in support of his title, put in evidence a patent issued to him by the United States for the land in controversy. This title was resisted by defendants on the ground that, under an act of congress of June 10, 1852, granting certain lands to the state to aid in the construction of certain railroads, the title to the land in question was vested in the state; and that by virtue of an act of the general assembly approved September 20, 1852, the title of the state was vested in the Hannibal & St. Joseph Railroad Company, under whom defendant Howe acquired the title. The facts in this case are identical with those in the case of *Wright v. Gish*, 6 S. W. Rep. 704, in which it is distinctly held that the defense above set up was sufficient to defeat plaintiff's right to recover, and, following that case, the judgment in this case is affirmed, as it was in that.

All concur.

HARTY v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri. June 4, 1888.*)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—PLEADING AND PROOF.

In an action against a railroad company by an employe for personal injuries alleged to have been sustained while running a hand car under the orders of defendant's foreman, where the only allegation of the petition as to the defective condition of defendant's hand car which was the cause of the injury is that a water-keg thereon was not in its proper position, evidence to show that the defective condition of the car was due to the disposition of the tools on the hand car is inadmissible.

2. SAME—DEFECTIVE APPLIANCES—INSTRUCTIONS.

In such case, where plaintiff testified that his injury was caused by the improper location of a water-keg on defendant's hand car, an instruction authorizing the jury to find a verdict, if they believed there was not a sufficient number of men furnished by defendant's foreman to help plaintiff to remove the hand car from the track, is erroneous.

3. SAME—NEGLIGENCE—LIABILITY OF MASTER.

In an action against a railroad company by a employe for injuries received while removing a hand car on the order of defendant's foreman, an instruction predicated on the foreman's power to hire or discharge men is erroneous, where there is no evidence as to such power.

Appeal from circuit court, St. Louis county; W. W. EDWARDS, Judge.

Bennett Pike and *Henry G. Herbell*, for appellant. *John W. Collins* and *A. R. Taylor*, for respondent.

NORTON, C. J. This is an action to recover damages for personal injuries alleged to have been occasioned by the negligence of defendant. Plaintiff had judgment, from which the defendant has appealed, and assigns for error the action of the court in admitting improper evidence, and in giving and refusing instructions. It is alleged in the petition that plaintiff was in the employment of defendant as a trackman, and under the direction of one Frank Roach, defendant's section foreman; that he was ordered by said Roach to get on a hand car, and run it to a certain switch, and remove it from the railroad, in order to get it out of the way of an approaching train; that, to properly control said hand car, it required two able-bodied men to be on it; that the other man on the car with him was physically incompetent to aid plaintiff in controlling the car; that in the performance of the duty assigned him one of his legs was caught between the cog-wheels and boxing of said car while perform-

ing said work, and was greatly lacerated, stiffened, and made shorter than the other. It is then alleged that plaintiff was so caused to be injured by the negligent act of defendant's agent in failing to have a man competent and suitable to aid plaintiff in controlling said car while performing said work; that the machinery of said car was in a defective condition; that at the time there was placed upon said car a keg of water in such position that the brake of said hand car could not be worked to control its movements, and such defective condition of the machinery of said hand car directly contributed to cause plaintiff's injuries. On the trial plaintiff testified on his own behalf, and gave this account as to the accident: "I was standing on the side of the car where the brake was, and Seth [the man with him on the car] told me to set the brake and stop the car. I could not reach the brake, because there was a water-keg and some tools in the way. * * * I tried to kick the keg of water off with my foot, but could not. * * * I hove on the lever, and it raised me up, and my foot swung under the lever of the car box, and went backward, dislocating and breaking it. * * * The keg was between the brake and the lever, so that I could not get round to it at all. It was an ordinary hand car, such as is used on all railroads." He further testified that the keg was on his side, and pretty near under the lever that he was working; that the keg of water generally sat on the other side from the brake. There was evidence also tending to show that the hand car was used in carrying men back and forth on the road, and that they usually carried on it a keg of water, and, if it was not in proper position on the car, it was moved, sometimes by the foreman, and sometimes by the men. During the trial a witness was asked the following question: "State whether or not the hand car was in proper condition to be operated at the time plaintiff was ordered to operate it." This question was objected to on the ground that the only defective condition of the car charged in the petition was that the water-keg was not in proper position. The objection was overruled, and the witness answered it was not in proper order for two persons to operate it, especially on account of the tools. There is no averment in the petition that the car was in a defective condition on account of tools, the only defective condition of the car alleged being that the water-keg was not in proper position. The evidence was therefore improperly received.

It is insisted that the court erred in giving the following instruction: "The court instructs the jury that if they believe from the evidence that the plaintiff was in the service of the defendant as a section hand on the 16th day of July, 1879; that on said day he was ordered by Frank Roach, in connection with one Silk, to remove a hand car from defendant's track; and if the jury believe from the evidence that said Frank Roach was empowered by the defendant to hire and discharge the men under his control, and the plaintiff; and if the jury believe from the evidence that while the plaintiff was seeking to remove said hand car from defendant's track, in pursuance of said order of Frank Roach, his foot was caught in the wheel of said hand car and injured; and if the jury further believe from the evidence that plaintiff's foot was so caught and injured because there were not a sufficient number of persons who were capable to do the work of removing said hand car from said track furnished by said Roach to do said work, or because the hand car at said time was not in a suitable condition to be operated by plaintiff and said Silk, and that said Frank Roach knew said hand car was in said condition at said time; and if the jury believe that the plaintiff was exercising ordinary care at the time of his injury,—then plaintiff is entitled to recover." There is no evidence in the record that Roach was empowered by defendant to hire and discharge the men under his control or the plaintiff, and for that reason error was committed in submitting that question to the jury.

The instruction is also erroneous in authorizing the jury to find a verdict, if they believed that there were not a sufficient number of persons who were

capable to do the work of removing said hand car from the track furnished by said Roach to do said work, as plaintiff in his evidence said his injury was caused by the improper location of the water-keg on the car. For the errors noted the judgment will be reversed, and cause remanded.

All concur.

SEXTON v. ANDERSON *et al.*

(*Supreme Court of Missouri. June 4, 1888.*)

1. FRAUDULENT CONVEYANCES—SATISFACTION OF BONA FIDE DEBT—NOTICE OF FRAUDULENT INTENT.

Knowledge by a preferred creditor that a transfer of property to him by an insolvent firm was made with the intent on their part to delay, hinder, or defraud other creditors does not amount to a participation in the intended fraud, when the transfer was accepted in good faith by the creditor solely for the purpose of saving a *bona fide* debt.

2. SAME—EVIDENCE—AGREEMENT BY GRANTEE TO PAY GRANTOR'S DEBTS.

Where a bill of sale of goods and fixtures made by an insolvent firm to a creditor, absolute in form, is accompanied by an agreement, signed by such creditor at the same time as the bill of sale, by which the creditor engages to pay certain specified indebtedness of the firm, they are different parts of one and the same transaction, and must be construed together, and parol evidence is admissible to show that the consideration for the goods was the discharge of existing debts of the firm by such creditor.

3. PARTNERSHIP—PAYMENT OF FIRM DEBT TO INDIVIDUAL PARTNER—CONSENT OF PARTNERS.

By the joint act of all the partners, partnership property may be applied to the payment of a debt of an individual member of the firm, if it be done in good faith, and not for fraudulent purposes.¹

Appeal from circuit court, Boone county; G. H. BURCKHARTT, Judge.

Bill of interpleader, by Elisha Sexton against James M. Anderson and James W. Anderson and Middleton S. Bush, to recover funds realized by a sheriff's sale of goods, chattels, and fixtures attached by defendants Anderson in a suit against William J. and Thomas D. Sexton and J. W. Kanatzar, co-partners as Sexton Bros. & Co. Bush was made a party defendant because he was a party to a bill of sale, under which plaintiff claimed, and refused to join in the bill. Judgment for plaintiff. Defendants appealed.

E. Smith, with Turner & Sebastian, and Boyle, Adams & McKeighan, for appellants. Shannon C. Douglass, for respondent.

BLACK, J. James M. and James W. Anderson brought suit by attachment against William J. and Thomas D. Sexton and James W. Kanatzar, partners doing business under the name of Sexton Bros. & Co. The writ was levied upon a stock of merchandise on the 22d December, 1883. Other creditors attached about the same time, and the property was sold by order of the court. Elisha Sexton interpleaded, claiming the property, and the proceeds arising from the sale thereof, amounting to \$4,532, by virtue of a sale to him and M. S. Bush. Issues were made on this interplea, in which the attaching creditors take the ground that the sale to Elisha Sexton and Bush was fraudulent as to them. The court, sitting as a jury, found the issues for the interpleader. The evidence discloses these facts: On the 18th December, 1883, Sexton, Bush & Co. made an instrument in writing, in the form of a warranty deed, whereby they sold their entire stock of merchandise and store fixtures to Elisha Sexton and M. S. Bush for the recited consideration of \$6,855. At the same time, and as a part of the same transaction, Elisha Sexton signed another writing which recites the sale, and in consideration thereof he and Bush agree to pay certain debts of Sexton Bros. & Co.; one being a debt of \$2,000 to Elisha Sexton, another a debt of \$1,380 to Bush, with other described debts. By the terms of this contract, they covenant to pay these debts, and to release Sex-

¹ See note at end of case.

ton Bros. & Co. from the payment of any of them. It winds up with the following stipulations: "It is further understood and agreed by the parties aforesaid that if the parties of the second part fail to make the amount necessary out of the goods and chattels and fixtures herein bargained and sold to the said parties of the second part, to pay the foregoing indebtedness mentioned, that the said parties of the second part are not to be held liable further than the proceeds of the sale of the said goods and chattels and fixtures, and that the said parties of the second part shall be paid a just and reasonable compensation for services and expenses for selling said goods and chattels and fixtures." The bill of sale was acknowledged, and was recorded on the 22d December, 1883, just anterior to the levy of the attachment by Anderson & Co. The other document was withheld by the parties thereto, and not made known until it appeared in evidence on the trial of this cause. An issue was made on the trial as to whether Elisha Sexton and Bush had possession of the goods at the date of the attachment, but that issue was found for the interpleader on favorable instructions for the attaching creditors. It is shown that Elisha Sexton and Bush took possession of the property on the 18th December, and sold from the stock until the 22d. Bush then brought an attachment suit, and hence does not join in the interplea. The evidence for the interpleader is that the debts mentioned in the agreement were *bona fide*,—his own being for money loaned the firm; that Sexton Bros. & Co. became embarrassed, were pressed by other creditors, applied to him for another loan, but he refused, and demanded security for what he had loaned thereon; and that he took the bill of sale and property, under these circumstances, to secure his and the other specified debts. Other evidence tends to show that Sexton Bros. & Co. made gross misrepresentations to their unsecured creditors as to their financial condition, and that they intended by the transaction in question to secure their relatives, and cared little or nothing for other creditors.

1. Generally, a sale of property, with the intent on the part of the seller to thereby hinder, delay, or defraud his creditors, and knowledge of such intent on the part of the purchaser, renders the sale void, though the purchaser pay a valuable consideration for the property, because the purchase of the property under such circumstances amounts to a participation in the intended fraud. *Dougherty v. Cooper*, 77 Mo. 529; *Frederick v. Allgaier*, 88 Mo. 601. But a debtor, though unable to pay all of his creditors, may pay one or more, to the exclusion of others, either in money or the transfer of property, and the favored creditor or creditors may accept such preference. If the preferred creditor, in such cases, acts in good faith, and takes the money or property for the sole purpose of saving a *bona fide* debt, mere knowledge that the debtor intended to hinder, delay, or defraud his creditors does not render the transaction void as against the creditor taking the preference; for simple knowledge under such circumstances, it is held, does not amount to a participation in the intended fraud. *Shelley v. Boothe*, 73 Mo. 74; *Albert v. Bessel*, 88 Mo. 150; *Frederick v. Allgaier*, *supra*. In the present case the court was asked, but refused, to declare the law to be that knowledge, notice, or information on the part of Elisha Sexton that Sexton Bros. & Co. intended, by the deed in evidence, to hinder, delay, or defraud their creditors, rendered the sale of the stock of goods fraudulent as to the attaching creditors. The position of the attaching creditors is that this transaction must be treated as a purchase for a fresh consideration, not the taking of property in payment of an existing debt. Although the deed does not on its face show that the consideration for the goods was the discharge of existing debts, still the fact could be shown by parol evidence, as evidence aside of the deed or bill of sale. But, in determining the character of this transaction, we are not at liberty to stop with the one instrument. They were both not only executed at the same time, but were different parts of one and the same transaction, and must be

construed together. *Bump, Fraud, Conv.* (8d Ed.) 868. This being done, there can be no doubt but the sale of the goods was for the purpose of paying the designated creditors; and, under the cases cited, it is not enough, to render the transaction void, to show that Elisha Sexton had notice or knowledge of a fraudulent design on the part of Sexton Bros. & Co. It must be shown that he participated in the intended fraud. The instruction was therefore properly refused.

2. One of the debts mentioned in the contract to be paid from the transferred property is a debt of \$1,000 due by Kanatzar individually to the estate of Emmett Sexton. This note was given for an interest in the partnership property. In respect of this, the court was asked to instruct that, if it was the intention of Sexton Bros. & Co. and the interpleader to pay or secure an individual debt of either member of the firm, as that was the effect and operation of the deed read in evidence, then such preferment was a fraud on the firm creditors, and as to them made the deed void. This instruction does not state a correct proposition of law, and was properly refused. It is to be observed it does not even require the court to find that the firm was insolvent. One partner has no right to appropriate firm property to the payment of his individual debts without the consent of his co-partners. To do so is a fraud on his copartners, and, through their right, the firm's creditors may pursue the property. But partners may consent to the application of firm property to the payment of the debts of one of the partners. Thus it is said in note 3 to section 109, 1 Colly. Partn. (6th Ed.): "If one partner, with the assent of the others, sells firm property to his creditor to satisfy his private debt, and the transaction is *bona fide*, the title passes, and a partnership creditor cannot compel an application thereof on his debt, as there is nothing through which the equities of the firm creditors can work." With us each partner is liable for all the partnership debts. The partners may, so long as the firm exists, do with their property as they see fit. The firm creditors have no lien on the partnership property for the payment of their debts while the firm continues to exist. Partners have a right to have the partnership property applied to partnership purposes; but this is a right or lien which they may waive. Hence the great majority of adjudicated cases are to this effect: that all the partners may, by their joint act, dispose of partnership property in liquidation and payment of a debt owing by an individual member of the firm. The qualification is that the transaction must be in good faith, and not for fraudulent purposes. *Rogers v. Batchelor*, 12 Pet. 221-232; *City of Maquoketa v. Willey*, 85 Iowa, 323; *Case v. Beaugerard*, 99 U. S. 124; *Schmidlapp v. Currie*, 55 Miss. 597, 30 Amer. Rep. 530. The cases of *Flanagan v. Alexander*, 50 Mo. 50; *Ackley v. Staehlin*, 56 Mo. 561; *Price v. Hunt*, 59 Mo. 258, and *Fornj v. Adams*, 74 Mo. 138, are all in accord with what has been said. These cases recognize the right of one partner to apply partnership property, with the consent of the other partners, to the payment of his debt. Nor is the authority of these cases shaken by the subsequent case of *Phelps v. McNeely*, 66 Mo. 555; for they are in terms approved. It is the clear deduction, from what has been said, that the agreement to pay from the partnership funds a debt of one of the members does not, as a matter of law, render the whole transaction fraudulent. The including of this debt among those to be paid, was a matter for the trier of facts to consider in determining whether or not the transaction was fraudulent in fact.

3. It is suggested, probably for the first time in this court, that the two documents, when taken and read together, as they must be, resolve the whole transaction into a voluntary assignment. There is a vast deal to be said in favor of this proposition. But it does not follow, from being an assignment, that the transaction is fraudulent or void. Our present law in respect of voluntary assignment, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors in proportion to their respective

claims. The fact that the deed of assignment does not name all the creditors does not render it void. Though part only of the creditors are named, the assignment will inure for the benefit of all. *Crow v. Beardsley*, 68 Mo. 487. Conceding, too, that the debt of Kanatzar was improperly included with the firm debts, that could not invalidate the assignment. *Pinneo v. Hart*, 80 Mo. 561. If an assignment, the creditors should proceed to compel the trustees to give bond, and administer the property under the assignment law. It is suggested that they did not have any information of the agreement converting the bill of sale into an assignment, until the trial of this cause. That may be a very good reason why they should not be precluded from proving up their demands. Their attachments ought not to prejudice their claims under these circumstances. But the attitude of the attaching creditors in this case is that, whatever the transaction may be, it was fraudulent, and they are entitled to all of the property. On the case made, the court committed no error in refusing the instructions. The judgment is therefore affirmed.

All concur.

NOTE.

PARTNERSHIP—FIRM PROPERTY—INDIVIDUAL DEBTS. A partner has no right to transfer the partnership property in payment of an individual debt of his copartner without the latter's knowledge and actual consent. *Brewster v. Reel*, (Iowa,) 88 N. W. Rep. 881. But so long as a firm is solvent, all its members assenting, the individual debts of the parties may be paid out of the firm assets, *Roop v. Herron*, (Neb.) 17 N. W. Rep. 353; and, there being no fraud in fact, a partnership creditor cannot impeach, as fraudulent in law, a conveyance of partnership property in trust to secure an individual debt of the partners, *Gin Co. v. Bannon*, (Tenn.) 4 S. W. Rep. 881; but if the firm is insolvent at the time the transfer of the firm property to make such payment is made, it is fraudulent and void as to existing creditors of the firm, *Goodbar v. Cary*, 16 Fed. Rep. 317; and one partner may not pay his private debts out of the assets of the firm, for this would be a fraud upon his partners, *Gallagher's Appeal*, (Pa.) 7 Atl. Rep. 237; *Caldwell v. Furniture Co.*, (Neb.) 23 N. W. Rep. 386; *Willis v. Bremner*, (Wis.) 19 N. W. Rep. 408; *Vernon v. Upson*, Id. 400; *Powers v. Paper Co.*, (Wis.) 18 N. W. Rep. 20. See, also, *Johnston's Appeal*, (Pa.) 9 Atl. Rep. 76, and note; *Crook v. Rindskopf*, (N. Y.) 12 N. E. Rep. 174; *Saunders v. Rellly*, Id. 170; *Tait v. Murphy*, (Ala.) 2 South. Rep. 317.

An insolvent firm sold the firm effects to a creditor in consideration of a certain sum in cash, and a further sum which was recited to be the indebtedness of the firm to the creditor, but which in fact embraced indebtedness of the individual members of the firm. Held that, in thus securing a pecuniary benefit beyond that which the law would secure, the transaction was fraudulent as to other creditors, and void, not only as to the benefit thus reserved, but *in toto*. *Pritchett v. Pellock*, (Ala.) 2 South. Rep. 735.

SMITH v. PATTERSON *et al.*

(Supreme Court of Missouri. June 4, 1883.)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—BEGINS, WHEN—DEATH OF TENANT BY THE CURTESY.

The evidence in ejectment showed that plaintiff's mother died seized of the land in question, in 1836; that in the same year plaintiff's father conveyed his estate by the curtesy therein to defendant, and afterwards died in 1878; and that plaintiff began this suit in the year 1882. Held, that the statute of limitations had not run against plaintiff, since her right of action did not accrue until the death of her father.

2. CURTESY—SALE BY TENANT BY—RIGHTS OF REVERSIONER.

Where lands belong jointly to seven heirs, and one person buys four and another two of the shares, and the estate of a tenant by curtesy in another share, and these purchasers divide the land between themselves, regardless of the rights of the reversioner of the one-seventh in which the estate by curtesy had been purchased, such reversioner may affirm the partition, and recover one-third of the three-sevenths of the land set off to the purchaser of the estate by curtesy and the two other sevenths.

3. EVIDENCE—MONUMENTS—INSCRIPTIONS ON TOMBSTONES.

Evidence of the inscriptions on the tombstone at one's grave may be introduced to prove the date at which she died.

Appeal from circuit court, St. Louis county; W. W. EDWARDS, Judge.

Action of ejectment by Lorinda I. Smith against James J. Patterson and others. Judgment for plaintiff, and defendants appeal.

M. F. Taylor, for appellants. *J. L. & F. P. Blair* and *Douglass & Babb*, for respondent.

NORTON, C. J. This suit is by ejectment to recover possession of certain land in St. Louis county. The defendants' answer, besides being a general denial, sets up the statute of limitations, and alleges that Durrett Patterson, one of the defendants, purchased the property from the mother of plaintiff, and, after having bargained for her interest, paid her part of the purchase money, and, under her direction, paid the remainder of the purchase price to her husband, with the understanding that the wife would execute, in proper form, a deed to the property immediately upon finding herself able to go to the nearest notary; but that she died without executing the deed. The answer further alleges that, in 1869, plaintiff, being of full age, and laboring under no disability, lived in the immediate neighborhood of the property, saw defendant making valuable improvements thereon, knew that he claimed entire title to the property, and permitted him to make the improvements without asserting any claim of title. The answer was denied by replication, and on the trial plaintiff obtained judgment, from which the defendants have appealed. The evidence establishes the following facts: That one Bannabas Harris owned a tract of land in St. Louis county, containing about 420 or 430 acres; that he died leaving seven children as his heirs; that one Simpson Harris acquired the interest of four of said heirs in said land; that Emily Crobarger was one of said heirs; that she was a married woman, and her husband's name was John Crobarger; that plaintiff is the daughter and only heir of said Emily; that said Emily died in 1836; that her husband, said John, survived her, and lived till 1878, when he died; and plaintiff thereafter, in 1882, brought this suit, as the only heir of said Emily, to recover her interest in the said land. To defeat plaintiff's title, thus derived, a deed was put in evidence from said John Crobarger, the husband of said Emily, conveying to defendant Durrett Patterson an interest of one-seventh in said land. This deed was dated the 20th of May, 1836, and was filed for record July 11th, and recorded the 3d of August, 1836. It is not executed by Mrs. Crobarger, nor does it purport on its face to be a deed from John Crobarger and Emily, his wife; but the only grantor named in it is the said John. It further appears that in 1837 said Simpson Harris, being the owner of four-sevenths, and defendant Durrett Patterson claiming to be the owner of three-sevenths, of said land, one of these three-sevenths being claimed under the said deed of said John Crobarger, made an equitable partition of said land according to the interests claimed as above set forth, under which said Patterson quitclaimed to said Harris his interest in 246 acres of said land, and said Harris quitclaimed to said Patterson his interest in 186.92 acres thereof,—the land set apart to each being specifically described in the deeds. Defendant Patterson went into possession of the land thus set apart to him, and has remained in possession ever since.

It is clear that the deed from John Crobarger to Patterson, under which he claims title, only conveyed the life-time interest of said Crobarger as tenant by curtesy, and that upon the death of Mrs. Crobarger the fee to one-seventh of the land became vested in the plaintiff as her only heir; and it is also clear that her right of action to recover possession of such interest did not accrue till the death of said Crobarger, which occurred in 1878; and that, inasmuch as plaintiff brought this suit in 1882, within 10 years after her right of action accrued, the defense set up of the statute of limitations cannot prevail.

The chief error complained of arises out of the action of the court in instructing the jury that, if they found for plaintiff, she was entitled to recover one-third of the land in Patterson's possession, and in refusing an instruction asked by defendant to the effect that plaintiff's recovery should be limited to

one-seventh. The cause was evidently tried on the theory that while plaintiff was not bound by the partition made between Harris and Patterson, that she might affirm it, and did affirm it, by asking a recovery for one-third; and, in this view of the question, the action of the court, in directing that plaintiff was entitled to one-third of the land, was not erroneous, inasmuch as it would leave Patterson in possession of all that he was entitled to, and would only take from him the Crobarger interest of one-seventh, which he claimed and got in the partition, and to which he was not entitled either in law or equity. There were 481 acres of land included in the partition made. Each of the seven interests amounted to 61 4-7 acres. Harris owned four of these interests, and got, under the division, 246 acres. Patterson owned two interests, and claimed to own three, one of them being the Crobarger interest, involved in this suit; and got, under said division, 184.71 acres,—that is 61 4-7 acres more than he was entitled to by virtue of his claim of the Crobarger interest; and it is this number of acres that the jury was authorized, under the instructions of the court, to find for plaintiff, leaving defendant in possession of the land represented by the two interests which he owned. If plaintiff's recovery had been limited to one-seventh, as defendant contends it should have been, she would have recovered 26 8-7 acres, and left defendant in possession of 158 2-7 acres; that is, with 38 2-7 acres more than his two interests amounted to, said two interests entitling him only to 123 acres. The theory of defendant, that plaintiff could only recover one-seventh of the land in Patterson's possession, and, to recover the remainder of her interest, she would have to resort to her action against Harris, would result in injustice in this: that it would leave Patterson in possession of 88 2-5 acres more of the land than belonged to him, and would take that number of acres from Harris which did belong to him, (Harris.) It is also insisted by defendant that plaintiff, notwithstanding her recovery from Patterson in this suit of a number of acres equal to one-seventh in the whole tract partitioned, might proceed against Harris, and recover one-seventh of what he received under the partition. If this is so, the judgment ought to be reversed; but we are of the opinion that plaintiff, after affirming this partition, and recover, by reason thereof, from Patterson a number of acres equal to one-seventh interest in the whole tract, then she would be estopped from setting up any interest in that portion of the land allotted to Harris under said partition thus affirmed by her. The claim made, that plaintiff should not be allowed to recover until the purchase money which the answer alleges was paid by the direction of and under an agreement made for the purchase of the land with Mrs. Crobarger, the mother of plaintiff, is not well founded, for the reason that there is no evidence that such payment was made. Defendant testified that he did not know whether it had been paid; that he asked one Hyatt to pay it, and Hyatt told him he had paid it. There is no evidence in the case on which to base an estoppel, as pleaded in the answer.

On the trial, evidence was offered and received, over defendant's objection, of the inscription on the tombstone over the grave of Mrs. Crobarger, showing the date of her death. Much latitude is allowed in the introduction of evidence as to the birth, age, and death of a person, and we do not think it was exceeded in the reception of the evidence objected to. 1 Phil. Ev. 238, 239. The judgment is for the right party, and is hereby affirmed.

All concur.

CLARK v. ROOTS *et al.*

(Supreme Court of Arkansas. May 26, 1888.)

APPEAL—PRACTICE—REHEARING—WHEN DENIED.

Where a judgment of the supreme court is based solely on a mutual mistake of fact, and there is no imputation of fraud, or evidence tending to prove the same, a motion for a rehearing will be denied.

Appeal from Pulaski chancery court; D. W. CARROLL, Chancellor.
On motion for rehearing. For former opinion, see 6 S. W. Rep. 728.
Sol. F. Clark, pro se. John McLure, for appellees.

COCKRILL, C. J. Opinion on motion to reconsider the judgment, and to modify the opinion. We are satisfied that the judgment in this cause is right. It is based solely on a mutual mistake of fact, unmixed with the imputation of fraud. Fraud in the transaction which begot the mistake was not charged in the pleadings; there was no evidence tending to prove it; no suggestion of it is made in the opinion, and none was intended. We do not think a modification of the opinion is necessary to make this evident. The motions are denied.

HUTCHCRAFT'S EX'R V. TRAVELERS' INS. CO. OF HARTFORD.

(Court of Appeals of Kentucky. May 28, 1888.)

INSURANCE—LIFE POLICY—EXCLUDED RISKS—KILLING ASSURED BY ROBBER.

A policy against death by "external, violent, and accidental means," contained a proviso that no claim should be made under the ticket when the death may have been caused by intentional injuries inflicted by assured or any other person. *Held* that, assured having been waylaid and killed for purposes of robbery, there can be no recovery under such policy.

Appeal from court of common pleas, Bourbon county.

Action by David Hutchcraft's executor against the Travelers' Insurance Company of Hartford, Conn., on accidental insurance policy. Judgment for defendant, and plaintiff appeals.

Wm. Lindsay and Russell Mann, for appellant. James S. Pirle, for appellee.

BENNETT, J. During the time that appellant's testator held two tickets of insurance in the appellee's company, insuring his life in the sum of \$3,000 each against death "through external, violent, and accidental means," he was waylaid and assassinated for the purpose of robbery. The appellee interposed two defenses to the appellant's action to recover these sums: *First*, that, the appellant's testator having been killed by intentional "means," his death was not accidental, within the meaning of the terms of the policy which insured him against death "through external, violent, and accidental means;" *second*, that the proviso in the policy expressly exempted the appellee from liability in case the appellant's testator come to his death through injuries intentionally inflicted by another person. These defenses will be disposed of in their order.

1. In each ticket the appellee covenanted to pay \$3,000 to Hutchcraft's representative, if he should be killed "through external, violent, and accidental means." Accidents are of two kinds: *First*, those that befall a person without any human agency; as the killing of a person by lightning. Here the elemental properties of lightning and its flash are not caused or controlled by human agency; but the fact that the person was struck, by unintentionally placing himself within its range, is, as to him, an accident. *Second*, those that are the result of human agency. The latter are divided as follows: *First*. That which happens to a person by his own agency; as if he is walking or running, and accidentally falls and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall. He did not foresee that he would fall in time to avoid it. The fall was therefore accidental. *Second*. That which befalls a person by the agency of another person, without the concurrence of the latter's will; as where one, standing on a scaffold, unintentionally lets a brick fall from his hand, and it strikes a person below. Here the dropping of the brick, as it was not intended by the former, and was unforeseen by the latter, is, in the broadest sense, an accident. *Third*. That which a person intentionally does, whereby another is unintentionally

tionally injured; as where one intentionally fires a gun in the air, and accidentally shoots another person. Here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun, the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional; but, as to the person shot, it was by purely accidental means. *Fourth.* So, also, as we think, if one person intentionally injures another, which was not the result of a rencounter or the misconduct of the latter, but was unforeseen by him, such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is as to him accidental, although inflicted intentionally by the other party. It is conceded that, in the three instances first named, the injury would be by accidental means. Nor, doubtless, will it be denied that if a person were to maliciously fire his gun into a crowd of persons for the purpose of general mischief, or were to maliciously wreck a train of cars for the purpose of injuring whoever might be on board, whereby one or more persons were shot or mashed, the casualty befalling these persons, as far as they were concerned, would fall within the term of accidental means. In other words, we do not regard it as essential, in order to make out a case of injury by accidental means, so far as the injured party is concerned, that the party injuring him should not have meant to do so; for, if the injured party had no agency in bringing the injury on himself, and to him it was unforeseen,—a casualty,—it seems clear that the fact that the deed was willfully directed against him would not militate against the proposition that as to him the injury was brought on by “accidental means.”

2. That part of the proviso that is germane to the second ground of defense is as follows: “And no claim shall be made under this ticket when the death or injury may have been caused by dueling, fighting, wrestling, lifting, or overexertion, or by suicide, (felonious or otherwise, sane or insane,) or by intentional injuries inflicted by the insured or any other person.” The fact that the insured engaged in a duel or fight, though forced upon him; the fact that he engaged in a wrestling match, however innocent; the fact that he engaged in lifting, though never so cautious; the fact that he overexerted himself, though never so innocent of an intention of doing so,—whereby he received injuries,—are expressly excluded from the operation of the policy. Also the fact that the insured commits suicide, although insane, therefore, in a legal sense, accidental, excludes him from the benefit of the policy. The remaining clause stipulates for a further exemption of the appellee's liability in the event that intentional injuries are inflicted upon the insured by himself or any other person. It is contended by the appellant that the meaning of this clause is that, “if the insured intentionally inflicted injuries upon himself, or if any other person intentionally inflicted injuries upon him with his consent, or at his instance, then the appellee should not be liable.” A moment's reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedents, reads as follows: “No claim shall be made under this ticket when the death or injury may have been caused by intentional injuries inflicted by the insured or any other person.” The sentence, though awkwardly expressed, is complete, and clearly expresses the idea that, if the insured intentionally kills or injures himself by the infliction of bodily wounds, he thereby breaks the condition of the policy; or that if he is intentionally killed or injured by any other person, by the infliction of bodily wounds, the condition of the policy is thereby broken. Therefore to add the words, “with his consent or at his instance,” would have the effect of torturing the meaning of the language used beyond its legitimate import. By the terms of the contract the company undertakes to indemnify against death or injury effected “through external, violent, and accidental

means." By virtue of this undertaking, the company would be liable if the death or injury should be effected by any external and violent means whatever that was as to the insured accidental, except in so far as the company by the proviso limited its liability; for it is a well-known rule of construction that, where the undertaking of a party is expressed in general terms, as in this case, and specified things, as in this case, are excepted from the operation of the general terms, such terms are to be construed as covering all things coming within their scope, except those that are expressly excluded. As, therefore, the assassination of Hutchcraft was as to him an unforeseen event,—a casualty,—his taking off was through external, violent, and accidental means. But we also think the clause of the proviso that excludes the appellee's liability, in case death or injury is intentionally inflicted by any other person, applies to this case. We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the insured may receive at the hands of the third persons who are attempting to do mischief generally, or who are attempting to injure any particular individual other than the insured, or class of individuals or any kind of property; for in such cases it cannot be said that the injury was intentionally aimed directly and individually at the insured.

The judgment of the circuit court overruling the demurrer to the appellee's answer is affirmed.

GILCHRIST *et al.* v. CLARKE.

(Supreme Court of Tennessee. May 5, 1888.)

FACTORS AND BROKERS—REAL-ESTATE AGENTS—RIGHT TO COMMISSIONS.

Where defendant was willing and able to complete a sale, and the purchaser, on a flimsy objection to the title, refused to accept a good title, and plaintiffs, real-estate brokers, had not reduced the contract for such sale to writing, so that specific performance would lie on part of defendant against such purchaser, plaintiffs are not entitled to their commissions for such sale from defendant.¹

Error to circuit court, Shelby county; L. H. ESTES, Judge.

Action by Gilchrist & Martin, real-estate agents and brokers, against William Clarke, to recover a commission on a sale alleged to have been declared off by a defective title of defendant. Judgment for defendant, and plaintiffs bring error.

Morgan & McFarland and *J. H. Kent*, for plaintiffs in error. *Miller & Gillham*, for defendant in error.

FOLKES, J. This is an action brought to recover commissions claimed to have been earned by the plaintiffs, as brokers or real-estate agents. The record shows that the plaintiffs, as such brokers, approached the defendant, and offered their services to sell a certain lot owned by the defendant. The defendant fixed the price at \$2,100, and agreed to pay the usual commission of 5 per cent. to sell the same. The brokers found a party who expressed a willingness to give \$2,000, which, when communicated to the owner, the latter agreed to take, and authorized the plaintiffs to close the trade at the figures named. The proposed purchaser was then furnished by the broker with an abstract of title, and returned shortly thereafter, stating that his lawyer had reported title doubtful as to 10 feet of the lot, on account of an interlap, occasioned by a deed held by the adjacent lot-owner, which deed was subsequent to the defendant's deed. The proposed purchaser heard no more about it, and after awhile went to Europe, giving the matter no further attention, and

¹ Respecting the rights of real-estate brokers, and when their commissions are earned, see *Jarvis v. Schaefer*, (N. Y.) 11 N. E. Rep. 634; *Robinson v. Kindley*, (Kan.) 12 Pac. Rep. 587; *Ratts v. Shepherd*, (Kan.) 14 Pac. Rep. 490; *Zeimer v. Antisell*, (Cal.) 17 Pac. Rep. 642.

learned for the first time when called as a witness in this case that the lot had been since sold, but said that he was still willing to take the lot at the price offered, provided the assumed defect in title was cured. It further appears that, when the broker communicated the action of the proposed buyer to the defendant, the latter said that his title was good; that it had been examined by his own attorney, and pronounced good; that he had been in actual possession of the lot, including the 10 feet in question, under inclosure for over 20 years, and covered by the calls in his deed; that his attorney could explain and make clear the whole matter to the attorney of proposed buyer. The attorneys had an interview, from which nothing resulted, and, hearing nothing more about the matter for some considerable time, some other broker made sale of the lot to a less critical purchaser, and the defendant executed deed, and paid the commission to the broker actually effecting the sale. Under these facts, the court, trying the case without a jury, gave judgment for the defendant, except as to actual cost of abstract of title which had been procured by the plaintiffs, and which the defendant expressed at the trial a willingness to pay; so that judgment was given the plaintiffs for \$32, the cost of abstract. The plaintiffs have appealed, insisting that they are entitled to recover \$100 as their commission on the offer of purchase communicated by them. Their contention is that the sale has been defeated by a defective title in the seller, and they are therefore entitled to a commission as for a perfected sale. If it were true that such title were defective, and such defect prevented sale, it would follow, as well-settled law, that the brokers should recover. But such a case is not made out in this record. Here there is no defect of title proven. On the contrary, the proof shows a sale defeated by a hypercritical objection to a good title made by the proposed purchaser. There has been no breach of duty, nor of contract obligation, upon the part of the seller, who was ready, willing, and able to make a good title, and to complete the sale. What was there left for the seller to do when he was apprised of the declination by the proposed purchaser to accept the title? He must either submit to the disappointment in his sale there and then, or go to the expense and trouble of filing a bill in equity against the sundry parties, or their heirs, who it was erroneously supposed had the "shade of a shadow" of title to 10 feet of the lot, for the purpose of removing a so-called cloud upon his title, or he must incur equal trouble and expense in the effort to procure quitclaim deeds or releases from such parties for the 10 feet in question; thereby inviting extortion or litigation, and casting suspicion upon his title, which for over 20 years had been unchallenged by any one. If he were unwilling to do one or more of these things, in an effort to put the title in such shape as would meet the fanciful views of the proposed purchaser, must he be made to pay commissions to the broker? If he prefers to avoid litigation, and to prevent a slander upon his title, and to retain his property until he finds some purchaser not so "uncertain, coy, and hard to please," must he pay commission to the broker who has failed to effectuate a sale? Such is the insistence of counsel, and, if the brokers had been sufficiently enterprising to have reduced to writing the contract of sale before any question of title had been made by proposed purchaser, the contention would be sustained, under the authority of *Parker v. Walker*, ante, 391, decided at this term by a divided court, (but with which the writer of this opinion could not then nor now concur;) and this case would then have to be reversed, and judgment given for the full amount of commissions as claimed, unless the defendant had availed himself of another avenue of escape, (no less inviting than the alternatives above enumerated,) furnished him by the writing, to-wit, the filing of a bill for specific performance. But inasmuch as the broker in this case neglected to reduce the contract of sale to writing, signed by the proposed buyer, the defendant cannot maintain a bill against him for specific performance, so as to compel him to accept the good title held by the proposed seller. The seller is

therefore not required to go to any expense in the effort to remove clouds for a proposed purchaser, when the former would be powerless to compel a performance by the latter after the removal of the difficulty, real or imaginary, by reason of the failure of the broker to secure for him a written contract of sale. The plaintiffs having failed or neglected to bind the purchaser by a contract which the defendant could enforce under the statute of frauds, they are not entitled to recover compensation as brokers for the parol contract of sale made by them, when the proposed purchaser refused to accept a good title, which the defendant was ready, willing, and able to make. See *Tombs v. Alexander*, 101 Mass. 255. The fact that the circuit judge placed his judgment in favor of defendant upon other grounds is immaterial. He has reached a right conclusion, and the judgment will be affirmed, with costs.

WADSWORTH et al. v. WESTERN UNION TEL. CO.

(*Supreme Court of Tennessee. April Term, 1888.*)

1. TELEGRAPH COMPANIES—NEGLIGENCE IN DELIVERING MESSAGE—MENTAL SUFFERING OF PLAINTIFF.

In an action against a telegraph company, plaintiff alleged that W. delivered a message to defendant, directed to her, informing her that her brother was in a dying condition; that, through defendant's negligence, the message, and also a subsequent one informing her of her brother's death, both sent at her expense, and paid for by her, were not delivered until too late to enable her to be present at his death or at his funeral,—“to her damage ten thousand dollars.” Code Tenn. Mill. & V. § 1541, requires telegraph companies to transmit and deliver all proper messages “correctly, and without unreasonable delay;” and, for a failure to do so, section 1542 declares the defaulting company “liable in damages to the party aggrieved.” *Held*, that mental suffering caused by plaintiff's inability to reach her brother in time, on account of defendant's negligence, was a proper element of damage, and the court erred in sustaining a demurrer to the declaration.¹

2. SAME—NEGLIGENCE—“PARTY AGGRIEVED.”

As the statute gives the right of action to “the party aggrieved,” the fact that the message was sent at the instance of a third party does not defeat plaintiff's right of action on the ground of want of privity of contract.

LURTON and FALKES, JJ., dissenting.

Appeal from circuit court, Shelby county; L. H. ESTES, Judge.
John D. Martin, for appellants. *Turley & Wright*, for appellee.

CALDWELL, J. This suit was brought in the circuit court at Memphis, by Mrs. Jennie H. Wadsworth and her husband, T. J. Wadsworth, against the Western Union Telegraph Company, for failing to promptly deliver to her the following telegraphic messages: “MEMPHIS, October 2, 1887. To Mrs. T. J. Wadsworth, Byhalia, Miss.: Your brother, Billie Howell, is in a dying condition at 105 Jefferson St. R. C. WALDEN.” And: “MEMPHIS, October 3, 1887. To Mrs. T. J. Wadsworth, Byhalia, Miss.: Mr. Howell died this morning. Advise us what to do. Will look for some one on morning train. R. C. WALDEN.” It is averred in the declaration that Byhalia is about 28 miles from Memphis, and that the two places are connected by direct line of telegraphic wire and railroad; that Billie Howell, a brother of Mrs. Wadsworth, one of the plaintiffs, was “seized with a mortal malady,” in the city of Memphis, on the 2d day of October, 1887, and that, at about the hour of 7 o'clock P. M. of that day, R. C. Walden, a “friend of the family,” presented to the defendant the former of the messages just set out, written upon one of its day or full-rate blanks, and that it was accepted by the defendant for immediate transmission and delivery to her; that through the gross, wanton, and reckless negligence of the defendant, and in palpable violation of its duty, the message was by the defendant detained, and not delivered until about 11:30 o'clock A. M. of the next day, and several hours after

¹See, also, *Loper v. Telegraph Co.*, (Tex.) post, 600.

the death of Howell; that he died about 6:30 o'clock A. M. on the 3d of October, 1887, and a few moments thereafter the second of said telegrams was presented and accepted for immediate transmission and delivery, as was the other one, and that, through the same gross, wanton, and reckless negligence of the defendant, this second message was detained, and not delivered by the defendant, until about the same time the other one was delivered; that, by reason of this negligence and breach of duty on the part of the defendant, Mrs. Wadsworth was prevented from attending her dying brother and administering to him in his last hours, and also from making desired preparations for his interment; that the messages were sent at her expense; and that she paid full toll therefor,—“to her damage ten thousand dollars.” Demurrer was sustained, and the suit dismissed. Plaintiffs have appealed in error.

The first assignment of demurrer is that the declaration shows no cause of action, in that it avers no pecuniary damage or personal injury; that mental suffering, unaccompanied by pecuniary injury, will not sustain an action. Clearly, the declaration discloses a case for some damage; and to this extent, it must be conceded, the action in sustaining the demurrer was erroneous. The messages in question were couched in decent language, and were lawful in their purpose. Such being true, Walden had a legal right to send them, and Mrs. Wadsworth a legal right to receive them; and it was the plain duty of the defendant to deliver them promptly. Its dereliction of duty, and violation of her legal right, as averred in the declaration, and confessed in the demurrer, unquestionably gave her a right of action. “Every infraction of a legal right, in contemplation of law, causes injury. This is practically and legally an incontrovertible proposition. If the infraction is established, the conclusion of damages inevitably follows.” 1 *Suth. Dam.* 2.

But the question most debated at the bar by learned counsel, and the one of most importance and interest in this case, is whether or not injury to the feelings, anguish, and pain of mind, occasioned by the defendant's breach of duty to Mrs. Wadsworth, can be regarded as an element of damage, under the law. In actions for personal injury, the general rule, which is too familiar to admit of citations of authority to sustain it, is that both bodily pain, and mental suffering connected therewith, are to be considered by the jury in estimating the amount of damage sustained, and the sum to be recovered by the plaintiff. Upon the latter element, it is very truthfully and appropriately remarked by a learned author that “the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other.” 3 *Suth. Dam.* 260. After laying down the rule as we have stated it to be, and citing some of the very many decisions adopting it, Mr. Wood says: “But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought from a reading of the loose *dicta* and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced.” Wood's *Mayne*, *Dam.* 74, note. On same subject Mr. Cooley says: “But in this country, as well as in England, the ground of recovery must be something besides an injury to the feelings and affections, or the loss of the pleasure and comfort of the society of the person killed. There must be a loss to the claimant that is capable of being measured by a pecuniary standard.” Cooley, *Torts*, 271. These are the strongest statements of the rule contended for by the defendant which we have seen, and to them we give our full approval when applied to the class of cases with respect to which they are made. But they are applicable peculiarly, not to

say exclusively, to actions for injury to the person where physical injury is the sole ground of the action, and without which the action will not lie at all. This, however, is an action, on the facts of the case, which is permissible under our Code, and may include all matters embraced in an action *ex delicto*, and also those proper to be considered in an action *ex contractu*. The plaintiff, having a clear right of action for some damage, as we have already seen, may maintain her action, and recover all the damage she may show herself to have sustained by reason of the wrongful act of the defendant; and, in ascertaining the amount thereof, all proven elements of damage, admissible in either form of action, are for the consideration of the jury. In an action for tort the injured party may recover such damages as result proximately and naturally from the wrongful act of the defendant, and also exemplary damages where the act was done with malice, or under circumstances of aggravation; and, in an action, for breach of contract, the measure of the damages recoverable is, generally, the loss which the contracting parties, with all the facts before them, would have contemplated as flowing directly from its breach. 2 Thomp. Neg. 849; Gray, Tel. 146. The latter author, on the next page, says: "Neither in an action of tort nor in one of contract can a party recover damages for mental anguish alone. He can recover such damages, in consonance with the foregoing rules, at least, only where he is entitled to recover some damages on another ground." There is a large class of actions for tort in which substantial recoveries are authorized and sustained for injury to the feelings of the person suing where the other damage is nominal merely. As instances of such actions, we mention the case of a husband suing for an injury to his wife, or for seducing or enticing her away from him, and that of a parent suing for the seduction of the daughter. In all these cases, the main element of damage, the real injury sustained, is the wound to the feelings; the loss of service upon which the actions are technically based being but a legal fiction, and more imaginary than real. *Love v. Mosoner*, 6 Baxt. 27; *Parker v. Meek*, 3 Sneed, 30; *Maguinay v. Saudek*, 5 Sneed, 147; *Cooley, Torts*, 224, 226, 231; 3 *Suth. Dam.* 744. With respect to actions for breach of contract, Mr. Sutherland asks the question, "May damages for breach of contract include other than pecuniary elements?" and then he proceeds to say: "In actions upon contract, the losses sustained do not, by reason of the nature of the transactions which they involve, embrace, ordinarily, any other than pecuniary elements. There is, however, no reason why other natural and direct injuries might not justify and require compensation. Contracts are not often made for a purpose, the defeating or impairing of which can, in a legal sense, inflict a direct and natural injury to the feelings of the injured party. A breach of promise of marriage is an instance of such a contract, and such considerations enter into the estimate of the damages. The action for such a cause is often referred to as an exceptional action. In a certain sense it is so; but in the particular under consideration it is only peculiar. It is an action upon contract, and the damages allowed are such as, considering the nature and benefits of the thing promised, will be adequate compensation." 1 *Suth. Dam.* 156, 157. To further illustrate and answer his question, the same author says: "Where a contract is made to secure exemption from a particular inconvenience or annoyance, or to confer a particular enjoyment, the breach, so far as it disappoints in respect to that purpose, may give a right to damages appropriate to the objects of the contract." *Id.* 157, 158.

These are but illustrations and application of the general rule which we have already stated for the estimation of damages in actions for breach of contract. They serve the purpose of showing that, in the ordinary contract, only pecuniary benefits are contemplated by the contracting parties; and that, therefore, the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that, where other than pecuniary ben-

fits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. The case before us (so far as it is an action for breach of contract) is subject to the same general rule; and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance. The messages were sent for a particular purpose, which was disclosed upon their face, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything; no proposition or promise with respect to any business transaction. The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains. Then her brother died away from her; his body needed her attention, and would have received it, as owned, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her. The messages were proper in language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be spared whatever pain and anguish such information, promptly conveyed, would prevent. By all the authorities, including our Code, it was the duty of the defendant to transmit and deliver these messages "correctly, and without unreasonable delay;" and, in failing to do so, it became responsible for all loss or injury occasioned thereby. Code Mill. & V. §§ 1541, 1542; *Marr v. Telegraph Co.*, 1 Pickle, 529, 3 S. W. Rep. 496; Gray, Tel. §§ 81, 82, *et seq.*; Cooley, Torts, 646, 647; Whart. Neg. § 767; 3 Suth. Dam. 298-300; Shear. & R. Neg. § 605. This rule of damages is enforced by the supreme courts of Georgia, Virginia, and other states, even where the message is in cipher. *Telegraph Co. v. Fatman*, 73 Ga. 285, 54 Amer. Rep. 877; *Telegraph Co. v. Reynolds*, 77 Va. 173, 46 Amer. Rep. 715, and reporter's note at end of case. It is true that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss; but we cannot agree that for that reason the liability should attach and be enforced in such cases only. Telegraphy is of comparatively recent origin, and the law concerning the duties and liabilities of telegraph companies has hardly passed its infancy, and cannot be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurring decisions.

In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart and so accustomed to the respect of all mankind, as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of the country. To hold that the defendant is not liable, in this case, for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default, would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contracts broken; and, furthermore, such a holding would justify the conclusion that the defendant might with impunity have refused to receive and transmit such messages at all, and that it has the right in the future to do as it has done in this case, or, at least, that it cannot be required to respond in damages for doing so. To such a result we think no court should submit. The telegraph company is the servant, rather than the master, of its patrons. It is their prerogative to determine

what messages they will present; and, so they are lawful, it is bound by law, upon payment of its toll, to transmit and deliver them correctly and promptly. It has no right to say what is important, and what is not; what will be profitable to the receiver, and what will not; what has a pecuniary value, and what has not; but its single and plain duty is to make the transmission and delivery with promptitude and accuracy. When that is done, its responsibility is ended. When it is omitted, through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse, one or both, subject alone to the proviso that the injury be the natural and direct consequence of the negligent act.

Continuing the discussion, and as illustrative of his position as to the allowance or non-allowance of a recovery for injury to the feelings, Mr. Wood says that an action will not lie for "charging a lady with being a prostitute, or a gentleman with being a scoundrel, a blackleg, a cheat," etc., unless the charge be productive of some special damages, apart from mental anguish occasioned thereby. Wood's Mayne, Dam. 75. This is conceded to be true at common law, because, as stated by the same author, such offenses are not by the common law crimes in the legal sense. But if, by statute, the making of such charges be rendered actionable *per se*, and the injured party in that way get a standing in court, a recovery may be had for all damages sustained, including mental suffering. In this connection, and in addition to what has already been said with regard to the right of action growing out of the defendant's breach of duty, it is to be observed that we have a statute which expressly confers the right of action. Section 1541 of our Code requires telegraph companies to transmit and deliver all proper messages "correctly, and without unreasonable delay;" and, for a failure to do so, the defaulting company is, by section 1542, declared to be "liable in damages to the party aggrieved." The language of each section is general, broad, and comprehensive. The act does not discriminate between messages appertaining to matters pecuniary merely, and those having reference to matters of a domestic nature, as are those now before us. On the contrary, all must be transmitted and delivered alike. The obligation upon the company is the same in the one class of cases as in the other; and, if default occur, the remedy is the same for one person that it is for another person. There is no discrimination with respect to the nature of the messages to be conveyed, nor is there any discrimination with respect to the nature of the company's default. One section imposes a general duty, and the other gives a universal right of action for the breach of that duty, and, of necessity, the nature and amount of damages recoverable in each particular case are to be determined by the character of the message, and the extent of the injury caused by the defendant's default. It is true that the "officer or agent" of the company who willfully violates any of the provisions of section 1541 is by section 1542 declared to be "guilty of a misdemeanor;" but that does not take the place of or diminish the civil liability. Both remedies are expressly given, and neither is exclusive, or in lieu of the other. The offending officer or agent is guilty of a misdemeanor, and he and the company are "also liable in damages to the aggrieved party."

The question with respect to the measure of damages in a case like this, though not of frequent occurrence heretofore, is not entirely new; nor is the view we have expressed without express authority to sustain it. Shearman & Redfield say: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages should not be

enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message." *Shear. & R. Neg.* § 605, p. 692. To the same effect are the following cases: *So Relle v. Telegraph Co.*, 55 Tex. 303, 40 Amer. Rep. 805; *Railway Co. v. Levy*, 59 Tex. 542, 46 Amer. Rep. 269; *Stuart v. Telegraph Co.*, 66 Tex. 580, 59 Amer. Rep. 623. In the first of these cases the telegraph company was held to be liable to So Relle for injury to his feelings, caused by its failure to promptly transmit and deliver to him a telegram announcing the death of his mother, whereby he was prevented from attending her funeral. *Levy's Case* is properly reported in the head-note, which is as follows: "The plaintiff delivered to the defendant, a railway company operating a telegraph, a message on Sunday, announcing the death of his wife and child to his father, and requesting him to come to him. The defendant negligently failed to deliver the message until the next day,—too late for the funeral. Held, that the plaintiff was entitled to recover, and that exemplary damages were proper." In the other case, Stuart sued the defendant for the non-delivery of a telegram, whereby he was prevented from seeing his brother in his last illness, and being present at his funeral. Compensation for injury to his feelings was allowed, and a judgment for \$2,500 was sustained. The father of the plaintiff in the *Levy Case*, just mentioned, also brought suit for the negligent failure of the company to deliver to him his son's telegram. The court held that he (the father) could not recover for mental suffering, because he averred no actual damage to sustain his action; and in its decision *So Relle's Case* was disapproved, to the extent that it was supposed to authorize a recovery for injury to the feelings only. *Railway Co. v. Levy*, 59 Tex. 563, 46 Amer. Rep. 278. These four are the only cases bearing upon the exact question under consideration which we have been able to find, or to which our attention has been called by counsel.

Then, upon what we regard as sound reason, public policy, and authority as well, we are constrained to differ with his honor, the circuit judge, and hold that the first ground of demurrer is not well taken in any particular. That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether, for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage. It is very appropriately said, however, in the conclusion of the opinion in *So Relle's Case*, that "great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company, for it is only the latter for which a recovery may be had; and the attention of juries might well be called to that fact." Nor do we think the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment, as a matter for the consideration of the court in its endeavor to reach a just and sound conclusion. It is rather to be hoped that instances of such dereliction of plain, easy, and important duty have not been very numerous in the past, and that they will seldom transpire in the future.

The other ground of demurrer is that the plaintiffs cannot maintain this action for want of privity of contract between them and the defendant. This ground is also bad. The question is whether a person to whom a telegraphic message is directed, has a right of action against the company for its negligent delay or non-delivery of the message. "In England this question is undoubtedly answered in the negative. In America, on the other hand, it is invariably answered in the affirmative." *Gray, Tel.* § 65; *Whart. Neg.* § 758; 3 *Suth. Dam.* 314; *Shear. & R. Neg.* § 560; 2 *Thomp. Neg.* p. 847, § 11. The application of the American rule in this case is proper in the highest de-

gree, for the messages themselves show unmistakably that they were intended for the benefit of Mrs. Wadsworth, and that she, of all persons, was the one interested in the intelligence to be conveyed. Moreover, she is "the party aggrieved," and our statute gives the right of action to such party. Code Mill. & V. 1542.

The judgment is reversed, and the case remanded, at the cost of defendant.

TURNER, O. J., (*concurring*.) While fully concurring in the results of Judge CALDWELL, I do so on the following grounds, as well as upon grounds stated in the opinion: Our statute, after providing for the use of the telegraph in cases of war, and for the arrest of criminals, enacts: "Any officer or agent of a telegraph company who fails or refuses to carry out the preceding section is guilty of a misdemeanor." Thomp. & S. Code, 1321. "All other messages, including those received from other telegraph companies, shall be transmitted, in the order of their delivery, correctly, and without unreasonable delay, and shall be kept strictly confidential." Id. 1322. Any officer or agent of a telegraph company who violates either of the provisions of the preceding section is guilty of a misdemeanor, and he and the telegraph company or proprietor are also liable in damages to the party aggrieved. Id. 1323. These provisions are broad and indiscriminating, embracing in terms all messages, commanding their transmission, and subjecting the agent and company or proprietor to respond in damages to the party aggrieved for a failure to comply. The law has made no distinction by defining the character of the message, the failure of whose transmission entitles a party to damages, and the courts can make none. So it must be that some damages may be recovered in any sort of case where the law has been violated; the amount, of course, depending on the facts of each particular case. It is presumed that, if a party propose to send a telegram, it is of consequence to him, or to the person to whom it is sent, in an amount greater than the money charged for the transmission. With the extent of the interest or concern of the sender, or of the person to whom sent, the agent or company has nothing to do. When called upon to dispatch a message or deliver it, he has but one office to perform, which is to put his machine to work, and see that the message goes "correctly, and without unreasonable delay;" and, if one be sent to his office, that it be delivered "correctly, and without unreasonable delay." He will not be permitted to speculate upon the value or importance of the message. So far as he is concerned, that is a matter exclusively for the judgment of the sender or receiver. If he fail or refuse to send or deliver, the question of damages is one for the courts. So that, put the case as we may, we can evolve from the law but the one duty for the company through its agent, viz., send and deliver the message. Telegraphy is young, and consequently comparatively little litigation has resulted from it. It is an institution *sui generis*. In laying down rules of law for its government, we must look to its uses. While it is a common carrier, and, as a rule, governed by the principles of law applicable to common carriers, this must be understood as not restricting courts to the literal definitions of the duties and liabilities of common carriers of persons or goods, but must be interpreted to meet the nature and purposes of the creature. The use of the telegraph cannot possibly result in injury to the person or property, as it is not a carrier of either. Its only patronage is intelligence; its only default is failure to transmit and deliver; and for these alone can it be held to account in damages, and to these alone courts must direct attention and investigation. That it may be difficult to estimate the damages in some cases is no reason for saying an action does not lie. As said before, the circumstances of each case must determine the amount of damages.

We cannot agree with counsel that mere sentiment is the basis of this suit. The love of a sister for her brother, and her desire to be with him in his last moments, and, after death, care for his body and its burial, are not mere

sentiments. They are the promptings and commands of nature, affection, humanity, and duty; and should not be trifled with by indifferent, incompetent, or heartless operators in telegraph offices. There is no danger of great wrong coming from the enforcement of damages for a neglect of duty. If juries may occasionally assess excessive damages, the courts can and will correct the wrong. If companies do their duty in the selection of agents, (an easy matter,) they will have no occasion to complain. If they employ unworthy agents, and injury results to them therefrom, they have no right to complain, and should not be heard when they do. It is much easier for companies to correct the evil, and more consistent with their duty to do so, than that the public should submit to it. Let them understand that they have a duty to perform, and must do it, or respond in damages, and there will be an end to negligence and unfitness in operators, to whom the law allows no discretion, and the courts must give none. The language of the statute authorizes in terms this action. It gives the right to sue to the "party aggrieved,"—the party to whom pain and sorrow have been given, and who has been vexed and harassed. When the law makes an act of omission or commission a criminal offense, and in the same connection, as here, gives a right of suit for such omission or commission, it follows of course that damages may be recovered in a civil proceeding.

LURTON, J., (*dissenting*.) I am unable to assent to the opinion of the majority. I deem the law of the case, as announced, as of so dangerous a tendency as to justify an expression of the grounds of my dissent. That an action for injury to the feelings, or fright or grief or other mental injury, cannot be sustained as an independent ground of action, is conceded by the concurrent assent of authors and judges. To recover for such an injury it must be the accompaniment of actual physical injury, unless it be the exceptional action for a breach of marriage promise or for seduction. As an accompaniment of bodily injury, or as a result of such injury, it may be the subject of consideration in the ascertainment of damages, but not otherwise. Says an eminent writer: "Mental anguish, of itself, has never been treated as an indispensable ground of damages so as to enable a person to maintain an action for that injury alone. Neither has insult or contumely. Mental anguish of the most excruciating character may and generally does result from charging a lady with being a prostitute, or a gentleman with being a blackleg or a cheat. Yet, unless productive of special damages apart from the mental suffering occasioned thereby, no action will lie." Wood's Mayne, Dam. 75. The supreme court of Texas are alone in sustaining actions of the kind now under consideration. But that court, in an exhaustive opinion, held that the receiver of a telegram, paid for by the sender, could not sustain an action grounded alone upon an injury to his feelings. That case was this: A son paid for and sent a message to the plaintiff, his father, advising the latter of the death of the wife and child of the sender. There was delay in the delivery, whereby the plaintiff was prevented from attending the funeral. The court held that there were neither allegations nor proof of any damage to the plaintiff, unless mental suffering alone constituted a ground of action, and they held that for mental suffering alone no suit would lie. *Railway Co. v. Levy*, 59 Tex. 568, 46 Amer. Rep. 278. The same court, in a suit by the son of the plaintiff in the action just mentioned, held that the son, as the sender of the message and as having paid for its transmission, could maintain a suit; and, said Judge STALOW in speaking for the court: "Upon the whole case as made by the petition and evidence, we are of opinion that the appellee was entitled to recover whatever damages the proof may justify, over and above such sum as he paid for the transmission of the message; and this, in the way of exemplary damages, if the negligence of the appellants, in failing to deliver the message, was willful or gross, which is a matter to be determined by the jury." *Railway Co. v. Levy*, 59

Tex. 542, 46 Amer. Rep. 269. That exemplary damages cannot be recovered save in an action for a tort will, perhaps, be conceded. Compensation is the rule of damages both in tort and contract; and only where the tort is done recklessly and wantonly may damages more than compensatory be recovered. That a contract should be breached "recklessly" and "willfully" and "wantonly," are essentials to recovery of punitive damages; but such adjectives are most manifestly out of place when not applied to one of that class of wrongs denominated torts. This Texas case is, perhaps, the first instance of the allowance of vindictive damages for the breach of a contract not producing a personal wrong. The error of such a holding soon occurred to that court, and the exemplary damage doctrine of the *Levy Case* was overruled; but, having begun to sustain such actions, they placed the last case upon the ingenious theory that damages for injury to the feelings could be recovered by way of compensation, and not as exemplary damages, provided the plaintiff could show that, in addition to such injury, he had such a case as would permit a recovery of "some damages," upon other grounds. *Stuart v. Telegraph Co.*, 66 Tex. 580, 59 Amer. Rep. 623. Such damages, clearly, cannot be recovered as exemplary damages; and the opinion of the majority does not rest upon such a basis. The rule that an action will not lie for injury to the feelings is conceded by the majority, but the claim advanced that such rule is alone applicable to actions "where physical injury is the sole ground of the action." This limitation upon the applicability of the doctrine is not supported by authority, nor does it rest upon any sound deduction. That an independent action for injured feelings cannot be maintained, must be conceded. If the ground of the action be a physical injury, and such an injury be established, then, as an accompaniment of substantial physical injury, mental suffering is a subject for consideration; but, if the plaintiff fail to prove a physical injury, his whole case must fail, though there be ever so much mental anguish. This is as far as any case goes. There can be no bodily suffering without pain of mind; and the law refuses to separate the one from the other, and allows compensation for the whole injury. *Johnson v. Wells*, 3 Amer. Rep. 245; *Canning v. Williamstown*, 1 Cush. 451. "Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." *Lynch v. Knight*, 9 H. L. Cas. 577, as quoted by opinion in *Wyman v. Leavitt*, 71 Me. 227. The last case, of *Wyman v. Leavitt*, was an action for injury to property by negligent blasting; and, as an additional element of damage, it was sought to recover for mental pain resulting from fright and anxiety caused by the blasting. The court held no recovery could be had for such injury. *Id.* 227, 36 Amer. Rep. 303.

Upon the assumption that mental suffering is not ground of action where the basis of suit is physical pain, it seems to be argued that, therefore, such damages may be recovered where the ground of suit is not physical pain, but pecuniary loss. *Non constat*. If excluded in the first class of cases, or as an independent ground of action, *a fortiori* it ought to be ignored where the cause of action is pecuniary loss. The rule may only have been announced in actions sounding in tort, such as actions for injury to the person, or in cases of wanton injury to property; but this is most obviously due to the fact that no claim for such damages was ever before made where the basis of the suit was a breach of contract. The reason why an independent action for such damages cannot and ought not to be sustained, is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within

all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury, with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of Mr. Wood, been applied to actions of slander and libel. No matter how gross the insult, or now harrowing to the feelings, there can be no recovery if the slander did not imply a crime, or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life; and in such cases there can be no recovery for the injured feelings, the grief, or anguish suffered by the plaintiff in consequence of the death for which the suit lies. This is the rule, regardless of the relation the deceased bore to the plaintiff. Whether husband or wife, or parent or child, the rule is the same; the damages are for the pecuniary loss sustained. *Railroad Co. v. Stevens*, 9 Heisk. 12; Cooley, Torts, 271, 272. "The true basis of recovery," says Judge Cooley, "seems to be stated by POLLOCK, C. B. 'It has been held,' he says, 'that these damages are not to be given as a *solatium*.' That was so decided, for the first time in *banc*, in *Blake v. Railway Co.*, [18 Q. B. 93.] That case was tried before PARKE, B., who told the jury that the lord chief baron had frequently ruled at *nisi prius*, and without objection, that the claim for damages must be founded on pecuniary loss, actual or expected, and that mere injury to feelings could not be considered." Cooley, Torts, 272.

[It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injury to the feelings, mental distress, and humiliation, where such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a day certain, who breaches his agreement willfully, with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental sufferings? How can that case, or many others which may be imagined, be distinguished in principle from the one now decided? Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language, not charging a crime or resulting in special pecuniary damages? Mental distress is or may be, in some cases, as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime. Yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered. The rule for the general averment of damages stated in the opinion, that they should be such as, "considering the nature and benefits of the thing promised, will be adequate compensation," is sound to the extent of being axiomatic. Yet this by no means determines, or helps to determine, the question under consideration, which is, what are legal damages? What are the injuries for which the law undertakes to give a remedy, and provide a measure of compensation? I do not understand that the opinion gives any sanction to the idea that exemplary damages are to be given as part of the "adequate compensation" to which a plaintiff is entitled for a broken obligation. Neither do I understand any sanction to be given to the idea that "adequate compensation" may be recovered in an independent action based alone upon grief, mental anguish, fright, or other metaphysical injury. Upon the con-

trary, the corner-stone upon which the opinion seems to rest is the assumption that "the declaration disclose a case for the recovery of some damages." Upon this predicate is based the right to recover additional damages for the mental injury. What damage the declaration discloses the plaintiff entitled to, other than damage for injury to her feelings, is not stated. If by some damage is meant some pecuniary damage, then this I do not concede. The telegram was received and paid for at the time by her. Her suit is not for the price paid for an undelivered telegram, or for an error in the transmission, but is for damages for delay in the delivery. She cannot recover the price paid for transmission and delivery, and does not sue for such price. This delay in delivery is not alleged to have resulted in any pecuniary loss whatever. Her case is, then, a straight action for damages for delay in delivery of a telegram, and the damages sustained are not claimed to have been other than such as are due for injury to her feelings. Now, if it be admitted that the receiver of such a message can maintain an action for damages consequent upon delay, what is the measure of her damage if no pecuniary loss is shown? Clearly, her recovery must be limited to nominal damages, unless, of course, she may prove and recover for injured feelings as legal damages. Nominal damages are such damages as are recoverable where there has been a violation of legal right without actual damages. In such a case the legal implication of damage remains; and, says a learned author: "This requires some practical expression as the compensation for a technical injury. Therefore nominal damages are given, as six cents, one farthing, or one cent,—a sum of money that can be spoken of, but has no existence in point of quantity." 1 *Suth. Dam.* 9. Nominal damages are not, therefore, proof of actual injury, nor given as the measure of pecuniary loss, but as a consequence of a technical injury without actual loss. Where there is a breach of contract without actual loss, the damages are nominal. *Seat v. Moreland*, 7 *Humph.* 574. Upon a judgment by default in an action for damages, the plaintiff's right to recover some damage is established, but the amount is open, and defendant may show he has no legal claim to damages; and, if successful, the plaintiff is entitled only to nominal damages. *Turner v. Carter*, 1 *Head*, 520.

The argument that nominal damages are inadequate to compensate for the injury sustained is not sound, unless the injury to her feelings is to be compensated. If she can recover only for actual damages sustained, as actual damages is understood by lawyers and courts, then, having sustained no pecuniary loss, and having sustained no bodily injury, nominal damages are adequate to the injury sustained. That our feelings or sentiments would be gratified if such dereliction of duty could be visited by imposition of larger damages by way of *solatium* to the plaintiff, and punishment to the defendant, is a consideration which neither court nor jury can entertain. All of us agree that exemplary damages cannot be given under the law. The controversy is limited as to whether compensatory damages are given by law. The fact that the Code gives a right of action to the party aggrieved by the failure of the defendant to comply with its agreement cannot possibly throw any light on the question. The Code gives a right to sue for and recover damages. This right exists independently of the statute. It is a common-law right, and the opinion of Judge CALDWELL so treats it. The statute does not define what damages may be recovered. We must look to the common law to determine what are legal damages. To say that because the right to sue and recover damages is conferred by statute, and that, therefore, damages for injured feelings may be recovered, is a species of legal logic which I cannot appreciate. Of course, in such case, it would be a matter of no importance whether any pecuniary loss had been sustained; and to this extent the opinion of Chief Justice TURNER clearly goes. The statute conferring no new right of action, and being only an affirmation of the common law, and failing to define the damages for which suit would lie, we must hold that only legal

damages can be recovered. Legal damages are to be ascertained by the common law. I do not understand that Judges CALDWELL and SNODGRASS concur with Judge TURNER in the opinion of the latter that an independent action will lie, under the statute, for injury to the feelings. On the contrary, the opinion of Judge CALDWELL, in which Judge SNODGRASS concurs, rests the right of action upon the ground that the right to sue for and recover some pecuniary damages, even nominal damages, will carry with it the right to recover, in addition, damages for mental suffering. This doctrine is only supported by one adjudged case, that of *Stuart v. Telegraph Co.*, *supra*. This doctrine is, I respectfully submit, a departure from the principles upon which damages for mental injuries have been heretofore allowed. The right to recover such damages has been heretofore made to depend upon some physical injury having been sustained. Bodily injury necessarily involved mental suffering, and the law has allowed a recovery for all the pain suffered from the injury. The law, in such case, refused to separate the one injury from the other. But now it is proposed to join pecuniary loss to mental pain; and if the first is shown, even though it be nominal, the latter may be compensated. There is no congruity between the elements of recovery. In the case of physical injury the law found that nature had inseparably blended mental injury; and, they being thus bound together, it refuses to separate the one from the other,—allows compensation for both. This recognition of the fact that physical pain and mental suffering were inseparably blended, and that the latter was, by nature, the accompaniment of the other, was the very ground upon which the law allowed damages for the latter. But to join pecuniary loss and injured feelings is to blend together that which nature has never blended, and for which there is no precedent save the single Texas case. If such an action is to be maintained, I would prefer it to stand on its feet as an independent action. To suffer it only on condition that the plaintiff has likewise sustained some pecuniary loss is standing the pyramid on its little end. If entitled to a standing in court at all, let it be conceded upon the substantial merits of the case, and not placed upon a forced construction of a statute which gives no action which did not exist before, or upon so obvious a fiction as that the right to recover nominal damages for breach of contract carries with it the right to recover for injury to the feelings. We have had some actions which have obtained a standing only by a fiction. The action by a parent for seduction of a daughter is one. The parent could only sue upon the fiction that the parent had sustained damage in that he had been deprived of the service of his daughter. That so meritorious an action should stand upon a fiction has always been a reproach to the law; and yet so conservative have the courts been that the necessity of proving some service by the daughter has been rigidly maintained as a prerequisite to any recovery; and this, for the reason that the law had always been so held, and the legislature alone could change it. For, says the eminent Judge Cooley, "the evil is not one to be corrected by judicial action. To uproot it would be to create new law, and this is the province of legislation." Cooley, Torts, 235. The conservatism of this observation is vastly more applicable here. If the hand of the judge is so restrained by precedent that it cannot strike down the fiction, and sustain a meritorious action upon its merits, how much more unsound and dangerous is the maintenance of a suit upon the fiction that the right to recover nominal damages for a breach of contract will support a suit for injury to the feelings otherwise not maintainable at all.

The argument, pressed with so much force in the opinion of Judge CALDWELL, that to hold that such damages are not recoverable "would justify the conclusion that the defendant might with impunity have refused to receive and transmit such messages at all," is not sound. If it were true that responsibility for pecuniary losses only might not be such responsibility as public policy might require to compel the performance of duty, this would not

justify us in imposing a responsibility not sanctioned by law. The remedy would be with the legislature. But no such stretch of jurisdiction is necessary, upon any idea of public policy. The legislature has provided full and ample means to compel performance of duty by telegraph companies. Section 1541 of the Code provides that the willful violation of duty, in receiving and forwarding and delivery of messages, shall be a misdemeanor, and the officer or agent at fault is subjected to fine and imprisonment. Thus the rights of the public are fully protected, and the necessity of imposing such damages by way of holding the defendant up to the discharge of its duties is fully met. The action of the plaintiff is one which has no public side. No public policy is to be subverted; and we are left to face the question as to whether her action to recover damages for injury to her feelings can be sustained upon authority. The novelty of a suit is not always a conclusive objection. But the fact that such an action has been sustained by the courts of Texas alone, and there only upon the fiction that a right to recover nominal damages gives the right to recover for injured feelings, furnishes to my mind a most forceful argument. [The principles upon which this suit is maintained, seem to me so radical a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to revere as the very foundation stones of the system of our law upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved.] The views of the majority have been the result of great investigation and calm deliberation, and have been presented with all the force that is possible; and, while I regret to differ so radically with gentlemen who have given such careful attention to my views, yet I am, with regret, compelled to adhere to the conclusions here advanced.

FOLKES, J. Agreeing fully with the views above expressed by my Brother LURTON, I am constrained to dissent from the opinion of the majority of the court in this case.

STATE, to Use of CITY OF MEMPHIS, v. BUTLER *et al.*

(*Supreme Court of Tennessee. May 17, 1888.*)

1. CORPORATIONS—ORGANIZATION—ISSUE OF STOCK CERTIFICATES.

In a suit to collect taxes from a banking corporation, defendant claimed exemption from taxation by virtue of a clause in its charter. No books of the corporation proving organization under the charter were produced, but it was proved by parol that, shortly after the charter was obtained, an organization was made, and the franchise transferred by the president and directors to a purchaser, but no certificates of stock were issued. The legislature recognized the existence and organization of the corporation by an act changing its *situs*, after which the organization was maintained, officers elected, stock-books kept, stock subscribed, certificates made out, and a banking business carried on, until interrupted by the late war. *Held* sufficient evidence to show organization under the charter, and transfer of the capital stock from the original corporators; the issuance of certificates of stock not being essential to corporate organization or to transfer of the capital stock.

2. SAME—CORPORATE EXISTENCE—TRANSFER OF STOCK.

In such case it appeared that, after the war, the stock was owned by three persons, two of whom sold their interests to the third, who transferred a portion to others to enable them to become directors; after which there were subscriptions to the stock, elections of officers and directors, and a regular banking business transacted, until the failure of the bank. It did not appear that any books for the transfer of stock were kept. The legislature again recognized the corporate existence of the institution by an act changing its name. *Held* sufficient evidence of the transfer of the capital stock to the parties reorganizing the bank, and of their right of succession to the privileges conferred by the original charter.

3. SAME—TO STOCKHOLDERS OF ANOTHER CORPORATION.

Said bank having made an assignment for the benefit of creditors, under which all its property was sold and its debts paid, the stockholders then assigned their stock to trustees for the stockholders of an insurance company; the stockholders of the latter company subscribing the amount of their stock in the insurance company to the stock of the bank, paying in thereon all the assets of the company and

the residue of their subscription in cash. The business of the insurance company was wound up, and its stock canceled, after which the bank was reorganized by the new stockholders, and business carried on under a new name, under an act passed by the legislature after the sale to said new stockholders. *Held*, that the transaction was not that of a corporation created for one business doing another, nor the absorption of one corporation by another; but was a sale by the stockholders in one corporation of their stock therein to the stockholders of another corporation in their individual capacities, and that it was a valid transaction, vesting them with all the corporate privileges conferred by the original charter. *TURNER, C. J., dissenting.*

4. CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION—OBLIGATION OF CONTRACTS.

The legislature of Tennessee had the power, in 1856, to grant to a corporation, by a clause in its charter, an exemption from all other taxes, upon the payment of an annual fixed tax on its capital stock; and, such corporation having accepted and organized under such charter, subsequent legislation cannot take away the exemption, which is in the nature of a contract.¹

Appeal from chancery court, Shelby county; *JOSIAH PATTERSON*, Special Chancellor.

The legislature of Tennessee repealed the charter of the city of Memphis by an act passed in 1879, and provided for the appointment of a receiver and back-tax collector, who was authorized to bring suits for uncollected taxes, and collect the same, for the benefit of the creditors of the defunct municipality. By the provisions of said act said receiver was authorized to sue in the name of the state for the use of said creditors, and to proceed in one general creditors' bill against all the delinquent tax-payers. This suit was brought against *W. E. Butler* and others, the Bank of Commerce being one; the object, so far as the bank was concerned, being to collect taxes for certain years on property owned by said bank. The defendant bank relied upon an exemption in its charter, and the chancellor dismissed the bill as to said bank, from which plaintiff appealed.

Smith & Collier, for appellant. *Morgan & McFarland, Taylor & Carroll*, and *Harris & Turley*, for appellee.

FOLKES, J. This is a bill filed by the receiver and back-tax collector of the late city of Memphis, for the benefit of the creditors of said city, under the acts of the legislature repealing the charter of the city, and providing for the collection of back taxes, and application of the proceeds thereof to the payment of the debts of said city. The object of the bill is to collect from the Bank of Commerce taxes claimed to be due the city for the years 1873, 1875, 1876, 1877, and 1878 upon the bank building and lot upon which it is situated, and upon the capital stock of said bank; which capital is said to be \$200,000. The amount charged as due is placed at about \$35,000. The bill sets out the legislation under which the Bank of Commerce is said to claim to do business, and under which it asserts an exemption from taxation, other than as therein provided. This legislation, briefly stated, is as follows: Act passed February 29, 1856. Benjamin Chandler and his associates were created a body politic and corporate, under the name of the Chattanooga Savings Institution, with all the usual powers of a corporation, authorized to engage in the banking business at the city of Chattanooga, with all the rights and privileges incident to banking, except that it was prohibited from issuing notes or other circulating medium. Section 2 provided that "the capital stock of said company shall be divided into shares of fifty dollars each, and when two hundred shares shall have been subscribed, and the sum of one dollar per share paid thereon, the stockholders may meet and elect five directors, who shall serve," etc. Section 3, among other things, that said company "shall pay to the state

¹Respecting the inviolability of charters, see *State v. Railroad Co.*, (N. J.) 7 Atl. Rep. 826; *Railroad Co. v. Duncan*, (Pa.) 5 Atl. Rep. 742, and note; *Tripp v. Plank-Road Co.*, (Mich.) 82 N. W. Rep. 907; *U. S. v. Mobile*, 12 Fed. Rep. 768, and note; *Railroad Co. v. Clifford*, (Ind.) 15 N. E. Rep. 524.

an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." By act passed November 15, 1859, the Chattanooga Savings Institution was authorized to remove its *situs* to Memphis; and on February 12, 1866, the legislature authorized the name of said institution to be changed to "The Savings Bank of Memphis;" and by act of March 12, 1873, the name was again changed to "Bank of Commerce."

The bill charged that there had never been any organization of said bank; that the charter had been sold by the first incorporators to one Richmond, who, without organization, did business at Memphis for a while, and then one Wicks did the same, until January, 1873, when he sold the charter to the Merchants' Insurance Company of Memphis, the stockholders of which formed the present organization of the Bank of Commerce. That in consequence of such sales of the charter the said Bank of Commerce acquired none of the rights and privileges conferred by said original act, and especially that it did not acquire the exemption from taxation as claimed; that, even if it be able to make out corporate succession and existence, it is not entitled to any exemption on its stock, by reason of the fact that there was no stock in existence until after 1870, and under the constitution of that year there can be no exemption from taxation upon stock issued since that time. It is also claimed in said bill that, while there is no valid issue of stock in said bank, for want of corporate existence, there is a liability for taxes on the amount of capital wrongfully employed by it in its business, just as there would be against private individuals who were engaged in banking under an assumed corporate name. Other allegations of the bill, where necessary, will be stated in the further consideration of the cause.

There was a demurrer interposed by the bank, which was sustained by the chancellor, and overruled by this court at a former term. (15 Lea, 104;) the points then adjudged being that, while the forfeiture of a charter of incorporation can only be had by direct proceedings on behalf of the state for that purpose, third parties dealing with a corporation may inquire into their powers and obligations, and that a transfer of a mere charter containing a stipulation for exemption from general taxation does not transfer the franchise to the transferee, and that while a state, by its legislature, may change the name of a corporation, and to this extent recognize its then existence as a corporation, it does not thereby assure to it any other or different franchises than those which it is at the time of such recognition entitled to. See the opinion then rendered herein as reported in 15 Lea, 104. There being no special rulings upon the sundry grounds of demurrer other than is involved in the above statement of the points adjudged, there is nothing else concluded, and the case went back for answer with all other questions open. *Battle v. Street*, 1 Pickle, 291, 2 S. W. Rep. 384.

The answer denies all the charges of the bill upon which a liability for taxes is predicated, except for so much of its bank building as is not used for banking purposes, tax upon which it claims to have paid; pleads estoppel and *res adjudicata* as to corporate succession, organization, and exemption; setting out specifically the several cases in this and in the supreme court of the United States upon which said pleas are predicated; claims that, as a matter of fact, there has been corporate organization, and regular corporate succession, from the original incorporators down to the present time; sets up the act of 1873, which provides that capital stock in a bank shall not be assessed against the bank, but against each stockholder for the shares held by each, even if it be that the capital stock in this bank can be taxed at more than one-half of 1 per cent. Upon the coming in of the answer much proof was taken, mainly on the question of organization and issuance of stock, and corporate succession. Upon the hearing the bill was dismissed. The complainant has appealed, and the whole case is before us.

It will be noticed, from the above meager summary of the case, that many

questions are presented for consideration, all of which have been pressed and combatted with great vigor and ability by learned counsel. We will now examine such of these questions as are in our opinion controlling.

In the first place, it may not be out of the way to say that, whatever may be our opinion of the power of the legislature in the granting of a charter of incorporation providing for the exemption from taxation of the property of such corporation, so as to tie the hands of succeeding legislatures from imposing an equal share of the burdens of maintaining the government upon such corporation as the exigencies of the state may require, if the question were before us for the first time, it is now too well settled by repeated decisions that such provisions create a contract, (the acceptance of which by the corporators who invest their money upon the faith thereof furnishing a valid consideration,) the obligation of which cannot be impaired, for us to attempt to disturb or review them here; so that if we find there has been organization of this corporation, chartered in 1856; that there has been succession of corporators, with authorized change of names,—the right of the present organization to the exemption from all other taxes upon its capital stock and property necessary to the conduct of its business, upon paying one-half of 1 per cent. upon its capital stock, nothing else appearing, may be considered as not open to debate. *State v. Butler*, 18 Lea, 407.

On the subject of organization and succession, as already stated, there is much proof, and there is no little confusion, and some contradiction; but, in our opinion, the weight of the proof establishes the fact of organization under the original charter; for the transfer of W. B. Richmond and his associates was made by the president and directors, who could not have been elected as such under the charter until there had been 200 shares subscribed, and the sum of one dollar per share paid thereon. Much stress is laid on the fact that it is not shown that certificates of stock were issued and transferred. While this is a circumstance that may be looked to in arriving at the good faith of the parties, and in determining the true nature of the transaction as to whether it were a transfer of stock so as to carry succession to the purchaser, or a mere sale of the charter, it is by no means conclusive. The issuance of certificates of stock is not essential either to the validity of the original organization or to the transfer of same to purchasers; the subscription to and payment for stock is all that is necessary. *Bank v. Bank*, 105 U. S. 217; *Cook, Stocks*, § 10, and cases there cited. The fact that the witness B. Richmond, who, speaking from his diary, says that he "got the charter of the affair," at this late day referring to a transaction had over a quarter of a century ago, cannot be taken as evidence that he got nothing else. The fact that he got the charter was emphasized because it was the thing of value sought, but does not show that he did not obtain the subscribed stock upon which the organization was predicated. He says the transfer was signed by the president, and that, while it had done no business, it had organized. Getting all the stock, of course he got the charter. After this purchase, and the act authorizing its removal to Memphis, there is no doubt, from the proof, but that the organization was kept up, and stock subscribed in the new company, and stock-books kept, and certificates of stock made out and signed,—whether issued or not does not appear, but this was immaterial. This organization was maintained, and banking business carried on, until the occupation of the city of Memphis by the Federal military forces, when its officers and owners removed, with its assets, south, following the fortunes of the Confederate government. After the war we find B. Richmond the owner of one-fourth interest in the institution, as the legatee under his brother's will, and J. W. Cochran the owner of another one-fourth, both of which were transferred for value to M. J. Wicks, who seems then to have held the remaining interest, and continued the business. The name of the institution being changed under the act of 1866, the proof, beyond question, shows a regular banking busi-

ness conducted by Wicks and his associates from that time to the failure of the bank, in October, 1872, when an assignment of all of its assets was made for the benefit of its creditors. There is some contradiction as to the amount of the stock in this last organization,—one witness putting it at \$100,000, of which Wicks is said to have owned \$60,000, and the remaining \$40,000 is said to have been held by New York parties; while, on the other hand, the stock is sometimes spoken of as \$30,000 and sometimes as \$60,000. Be the true amount what it may, there is no doubt but what there were stock subscriptions, and a regular organization by election of directors and officers, and regular banking business conducted, until October, 1872. How this stock is thus made to fluctuate, whether from want of recollection of the facts on the part of the witnesses, or because of the improper conduct of the parties owning it, in the effort to accomplish some private purpose, is alike immaterial to the question of corporate existence. Whatever may have been the rights of the individuals as stockholders or creditors, as affected by said changes, it is certainly not sufficient to establish the contention that there were no stock subscriptions and organization, in the face of the direct proof of Tate and McClure; and it only serves to show that there were no stock certificates issued, the stock being held almost entirely by Wicks, who seems to have presented to his friends enough stock to qualify them as directors. The bank, after its failure, paid all of its debts, either out of the assets assigned to Parker for that purpose, or with the assistance of Wicks, from his private means.

But it is said that if, under the proof and the presumptions that courts may indulge, where a corporation is found in the exercise of its corporate franchises, in favor of its due organization, after a lapse of time, and where there have been legislative recognitions of its existence, there is at least one link in the chain of defendant's title which is fatally defective, to-wit, the transfer from Wicks and others, made in January, 1873, to the parties who reorganized the bank, and are now conducting the same under the name given it by the act of March 12, 1873. Let us see what are the facts: The written transfer shows that on January 31, 1873, Wicks, W. C. McClure, Sam Tate, W. B. Greenlaw, and W. R. Cunningham, describing themselves as owners and holders of the 600 shares of the present capital stock of the Savings Bank of Memphis, for value received, sell, assign, and transfer to E. McDavitt and others, as trustees for the stockholders of the Merchants' Insurance Company, the said 600 shares of the present capital stock of said Savings Bank of Memphis, together with all the franchises, rights, and privileges of said savings bank. Said paper, continuing, guarantees said purchasers, on the resumption of business by said savings bank, under its present or any new name, against any debts now existing against said bank; each signer limiting his guaranty to his *pro rata* share of the stock transferred, without stating what that share was. After this purchase and transfer the stockholders of the Merchants' Insurance Company, to the amount of \$200,000, (that being the full amount of its capital stock,) subscribed to \$200,000 of stock in the Bank of Commerce, to which name, as we have seen, the bank had been in the mean time changed, and paid for the latter subscription all of the assets of the insurance company, consisting of notes, securities, etc., estimated as actually worth 85 cents on the dollar, and paid in the remaining 15 per cent. in cash; each stockholder subscribing for the exact amount in the bank that he had in the insurance company,—the latter stock having been placed in the hands of Parker, the secretary, to be canceled; and, upon the cancellation of this stock, certificates of stock in the bank were issued to the subscriber. With the \$200,000 of new capital thus subscribed and thus paid in, the bank regularly organized, and has continued business from that time to the present. For the complainant it is urged that the transaction just detailed was a merger of the bank into the insurance company, or was a sale by the bank of all of its stock to the Merchants' Insurance Company, for the pur-

pose of carrying to the latter its corporate entity and franchises, to enable the insurance company to control the organization, and to become a bank; and that the mere interposition of the directors, as trustees, to hold the stock, does not change the effect. The legal proposition advanced is sound. There is no doubt but that the insurance company had no power to purchase, and the bank no power to sell, so as to vest all the stock and franchises of the latter in the former; there being no express authority to do so in either charter, nor by any additional legislative grant or provision. *Green's Brice, Ultra Vires*, 116; *Cook, Stocks*, §§ 60, 315-317. And it is equally true that, if the purchase was by the one corporation for the purpose of controlling or absorbing the other, the mere interposition of the directors or trustees would not validate the transaction. *Railroad Co. v. Railroad Co.*, 31 N. J. Eq. 475. But, in our view of the facts, a case is not made out for the application of the law advanced. Counsel seem to assume that the trustees were such for the insurance company, when the paper itself shows that McDavitt and others, to whom the sale and transfer was made, were trustees for the stockholders of the insurance company, and not for the corporation. We know of no principle of law that would prevent the stockholders in an insurance company from becoming, at the same time, stockholders in a bank, even where the same stockholders own all the stock in the two corporations. Now, this record fails to show any effort or purpose on the part of the one corporation to absorb or manage the affairs of the other; but everything that was done was by individuals, as such, and in good faith. A number of gentlemen who are stockholders in an insurance company purchase all the stock in a suspended bank, having a charter which it is thought confers very valuable franchises, and conclude that the \$200,000 they have in the insurance company can be used to their greater individual profit if invested in the bank. They thereupon subscribe this amount to stock in the bank, and wind up the business of the insurance company, using their respective assets in the latter for the purpose of paying their subscriptions to the former; and, as the actual value of these assets only pay 85 per cent. of their respective subscriptions, they pay the balance in cash. We can see no legal obstacle to such a consummation. So that, if the Savings Bank of Memphis had a valid corporate existence at the time of its failure, in October, 1872, there was nothing to prevent its stock from being sold in January, 1873, to McDavitt and his associates, nor to prevent the purchaser from making good the impaired capital, and increasing the amount thereof, (provided under the original charter there was a right to increase,) and resuming business. The mere insolvency of a corporation will not work a dissolution, nor will the assignment of all of its property, nor the appointment of a receiver, extinguish the franchises with which the company has been invested, where there have been no proceedings for forfeiture inaugurated by the state, nor a surrender by act of the shareholders. *Coburn v. Manufacturing Co.*, 10 Gray, 245; *Brinkerhoff v. Brown*, 7 Johns. Ch. 217. We hold, therefore, that there has been an acceptance of the charter as granted in 1856; that there has been corporate organization and succession; and that the defendant company is a duly organized banking institution, with all the powers, privileges, and immunities possessed by the Chattanooga Savings Institution under the charter of 1856.

In addition to what has already been said, as the basis of the conclusions reached as to organization and succession, it should be remarked that most, if not all, of the criticism made by counsel for complainant, upon the defect in the proof as to such organization and succession, is met by the legal effect of the repeated legislative recognition of this corporation by the several acts to which we have referred. Well-considered cases have gone so far as to hold that, when the existence of a corporation has been recognized by acts of the legislature, all inquiry into the original creation of the corporation is precluded. *Society v. Pawlet*, 4 Pet. 480; *In re Railroad Co.*, 70 N. Y. 338.

Again, it becomes by such recognition *ipso facto* a legal corporation, and any defect or irregularity in the proceedings required by law to be taken for its organization will be deemed to have been waived. *Railroad Co. v. Barnard*, 81 Barb. 258; *Railroad Co. v. St. Louis*, 66 Mo. 228; *Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 396; in which last case it is said by Judge COOPER that, "after repeated recognitions of the existence of a turnpike corporation up to and inclusive of the last legislature, a collateral impeachment of its existence, based on pre-existing facts, cannot be entertained." See, also, 1 Wat. Corp. § 42. Of course, we do not mean to be understood as placing any stress upon the legislative recognition by the act of March 12, 1873, as aiding in the conclusion that there is a valid corporate existence of the Bank of Commerce to-day; for it is manifest that, if the savings bank had no valid existence prior to 1870, it could acquire none by legislative act since the constitution of 1870, which provides that "no corporation shall be created, or its powers increased or diminished, by special laws." But the change of name, by special act, of an existing corporation, does not fall within the inhibition of the constitutional provision referred to; as such change of name does not involve in any sense a creation of a corporation, nor the increase or diminution of corporate powers. *Wallace v. Loomis*, 97 U. S. 146; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. Rep. 886. The Bank of Commerce, therefore, with a valid organization and succession, possessed the franchises, including the exemption from all other taxes, except one-half of 1 per cent. upon its capital stock, to the same extent, no more and no less, than was possessed by the Chattanooga Savings Institution under the original charter.

The question, much discussed at the bar, as to the increase of the capital stock, in which it is insisted, on behalf of the complainant, that the second section of the charter limits the amount of capital to 200 shares of \$50 each, or, if mistaken in this, that it can only be increased by deposits being converted into stock, under the privilege given to depositors in section 4 of the charter, or, if mistaken in this, that, when once fixed by the corporation, it cannot be increased for want of express power in the charter to increase amount of capital; and finally that, if wrong in this, the stock cannot, since the constitution of 1870, prohibiting exemptions from taxation, be increased beyond the amount issued prior thereto,—the insistence on behalf of the defendant being that the 200 shares named in the second section is a minimum and not a maximum designation, and that, there being no maximum, the stock can be increased, from time to time, by the corporation, as the necessities of its business may reasonably require, after, as well as before, 1870. The acceptance of the charter, with no fixed limit upon its stock, constituting a contract, the obligation of which cannot be impaired by constitutional provision, any more than by legislative enactment,—these questions, we say, are not necessary to be determined, in the view we have taken of the case, under the state of the pleadings.

The bill charges, and the proof shows, that the assessment upon which the tax is now sought to be collected was against the bank, and upon the capital thereof. No recovery can be had upon such an assessment, since the act of 1873, carried into Thomp. & S. Code, § 541c, which provides that "no tax shall hereafter be assessed upon the capital of any bank or banking association, * * * organized under the authority of this state, or of the United States, but the stockholders in such banks * * * shall be assessed and taxed on the value of their shares of stock therein," etc. So that this bill must fail, so far as the same seeks to recover taxes upon the capital stock, whether the amount of the capital stock be \$10,000 or \$200,000, when we adjudge that the defendant bank is duly organized, as the successor of the Chattanooga Savings Institution, none of the stockholders being sued.

It is ingeniously sought to evade the effect of this statute by the charge that, the bank having no charter authorizing its present organization, all so-

called stock is void as such, or that, if it were entitled to only \$10,000 of stock, all in excess of that amount is void, and becomes so much money or property or capital embarked in a private enterprise, by individuals who assume to act under a corporate name, and, as such, is taxable; to all of which the answer is obvious: *First*. To the extent of the minimum amount of stock, in any event, we have held the charter valid and organization perfect. *Second*. As to unauthorized excess of stock, if it be unauthorized, it cannot be reached by this bill, for the twofold reason that the assessment, which is the cause of action here, is not against the individual owners of such surplus, and, if it were an assessment against them individually, none of them are parties to this suit. So that in no event can there be any recovery here for taxes claimed to be due on the capital stock of the bank.

But the inquiry remains, can the real estate of the bank be subjected to taxation for the years stated in the bill? The question was practically answered when we held the defendant was duly organized as the successor of the Chattanooga Savings Institution, with whatever exemptions and privileges were possessed by that institution; for we find, under section 4 of the charter, such real estate as is necessary for a suitable place of business may be purchased and held by the bank, and upon well-settled authority the provision that the bank "shall pay annually one-half of 1 per cent. on each share of its capital stock, which shall be in lieu of all other taxes," operates to exempt so much of the real estate owned by it as is actually used for the purpose of its banking business. Indeed, the identical question is so held in the case of *Bank v. McGowan*, 6 Lea, 708; affirmed in 104 U. S. 494. See, also, *Bank v. Memphis*, 6 Baxt. 415. The record shows that the bank has paid all taxes on so much of said real estate as is not actually used by it in the conduct of its business as a banking house. Without reference to other questions that have been discussed by counsel, and without further elaboration, the decree of the chancellor, dismissing the bill at complainant's cost, will be affirmed.

TURNER, C. J., is of opinion that the transfer to McDavitt and his associates by Wicks and others is invalid, and considers the real estate, therefore, taxable. In other respects he concurs with the opinion of the majority.

CURRY v. WRIGHT *et al.*

(*Supreme Court of Tennessee. May 17, 1888.*)

BONDS—CONSTRUCTION—OFFICER DE FACTO.

Under Code Tenn. § 8491, providing that upon judgment of vester against an officer *de facto*, at the suit of the officer *de jure*, the latter may recover of the former such damages as he may have sustained by reason of his wrongful act, and section 854, which provides that the bond of a sheriff shall be conditioned to " * * * pay all fees and sums of money by him received to the person entitled thereto, and for the faithful execution of his office of sheriff, the sureties on the official bond of a sheriff *de facto*, against whom such judgment has been rendered, are not liable for such damages.

Appeal from chancery court, Shelby county; W. W. McDOWELL, Chancellor.

Bill in chancery by A. P. Curry against Marcus J. Wright and the sureties on his official bond for the fees and emoluments of the office of sheriff, to which the plaintiff had been duly elected, but which had been usurped by said Wright. Judgment against the principal and sureties for \$50,000, the penalty of the bond; from which J. S. Bailey, one of the sureties, appealed.

Turley & Wright, for appellant. *W. M. Randolph*, for appellee.

LURTON, J. This case is here upon the appeal of J. S. Bailey, one of the sureties upon two of the official bonds executed by M. J. Wright, while sheriff. 8s.w.no.7—38

iff *de facto* of Shelby county, and against whom a judgment has been rendered for \$50,000 in favor of A. P. Curry, who was wrongfully deprived of the office by the intrusion of Wright. This judgment is for damages alleged to have been sustained by the exclusion of the *de jure* officer from the office to which this court at a former term held him to have been lawfully elected. *State v. Wright*, 10 Hiesk. 237. The controversy is as to whether the sureties on the official bond of an officer *de facto* are liable to the officer *de jure*, upon his recovery of the office, for the fees, salary, or other emoluments of the office which were received by the intruder while exercising the functions of the office. At the common law the remedy against a usurper of an office seems to have been by a proceeding called "assise," and the suit to have been sustained by analogy to proceedings for the recovery of possession of lands. Bac. Abr. "Assise," "Office." As remarked by CAMPBELL, J.: "So far as this analogy holds, it would not permit any deduction from the recovery of damages based on personal services of the disseizor, or on the outside profits of the disseizee." *People v. Miller*, 24 Mich. 458. The books are full of cases involving the question of the damages which the excluded officer may recover from the intruder. These cases have all been either actions to recover from the municipality the salary withheld during such exclusion, or to recover damages from the usurper for such wrongful exclusion, and in all such cases the controversy has been as to the measure of damages. *People v. Miller*, 24 Mich. 458, 9 Amer. Rep. 131; *U. S. v. Addison*, 6 Wall. 291; *Fitzsimmons v. City of Brooklyn*, 102, N. Y. 536, 7 N. E. Rep. 787; *Mayfield v. Moore*, 53 Ill. 423, 5 Amer. Rep. 52.

In the case of *U. S. v. Addison*, the contested office being that of mayor of Georgetown, D. C., it was held that the measure of damages was the salary received by the defendant during his occupancy of the office; and that in such a case there should be no deduction by reason of the failure of the plaintiff to seek other employment while excluded. So, in the case of *People v. Miller*, the *de jure* county treasurer was held entitled to recover the gross salary paid to the intruder, all expenses of the office having been paid by the county. In the case of *Mayfield v. Moore* it was held that the measure of damages was the fees and emoluments of the office received by the intruder, after deducting reasonable expenses in earning them. This was a contested sheriff's case. The court, as to the measure of damages, saying: "This being an equitable action, it should be governed, in this respect, by the same rules that would obtain had this been a bill for an account, instead of an action for money had and received. He should have only a reasonable allowance for the necessary expenses in earning the fees and emoluments. Had he intruded without pretense of legal right, then a different rule would no doubt have been applied." This court, upon a former hearing of this case, upon the appeal of Curry fixing basis of account, declined to lay down any rule as to the measure of damages in such cases; only deciding that certain fees earned by Wright, but uncollected by him, could be recovered from the clerks in whose hands they were, claiming to hold them under assignments made *pendente lite* by Wright, and without consideration. This decision, limited to the facts of the case, was doubtless correct; for such uncollected fees could be treated as salary unpaid to the intruder, and such salary and such uncollected fees would, in either case, belong to the officer *de jure*, and could be recovered as part of the damages due to him. A careful review of the cases leads to the conclusion that whether the action be for the recovery of specific salary due and uncollected by the usurper, as fees earned and unappropriated, as for damages *eo nomine*, the action is but an action for damages, and is a personal action against the intruder. Curry recovered the office from Wright under the Code provisions, which expressly authorize an action for damages after recovery of the office. Code, 3409 *et seq.* Section 3421 provides: "Such claimant in this court (recovery of officer) may also, at any time within one year thereafter,

bring suit against the defendant, and recover the damages he has sustained by reason of the act of the defendant."

Are the sureties upon the official bond of the *de facto* officer responsible for such damages as are contemplated by this section? We think not. But whether the action be for damages, or for money had and received, can the bond be made liable by changing the form of action? We think not. The bond of the sheriff is conditioned as follows: "Well and truly to execute and due return make of all process to him directed, and to pay all fees and sums of money by him received, or levied by virtue of any process, into the proper office, or to the person entitled, and faithfully to execute the office of sheriff, and perform its duties and functions during his continuance therein." Code, 354. The requirement that he shall pay all fees by him received into the proper office, or to the person entitled, clearly applies to fees collected for other officers, and it could not have been in contemplation of the legislature to make the sureties liable for fees earned by a *de facto* officer to the rightful officer, or that this was an undertaking binding them to guaranty the validity of the title of their principal to the office he was exercising. As to the general public, an intruder under color of title is a *de facto* officer, and to this class the bond is liable, as much so as if he was an officer *de jure*. Third persons have a right to look to the bond of the *de facto* officer for their protection, but, if such a bond is responsible to the excluded officer for the gross income of the office, it will afford little security to third persons. The claimant may generally secure himself against an insolvent intruder by injunction, or by such steps as will compel him to give a bond to cover damages by his detention of the office, if held to be wrongful. This was done in this very case, and Wright was enjoined from exercising the functions of the office except upon giving a special bond, which was done. But the effort now is to reach the sureties on the official bond in addition to those on the bond given upon dissolution of Curry's injunction. This bond seems then to have been regarded as sufficient in terms and amount. If not, steps could have been taken for its increase. The insufficiency furnishes no reason for resort to the official bond. We think they are not liable. No such responsibility is imposed by the terms of the bond, as fairly inferable therefrom. No case can be found where the excluded party has sought to hold the sureties upon the official bond of the *de facto* officer liable for damages for such wrongful detention as for fees collected for services rendered by such intruder. This affords a strong presumption that there is no such liability.

The judgment against Bailey must be reversed, and bill dismissed as to him.

BROOKS v. PEGG.

(Supreme Court of Texas. May 22, 1888.)

1. PLEADING—REPLY—WHEN UNNECESSARY.

Under Rev. St. Tex. art. 1197, which provides that any special matter of defense pleaded by defendant shall be regarded as denied unless expressly admitted, where the coverture of a female defendant is pleaded, the fact is in issue without a general denial.

2. TRIAL—BY COURT—WHEN PROPER.

Where neither party demands a jury trial, it is the duty of the court to hear the evidence, and determine the facts as well as the law.

3. APPEAL—REVIEW—OBJECTIONS WAIVED—DEPOSITION.

A defendant who was not present at the trial, either in person or by attorney, cannot, on appeal, object to the suppression of a deposition at the trial on motion of plaintiff.

Error from district court, Bexar county.

This was an action on account, brought by John Pegg against Mrs. E. J. Brooks. Judgment for plaintiff, and defendant brings error. Rev. St. Tex.

art. 1197, is as follows: "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted."

W. H. Brooker, for plaintiff in error.

GAINES, J. Defendant in error brought this suit against plaintiff in error in a justice's court of Bexar county. The plaintiff having obtained judgment before the justice, the defendant appealed to the district court, where judgment was again rendered against her. She brings a writ of error to this court. There are five assignments of error; but, there being neither a statement of facts nor bills of exception in the record, the grounds relied on by counsel for a reversal of the judgment are such as cannot, in our opinion, be sustained. We will briefly notice the points which are presented. The defendant pleaded that she was a *feme covert* and could not be sued without her husband's being joined. The plea was insufficient in not stating the name of her husband so as to give the plaintiff a better writ. It was not excepted to, and we must therefore treat it as a good plea. But, on the other hand, the fact of coverture is not "expressly admitted in the plaintiff's pleading," and hence is put in issue under the statute without a general denial, (Rev. St. art. 1197,) and, in the absence of a statement of facts, it must be presumed that the allegations of the plea were not proved upon the trial. The second assignment is that the court erred "in sustaining the plaintiff's counter-motion or showing to defendant's plea of coverture," etc. We find in the record no such ruling as is here complained of. The third assignment is to the effect that the court erred in suppressing the deposition of defendant. The judgment does show that a motion to suppress the deposition was sustained, but this was not excepted to. In fact, the judgment shows that, upon the trial in the district court, no appearance was made for the defendant. She could not have been prejudiced by the action of the court, because she was not present upon the trial, either in person or by attorney, to offer the deposition in evidence, even if it had not been suppressed. The fourth assignment is that the court erred in giving judgment without the intervention of the jury. The answer to this is that neither party demanded a jury, and it was therefore the duty of the court to hear the evidence, and determine the facts as well as the law. The court correctly allowed interest on the account from the 1st day of January next after it accrued. The fifth assignment of error presents the same question of coverture which was raised by the first, and need not be separately considered. If injustice has been done the defendant in the court below, it is not made manifest by the record, and this court can afford her no relief. The judgment is therefore affirmed.

BUMPAS et al. v. MORRISON.

(Supreme Court of Texas. May 25, 1888.)

1. JUDGMENT—BY DEFAULT—ASSESSMENT OF DAMAGES—JURY TRIAL.

Where a judgment by default was taken in an action involving unliquidated damages, and the record failed to show that defendant demanded a jury, and deposited the proper fee, a jury was properly refused, and the court properly assessed the damages.

2. MORTGAGES—EQUITABLE—FORECLOSURE—EVIDENCE.

Appellee, in a deed to appellants of certain property, retained a lien to secure him against expenses that might be incurred in defending the title of other property conveyed to him by appellants. *Held*, that parol testimony as to the anticipation by the parties of a suit in reference to that title, and the expenses incurred in defending it, was admissible in suit to foreclose the lien.

3. SEQUESTRATION—CLAIM FOR RENT OF LAND SEQUESTERED—PLEADING.

When, upon suit to foreclose a lien on land, the land is sequestered, and not replevied by defendants, the latter cannot at the trial prove the rental value of the lot during the time it has been sequestered, with a view to recover rent therefor, when they have set up no claim for such rent in their pleadings.

4. EXECUTION—ISSUANCE AND VALIDITY—TERM OF COURT.

Where the judgment did not authorize process for its enforcement to issue sooner than permitted by law, execution was properly taken out before the adjournment of the court.

5. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS.

Where a motion for a new trial sets forth many grounds for granting a new trial, an assignment of error that the court erred in overruling the motion is too general to be considered.

Appeal from district court, Dallas county.

Action by Hiram Morrison against R. E. Bumpas and others. Judgment for plaintiff, and defendants appeal. Judgment was rendered, and motion for new trial overruled, and exceptions taken, and appeal prayed on December 15, 1885. Execution was issued in February, and the court adjourned March 6, 1886. Appellants' fifth assignment of error was as follows: "The court erred in permitting plaintiff to issue execution in February, when the term of court did not expire until March 6th."

M. T. Connor, for appellants. *Watts & Wood*, for appellee.

STAYTON, C. J. On July 1, 1884, appellants conveyed to the appellee certain property in the city of Dallas in consideration of a sum of money sufficient to discharge a lien on the property which was about to be foreclosed, and in further consideration of the sum of \$300, which was paid by the conveyance of another lot by appellee to appellants. The price agreed upon for the lot last referred to was \$500, and to secure the payment of \$200 of this, which was not paid in the exchange of property, the notes sued on in this case were executed. The deed by which the appellee conveyed the lots to appellants reserved a lien to secure the unpaid purchase money, and it contained this further provision: "Said Morrison has herein retained a lien on the property above described to secure and protect him against all loss or damages that may accrue against any and all claims that may ever come against the property this day deeded by said R. E. Bumpas and wife to H. Morrison, or for or on account of John Caldwell, or from any other source." It was shown by parol testimony that John Caldwell asserted a claim to the property conveyed by appellants to appellee at the time the respective conveyances were made; that it was expected he would institute an action to recover it; and that the clause in the deed from appellee to appellants, above set out, was inserted under the agreement of the parties in order to secure appellee against expenses he might be compelled to incur in defending an action to be brought by Caldwell. Caldwell brought an action to recover the property conveyed by appellants to appellee, and in its defense the latter was compelled to pay attorney's fees and other costs. Appellee seeks to recover the sum due on the two notes executed by appellants to secure the balance of the purchase money for the lot conveyed by him to them, to recover the sum paid in defense of the action brought by Caldwell, and to establish and foreclose a lien on the property conveyed by him to appellants to enforce the payment of all these claims. There was a judgment by default against defendants, and an assessment of damages by the court without a jury, when a judgment was rendered for appellee for the sum due on the purchase-money notes, and for a part only of the reasonable and necessary expenses shown to have been incurred by appellee in defending the action brought by Caldwell. The judgment also declared and directed to be enforced a lien on the property conveyed by appellee to appellants to secure the entire sum thus adjudged to the appellee.

The first assignment of error is that the court erred in overruling a motion for new trial, which set forth many grounds on which a new trial was asked. This assignment is too general to require consideration. The second assignment urged that the court erred in refusing to impanel a jury to assess damages. If appellants desired a jury for this purpose, they should have de-

manded it, and have deposited the proper fee. This is not shown to have been done, and in such case the damages were properly assessed by the court. There was no error in admitting the parol evidence introduced in reference to the anticipation by the parties of a suit by Caldwell for the property conveyed by appellants to appellee, and as to the necessary expenses incurred by the appellee in the defense of that suit. The deed executed by the appellee to appellants shows clearly the intention of the parties that the former should have the right to subject the property by him conveyed to sale, in satisfaction of such sum as he might be compelled to expend in defense of his title to the property conveyed to him by appellants. This right was evidenced by writing which, though somewhat informal, left no doubt as to the agreement and intention of the parties. The lot on which a lien was claimed was sequestered, and seems not to have been replevied. On the execution of the writ of inquiry, the appellants proposed to prove the value of the rent of the lot from the time sequestered until the trial, with a view to recover rent therefor, but the evidence was objected to and excluded. The grounds of objection are not shown, but there were no pleadings setting up such a claim, and for this reason the evidence would have been properly excluded. If the owner of property on which there is a lien so acts as to render it necessary for the lienholder, in order to protect himself, to sequester it, we do not see that he would be entitled to rents. Such an owner may retain the possession of the property by giving the security required by the statute, or he might recover damages in case of a wrongful sequestration; but to entitle such a person to compensation for injury resulting from even a wrongful sequestration, there must be some pleading to authorize the introduction of evidence. The judgment did not authorize process for its enforcement to issue sooner than permitted by law, and the fifth assignment presents nothing for revision. There is no error in the judgment, and it will be affirmed.

MASON v. STAPPER.

(Supreme Court of Texas. May 25, 1883.)

1. APPEAL—PRACTICE—ASSIGNMENTS OF ERROR.

An assignment in error setting out that "the judgment of the court is contrary to the law of the case, and not supported by the law arising from the facts proved," is too general in its nature, and, in the absence of a more specific designation of the grounds relied upon to show the insufficiency of the evidence in support of plaintiff's case, does not warrant the court in searching the record for errors.

2. LIMITATION OF ACTIONS—ADVERSE POSSESSION.

When two persons claim under conflicting surveys, the defendant under a junior grant cannot set up his title by the plea of limitation, unless he can show actual occupancy of some portion of the strip in conflict, and the mere herding of sheep from time to time thereon is not such occupancy.¹

Appeal from district court, Bexar county.

Action of trespass to try title to a certain tract of land, brought by Julian Stapper against Henry Mason. Judgment for plaintiff. Defendant appeals. *T. G. Pray*, for appellant. *Minter & Altgelt*, for appellees.

GAINES, J. This suit grows out of a conflict between the Carderas and the Peasley surveys. The appellee was the plaintiff in the court below, and claims under the Carderas patent, which is the older grant. The appellant claims title under the Peasley. The first and third assignments of error are as fol-

¹As to what constitutes adverse possession, see *McLaughlin v. Del Be*, (Cal.) 16 Pac. Rep. 881, and note; *Martin v. Niblett*, (Tenn.) 7 S. W. Rep. 123; *House v. Brent*, (Tex.) Id. 65; *Bozeman v. Bozeman*, (Ala.) 8 South. Rep. 784; *Craig v. Walker*, (Ky.) 7 S. W. Rep. 540; *Frick v. Simon*, (Cal.) 17 Pac. Rep. 439; *Mills v. Penny*, (Iowa,) 37 N. W. Rep. 135; *Bridges v. Johnson*, (Tex.) 7 S. W. Rep. 506; *Duff v. Leary*, (Mass.) 16 N. E. Rep. 417; *Degman v. Elliott*, (Ky.) 8 S. W. Rep. 10; *Oglesby v. Hollister*, (Cal.) 18 Pac. Rep. 146; *Fuller v. Dauphin*, (Ill.) 16 N. E. Rep. 917.

lows: *First*. The judgment of the court is contrary to the law of the case, and not supported or warranted by the law arising upon the facts proved. *Third*. The court erred in giving judgment for the plaintiff, and in not giving judgment for the defendant, on the facts proved, and the law arising therefrom. It is objected that these assignments are too general, and the objection is well taken. Without a more specific designation of the grounds relied upon to show the insufficiency of the evidence in support of the plaintiff's case, we are neither required nor permitted to search the record for errors. It is enough to say that there is sufficient evidence in support of the judgment to show that it is not fundamentally erroneous. We take it, therefore, that the plaintiff established his title to the land in controversy under the older grant, and was entitled to recover, unless barred by the statute of limitations.

The third assignment of error is more specific, and properly presents the question of the sufficiency of the evidence to establish the defense of limitation of three years. The Peasley survey, under which defendant claimed, it seems, actually embraced the land in controversy. The defendant bought in June, 1879. He testified that immediately after his purchase he "moved on said land so purchased, and erected dwellings, barns, and other improvements on the east end of the same, * * * and has remained in possession of such premises continuously and undisturbed by any body or thing to this time, save the commencement of this suit, February 1, 1885. That he herded his sheep from time to time, since he moved onto said purchase, on the portion in controversy, and has done no other act of actual occupancy on that portion, save that he commenced to fence the same, and was engaged in building a post and wire fence around the same, when this suit was commenced." The plaintiff occupied this survey for the first time in 1883, but his occupancy did not even then extend to the disputed strip. The defendant's deed, and the patent under which he claims by consecutive transfer, extending over the land in controversy, it may be that he has such color of title from the sovereignty of the soil as will support the plea of the statute of limitations, provided that he has shown possession, either actual or constructive, of the premises in controversy. But in our opinion his testimony shows actual possession of no part of the disputed land, and the principle applicable to the case is that, in case of a conflict of surveys, the possession of the claimant under the junior grant extends only to the limits to which he has the lawful title, unless he have an actual occupancy of some portion of the strip in conflict. This is expressly held in *Peyton v. Barton*, 53 Tex. 298, and the doctrine has been repeatedly reaffirmed in subsequent decisions by this court. The mere herding of sheep upon the land "from time to time" is not such possession as will set in operation the statute of limitations.

We find no error in the judgment, and it is affirmed.

BROWN v. ABILENE NAT. BANK.

(*Supreme Court of Texas. May 26, 1886.*)

CONTINUANCE—APPLICATION FOR—DILIGENCE.

Under Rev. St. Tex. art. 1277, providing that an applicant for continuance for want of testimony shall state "that he has used due diligence to procure the same, stating such diligence," such an application, which does not show when the subpoenas for the absent witnesses were placed in the hands of an officer for service, or when they were served, is properly refused.

Appeal from district court, Taylor county.

Wray & Stanley, for appellant. *Spoons & Leggett*, for appellee.

STAYTON, C. J. On January 25, 1886, the Abilene National Bank brought an action against B. M. Daugherty on several promissory notes, and sued out

a writ of attachment that was levied on property belonging to Daugherty. On March 9, 1886, the appellant filed a plea in intervention, in which he alleged that he had also brought an action against Daugherty, and caused a writ of attachment to be levied on the property, which the appellee had first caused to be attached. The intervenor set up several grounds on which he claimed that precedence should be given to the lien acquired through the attachment sued out by him. On March 12, 1886, a judgment was rendered in favor of the appellee against Daugherty, whereby the attachment lien was foreclosed, and the proceeds of the attached property, the same having been sold and deposited with the clerk, was directed to be paid to the appellee. By that judgment no disposition of the intervention was made. On April 2, 1886, the appellee announced ready for trial on the matters set up in the intervention, and the intervenor made an application for continuance, which was by the court overruled, and a judgment was then rendered in favor of the appellee against the intervenor, who offered no evidence. The action of the court in refusing a continuance is assigned as error. The ruling of the court refusing a continuance was on the ground that the intervenor could not delay the appellee in the assertion and collection of his claim against Daugherty. In view of the grounds on which the continuance was sought, it is unnecessary to inquire whether an intervenor in any case is entitled to a continuance whereby a plaintiff will be delayed in the collection of a judgment against a defendant, or, if so entitled, to determine on what terms a continuance upon sufficient showing should be granted. The application for continuance was based on the absence of witnesses, and it showed that subpoenas for them were obtained by the intervenor on the day that he filed his pleadings in intervention, but it did not show when they were placed in the hands of an officer for service. It showed that the witnesses had been served, but did not state when they were summoned. When a first application for a continuance is sought by one entitled to ask it for the want of testimony, the statute requires that such applicant shall state "that he has used due diligence to procure the same, stating such diligence." Rev. St. art. 1277. No such statements are found in the application, which was verbal, and is contained in a bill of exceptions. On an application for a continuance, a court will not assume a necessary fact to exist when the applicant fails or is unwilling to state its existence. Every fact stated in the application may be true, and still due diligence not have been used. The time when the subpoenas were served on the witnesses should have been stated, in order that the court might determine whether this was such reasonable time before the trial as would enable the witnesses to be present. *Conner v. Sampson*, 22 Tex. 20; *Stanley v. Epperson*, 45 Tex. 650. No facts are shown by the application which can take this case out of the general rule. There was no error in overruling the application for continuance, and the judgment will be affirmed.

LOPER v. WESTERN UNION TEL. CO.

(Supreme Court of Texas. May 11, 1888.)

1. TELEGRAPH COMPANIES—LIABILITY FOR DELAY IN DELIVERING MESSAGE—PLEADING.

In an action against a telegraph company, plaintiff alleged that his wife's son, who was lying dangerously ill at M., in obedience to a special request previously made by plaintiff's wife, prepared for transmission to her, at W., a message dated October 2, 1882, reading: "Come immediately. I am very sick." That this message was delivered to the agent at M., at 4 p. m. of that date. That the agent was informed of the relationship between the parties. That on that day plaintiff and his wife were at their residence in W., within 600 yards of defendant's office, as was well known by the agent at that place. That the message could have been delivered within half an hour from the time of its receipt by the agent at M. That, if it had been so delivered, plaintiff's wife could have gone to her son by the usual course of travel, and reached him before his death, which occurred on the 3d. That, by the negligence of defendant, the message was not delivered until 6 p. m. on the 3d.

That she took the next train for M., but learned, at an intermediate point, that her son was dead, and that the body had been sent to E. for burial. That she started at once for E., but was unable to reach there until after the body had been interred. That she suffered great hardship and inconvenience in being compelled to travel on a freight train a part of the way, and that she suffered great mental anguish by being deprived of the privilege of being with her son in his last moments, etc. *Held*, that the petition stated a good cause of action, and that a demurrer thereto was improperly sustained.¹

2. SAME.

It being affirmatively alleged that, if the message had been promptly delivered, plaintiff's wife would have arrived before her son's burial, any subsequent default on the part of the railroad company in failing to make connections on the trip actually made, could not be urged in defense.

3. SAME.

Although the allegations in the petition in regard to the death and burial of the son may have been insufficient if specially excepted to, yet it appearing, by reasonable intendment, that he died about noon of October 3d, and had been buried when his mother arrived, the allegations must be treated as sufficient on general demurrer.

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—DAMAGES FOR MENTAL SUFFERING.

Damages accruing from a personal injury to the wife are community property; and for the mental suffering of the wife, as an element of such damages, a recovery may be had at the suit of the husband.

Error from district court, Eastland county.

This was an action by J. P. Loper against the Western Union Telegraph Company for damages for negligently delaying the delivery of a telegram to plaintiff's wife. A demurrer to the petition was sustained, and plaintiff brings error.

Davenport & Truly, for plaintiff in error. *Stemmons & Field*, for defendant in error.

GAINES, J. This is a writ of error to a judgment sustaining a general demurrer to plaintiff's petition. The main issuable facts in the case, as shown by the allegations in the petition, are that Mrs. S. J. Loper is the wife of the plaintiff. That M. A. Truly was her son, and that on the 2d of October, 1882, he was lying dangerously ill at the town of Mineral Wells, in Palo Pinto county. That plaintiff and his wife then resided at Whitesborough, in Grayson county. That on the day above named, "in obedience to a special request of Mrs. S. J. Loper theretofore of him made, and for the special information and guidance, the said M. A. Truly, assisted by others, to-wit, Dr. Fowler, D. W. Staton, Thos. Johnson, and others to the same end acting, prepared for transmission and delivery by defendant a message in writing of great importance and urgency to S. J. Loper, substantially as follows, to-wit: MINERAL WELLS, October 2, 1882. To Mrs. S. J. Loper, Whitesborough, Tex: Come immediately. I am very sick. M. A. TRULY. That the message was delivered to the agent of defendant at Mineral Wells at 4 P. M. on the day of its date, and was paid for. That the agent was informed of the relationship between the sender of the message and the person to whom it was addressed. That, on the 2d of October, plaintiff and his wife were at their residence in Whitesborough, which was within six hundred yards of the office of the defendant at that place. That this was well known to the agent at that point. That the message could have been delivered within half an hour from the time of its receipt by the company's agent at Mineral Wells. That, if it had been so delivered, Mrs. Loper would have gone to her son, and, by the usual course of travel, would have reached him by 2 P. M. the next day, and that, at all events, she could have reached Millsaps (an intermediate point on her route) about midnight on October 3d, and would there have met the funeral cortege with the dead body of her son." It is further alleged that, by reason of the negligence of defendant, the dispatch was not delivered until after 6 o'clock on the evening of the day last named: that she took the next train going to-

¹ See, also, *Wadsworth v. Telegraph Co.*, (Tenn.) *ante*, 574.

wards her destination, and did not arrive at Millsaps until the evening of October 4th, "when she learned that her son was dead, and had been carried to Eastland for burial, and that he had died at Mineral Wells about noon on the previous day." It is also averred that she telegraphed to Eastland to delay the burial, and immediately proceeded to that point, but failed to arrive until after the body had been interred. The petition also contains very full allegations as to the business of the company, the means of travel between Whitesborough and Mineral Wells, as to the hardship and inconvenience suffered by Mrs. Loper in being compelled to travel on a freight train during a part of the way in order to expedite her journey, and as to her mental sufferings caused by being deprived of the privilege of being with her son in his last moments, and of attending the burial of his body. Both actual and exemplary damages are claimed. The elements of actual damages alleged are cost of telegram, expenses of travel, impairment of health from hardships of travel, and mental suffering.

Upon what ground the court sustained the demurrer to the petition the record does not disclose. We are of the opinion that the facts alleged in the petition bring the case substantially within the rules announced by this court in the case of *Stuart v. Telegraph Co.*, 66 Tex. 580. The allegations first quoted above show that the parties who sent and paid for the message acted at the instance and request of plaintiff's wife, and for her benefit. This shows a contract on her part with the company. They also show that the relationship between the sender and the addressee was made known to the messenger, and that he was informed that the message was urgent and important; that there was a negligent failure to deliver it promptly; and that, by reason of this, she was deprived of the consolation, at least, of attending the burial of her son, and that in consequence she suffered great mental distress. The *Stuart Case* was very carefully considered, and the previous decisions of the court were fully reviewed. The opinion therein delivered must be held the law of this court upon the questions there decided. It follows that the ruling of the court below cannot be sustained, unless we should hold that plaintiff cannot recover for the damages which have resulted to the wife. It is held that damages accruing from a personal injury to the wife are community property, (*Ezell v. Dodson*, 60 Tex. 331,) and that for the mental suffering of the wife, as an element of such damages, a recovery may be had at the suit of the husband, (*Gallagher v. Bowie*, 66 Tex. 265.) Appellee insists that the petition does not show that the damages which are sought to be recovered were contemplated by the parties at the time the message was received by the defendant's agent. But we think otherwise. It is alleged that the agent was informed that the addressee and the sender of the dispatch were mother and son. The summons itself was urgent, and the face of the dispatch showed the sender was very sick. The agent might reasonably have anticipated that the son's life was in danger; and that, if the message was not delivered, the mother would suffer distress by being deprived of the consolation of seeing him in his last sickness, and of attending his burial. The message differs from that in the case of *Stuart v. Telegraph Co.*, *supra*, in form, but not in substance.

It is also insisted that it appears from the petition that the plaintiff's wife could have been at her son's burial but for the fault of the railroad, and that, therefore, the petition is insufficient. To this it must be answered that we think it is affirmatively shown that, if the message had been promptly delivered, the wife would have arrived before the burial; so that any subsequent default on part of the railroad company, in failing to make connections on the trip actually made, would not affect the case. The allegations in regard to the death and burial of the son are probably insufficient if a special exception had been interposed. They are quoted in the statement which is set forth in the opinion. The facts of the death and burial should have been directly

averred. We think, however, the reasonable intendment from the averments is that he died about noon on the 3d day of October, and had been buried when his mother arrived at Millsaps. We therefore conclude that these allegations are sufficient on general demurrer. *Burks v. Watson*, 48 Tex. 117.

Because of the error of the court in sustaining the demurrer to the petition, the judgment is reversed, and the cause remanded.

JENKINS v. ADAMS *et al.*

(*Supreme Court of Texas. May 25, 1888.*)

1. TRESPASS TO TRY TITLE—EVIDENCE—DEED DATED AFTER THE ALLEGED ENTRY.

In trespass to try title, a deed to plaintiffs bearing date after the entry alleged in the petition, but before the filing of the suit, is admissible in evidence.

2. TRIAL—OBJECTIONS TO EVIDENCE—FILING DEEDS—WAIVER.

Where deeds offered in evidence had been exhibited to counsel for the adverse party at a former term, and examined by him, under a parol agreement that they need not be filed in the case, he cannot object to their introduction on the ground of failure to file them before the trial, and to give notice of such filing.

3. VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE OF RECORDS.

Where the records disclosed a conveyance and also a deed of trust by the owner of land, which were followed by conveyances by the grantees in one, and trustee in the other, a subsequent purchaser from the administrator of such owner is affected with notice of whatever defect in his title was caused by such instruments.

Appeal from district court, San Saba county.

Action of trespass to try title, by Adams and Wickes against J. Jenkins. Judgment for plaintiffs, and defendant appeals.

S. H. Lumpkin, for appellant. *Burleson & Harris*, for appellees.

WALKER, J. This is an action of trespass to try title, filed November 6, 1885, by appellees against Jenkins for two surveys of 160 acres, each patented together to J. De Cordova, assignee of Carl Linke. On the trial, plaintiffs read in evidence patent to De Cordova, and a conveyance, in form a warranty deed, acknowledging the payment of the purchase money by De Cordova to Victor Considerant, of date January 9, 1856, and duly recorded same day in Bexar county, of which San Saba then formed a part. San Saba county was organized June, 1856. Plaintiffs then read a quitclaim deed from Considerant, for nominal consideration, to the plaintiffs, of date August 17, 1885. The court did not err in overruling objection to this deed because it bore date subsequent to the alleged entry charged in the petition. The deed bore date before the filing of the suit.

The defendant then read in evidence an unrecorded document, of date January 19, 1856, proving its execution by Considerant, acknowledging that the deed of 9th January was a mortgage. Defendant then read in evidence a deed from one Harris, of date March 22, 1883, to defendant, for 160 acres of the Zinke land. Harris, in the deed, acted as administrator of estate of J. De Cordova, who was shown to have died in 1868, and as trustee. The defendant offered, in this connection, certificate that Harris was administrator, and appointed by probate court of Bosque county; copies of order of sale, sale, and confirmation of sale of 160 acres of the Linke surveys to Reed, and of 160 acres to C. V. Glenn; and trust deeds to Harris, as administrator, by Reed and by Glenn, authorizing Harris to sell the lands in default of payment of the purchase money. These were excluded on objections by the plaintiffs. There appears some variance between the description of the lands sold by Harris and the lands described in the petition and as described in the patent. This variance will not be passed upon. The trial was before the court without a jury, and the entire testimony can be considered here. Jenkins then testified that he had paid Harris the purchase money, and that, when he bought, he had no notice of the title or claim of plaintiffs, and thought he was

buying a good title. Defendant also read in evidence a deed of trust signed by J. De Cordova, grantor, Victor Considerant as beneficiary, and F. Gilbean, trustee, made December, 1856, to secure a note by De Cordova to Considerant, recorded in Bexar county, and again recorded in San Saba county, May 27, 1882. This was produced by plaintiffs on notice from the defendant. It was offered by defendant to show the fact of mortgage subsequent to the deed of January 9, 1856, but the court ruled that its introduction should be for all purposes for which it could be used. The plaintiffs, in rebuttal, then read in evidence deed by Gilbean, trustee, to Jos. B. Sweet for the land, recorded in Bexar county, and subsequently in San Saba county, May 8, 1886; also deed from Sweet to plaintiffs of date July 18, 1870, and recorded in San Saba county, June 16, 1871. This last recited the trust sale by Gilbean. These were objected to because they had not been included in the abstract of title filed by plaintiffs, and because not filed four days before the trial, with notice of filing. The abstract is not shown in the record. It was insisted by counsel for the plaintiffs that, by agreement between counsel at a former term of the court, filing had been waived; the deeds having been exhibited to and examined by counsel for defendant. The court, after hearing the statements of counsel, held that filing had been waived, and enforced the parol agreement. This the court had a right to do, and such action is not error. *Williams v. Huling*, 48 Tex. 120.

It is evident that as neither Reed nor Glenn paid the purchase money to Harris, that the condition of the records of deeds at the time of defendant's purchase, March 23, 1883, he having no actual knowledge of plaintiffs' title, must determine the rights of the litigants. Our courts have held that registry of a deed is notice only to one claiming under the grantor in the recorded deed. *Watson v. Chalk*, 11 Tex. 98. At defendant's purchase the records disclosed the deed by De Cordova to Considerant of January 9, 1856, and that in 1882 the conveyance by De Cordova to Gilbean for benefit of Considerant had been placed on record in San Saba county. Of these records, defendant was charged with notice. He was a junior purchaser of whatever right in the land was in the deceased, De Cordova, at his death. He bought subject to whatever defect in his title these conveyances made. These records imposed upon defendant the duty of inquiry, and he is chargeable with whatever he could have discovered upon inquiry. *Cordova v. Hood*, 17 Wall. 8, and cases cited. We are of opinion that defendant, under these facts, was not an innocent purchaser, and that he was chargeable with the want of title in De Cordova at his death. We find, therefore, no error in the judgment of the court, and it is affirmed.

LANGE v. CAROTHERS.

(Supreme Court of Texas. May 15, 1888.)

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—PROMISE TO PAY IF ABLE.

A conditional promise, in writing, to pay if ever the promisor is able, coupled with proof of such ability subsequent to the promise, is sufficient to take a case out of Rev. St. Tex. art. 3203, limiting actions for debt not evidenced by a contract in writing to two years, even if such ability is not a continuing one.¹

Appeal from district court, Milam county.

¹ As to what is sufficient to remove the bar of the statute, see *Jordan v. Jordan*, (Tenn.) 3 S. W. Rep. 896, and note; *Gartrell v. Linn*, (Ga.) 4 S. E. Rep. 918; *In re Kendrick*, (N. Y.) 13 N. E. Rep. 762; *Manchester v. Braender*, (N. Y.) 14 N. E. Rep. 405; *Auzerais v. Naglee*, (Cal.) 15 Pac. Rep. 371; *Appeal of Fox*, (Pa.) 11 Atl. Rep. 228; *Crane v. Abel*, (Mich.) 34 N. W. Rep. 658; *Hellman v. Kiene*, (Iowa,) 35 N. W. Rep. 516; *Hostetter v. Hollinger*, (Pa.) 12 Atl. Rep. 741; *Gover v. Chamberlain*, (Va.) 5 S. E. Rep. 174; *Croman v. Stull*, (Pa.) 12 Atl. Rep. 812; *Johnson v. Johnson*, (Ga.) 5 S. E. Rep. 629; *Meyer v. Andrews*, (Tex.) 7 S. W. Rep. 814; *Hargis v. Sewell's Adm'r*, (Ky.) 7 S. W. Rep. 557.

Heffley & Wallace, for appellant. *Ford & Ford*, for appellee.

WALKER, J. November 1, 1886, Lange sued Carothers upon an open account for merchandise made in 1881 for \$944.47. November 22, 1886, the case was tried before the judge. The account was proved as alleged. In order to take the account out of the statute of limitations, the plaintiff read in evidence the following letter: "THORNDALE, TEX., November 14, 1882. *Messrs. Focke, Wilkins & Lange, Galveston, Tex.*—GENTLEMEN: Yours of the 11th inst. to hand, and contents noted. In reply I can only say that I am not at present able to pay anything. I am not in any business at present, and in fact have done nothing to make any money since I was closed up. I have studied matters over thoroughly, and have concluded to make you this proposition: I have a suitable house, and in a good location for a country store, and in the center of my old customers, to whom I sold about \$1,000 to \$1,200 per month while I was in business before. A number of them have insisted on me trying to open up a small stock here, about six miles from Thorndale. Now, if you gentlemen see fit to investigate this matter, and if it should prove satisfactory, and you have a mind to furnish me \$1,000 worth of goods, and give me time, I can pay you up in 12 to 15 months. I will go into any kind of an agreement to make you secure. I will run the business in your name, or any other name that would be agreeable to yourselves or me, until you are paid, or satisfactory arrangements are made otherwise. I will agree, further, to deposit all proceeds of sales to your credit at the Rockdale Bank, subject to your drafts, reserving only the right to appropriate a small portion of the profits only,—say a salary for my individual expenses, as, of course, I must live. I could not expect to do much business for a short while; but, as soon as the thing got thoroughly advertised, I am sure I can sell a good many goods. The nearest stores are: One north, 6 miles, one south, 6 miles, Rockdale, 15 miles east, and Taylor, 16 miles west, of me. A good farming country all around me. For reference as to my character and habits, I give you Mr. J. W. Hamblin, W. F. Fokes, Mr. Wm. Bange; post-office, San Gabriel, Milam county, Tex. These gentlemen can also tell you what my prospects would be for a business here. I will also say that the Rockdale Bank folks can tell you the character of the above parties I have referred you to, as also can almost any of Rockdale merchants. I will also refer you to the firm of Hudson, Watson & Co., of Burnet, Burnet county, Tex. This is all the way I see to pay you any way soon, as I have literally nothing; and unless I can get up something of the kind I will be obliged soon to hire myself for a salary. Let me hear from you at once; and, of course, if the thing does not suit you, you have only to say so. I will, if I am ever able, pay you; but the prospects are gloomy now. I have been unfairly dealt with, or I would not now be in the position I am; and I am sorry to say my brother, who ought to have stood with me, has had as much to do with the matter as any one, and simply because I refused to be unjust to my creditors. However, you will credit this as you see fit any way; so it is of no use for me to enter into detailed explanation. But time will tell the story for itself. Respectfully, L. W. CAROTHERS." Carothers knew the nature and extent of his indebtedness to Lange at the time he wrote and delivered the letter, which was in answer to one demanding payment of the debt. In October, 1885, Carothers received in money at one time \$3,000 from McIlhenny Co., upon a compromise of a suit by him against McIlhenny Co. for damages for attaching his goods while doing business at Thorndale. Thirteen hundred dollars of the three thousand dollars was never paid over to him, but was retained as fees by his attorneys in the suit. Nine hundred dollars of the balance was paid for a house and lot in Cameron, a homestead; one hundred and sixty dollars for wagon and pair of horses; one hundred and sixty for purpose of bringing his mother, sister, and little son from Iowa to Texas. The balance he paid out upon debts due

for doctor bills, medicine, rents for house to live in, and family supplies; all incurred prior to receiving the money. He had paid out all the money before January 1, 1886, but \$25. Carothers is a widower, with five children, from five to seventeen years of age, a mother, and sister dependent upon him. The house and lot he bought to live in with his family, and he occupies it as a home. He is a carpenter, dependent upon his labor for support of himself and family. The wagon and horses are necessary assistance in carrying on his trade. He had no other means than as above stated, and owes no other debts. The account sued on was for merchandise sold him while in business, in 1881, at Thorndale; he having failed. The parties agree in the record that the only point to be decided by the court on appeal is whether the above letter of the defendant to plaintiff, and the facts above set out, will take the case out of the statute of limitations of two years. If they do, plaintiff to recover \$944.47.

The existence of the indebtedness as alleged upon account being shown, the words, "I will, if I am ever able, pay it," evidently refer to it, and constitute a conditional promise to pay it. To entitle plaintiff to recover, he was bound to allege and prove that defendant was or had been able to pay the account subsequent to the promise, and before suit. *Coles v. Kelsey*, 2 Tex. 544; *Mitchell v. Clay*, 8 Tex. 443; *Salinas v. Wright*, 11 Tex. 576; *Summerlin v. Reeves*, 29 Tex. 84; *Leigh v. Linthecum*, 80 Tex. 100; *Ex parte Towles*, 48 Tex. 420. In 1885, defendant received \$1,700, net proceeds of the damage suit. Deducting what was necessary to pay medical bills, house rent, and living expenses, he is shown to have had sufficient left to meet this account,—indeed, to have paid all his debts, and have several hundred dollars remaining. The condition named in this promise then existed. The plaintiff was not bound to show that Carothers kept up his ability to pay, or a continuing ability to pay, the debt. The right of action accrued, and it was not defeated by the subsequent appropriation of the money otherwise. His investment in a homestead and other exempt property could not destroy the legal effect his ability to pay had upon his promise in making it absolute.

The judgment should have been for plaintiff. It is reversed, and judgment is here rendered for plaintiff for \$944.47.

NYE *et al.* v. MOODY.

(Supreme Court of Texas. April 10, 1888.)

1. JUDGMENT—LIEN—RECORDING AND INDEXING.

Under Rev. St. Tex. arts. 3157, 3158, particularly providing for recording and indexing judgments, and article 3159, providing that, "when any judgment has been recorded and indexed as provided in the next preceding articles," it shall operate as a lien, a judgment is not a lien as against a deed recorded before the judgment is indexed.

2. DEED—DESCRIPTION—REFERENCE TO FIELD-NOTES.

A description as follows: "200 acres of the Chas. L. Harrison one-third league survey, on Wichita river, in Wichita county, Tex., to be run off by the surveyor of said county, fronting 475 varas on the river, and back for complement of 200 acres to be taken out of my half of said survey, and begin at the upper or lower corner, and run with the upper or lower line of my survey for complement. Field-notes to be attached to this deed by said surveyor, and become a part of this instrument," sufficiently identifies the interest conveyed.

3. SAME—FIELD-NOTES ATTACHED AFTER RECORDING.

In a deed to which field-notes were to be attached fixing the locality of the portion conveyed of a certain survey, the fact that the field-notes were added after the recording does not lessen its effect as a recorded instrument, and the right to select the locality of the portion conveyed will be protected.

Appeal from district court, Wichita county.

Action of trespass by James S. Moody against Thomas C. Nye and others to try title to land, the defendants claiming under an execution sale. Judgment for plaintiff, and defendants appeal.

R. E. Huff and Herring & Kelley, for appellants. *Flood, Hunter & Stewart*, for appellee.

WALKER, J. Moody brought an action of trespass to try title of 200 acres of land against the defendants. The title asserted was a deed from W. A. Cassaday, under whom defendants also claimed title, with description as follows: "Two hundred acres of the Chas. L. Harrison one-third league survey, on Wichita river, in Wichita county, Tex., to be run off by the surveyor of said county, fronting four hundred and seventy-five varas on the river, and back for complement of 200 acres to be taken out of my half of said survey, and begin at the upper or lower corner, and run with the upper or lower line of my survey for complement. Field-notes to be attached to this deed by said surveyor, and become a part of this instrument." The deed bore date November 12, 1879, and was duly recorded April 15, 1881, in Clay county, to which Wichita county had been attached for judicial purposes. Moody had Warren, the county surveyor of Wichita county, make a survey with field-notes, which were attached to the deed in August or September, 1882. Stone & Giddings recovered a judgment against Cassaday, December 17, 1880, in the district court of McLennan county. An abstract of this judgment was filed for record and was recorded January 21, 1881, in Judgment Record Book No. 1, p. 5, by the county clerk of Clay county. October 26, 1881, an *alias* execution was issued on the judgment to Clay county, under which the entire Cassaday interest in the survey, and including the Moody part, was sold. Sheriff's deed was executed, and the defendants showed title under this sale. The case was tried by the judge, and he found as a fact that the abstract of the judgment had not been indexed, and that the lien was not fixed by the record without such indexing. The testimony on which the finding was based was amply sufficient. The abstract had not been entered on the index as the statute required. Judgment liens are regulated by statute. Rev. St. art. 3155, provides what an abstract of judgment for record shall contain. Article 3157 provides that "the county clerk shall file and immediately record the same [the abstract] in the judgment record, noting in such record the day and hour of such record, and shall also at the same time enter it upon the index." Article 3158: "The index to such judgment record shall be alphabetical, and shall show the name of each plaintiff, and of each defendant in the judgment, and the number of the page of the book upon which the abstract is recorded." Article 3159 provides: "When any judgment has been recorded and indexed as provided in the next preceding articles, it shall, from the date of such record and index, operate as a lien upon all of the real estate of the defendant situated in the county where such record and index are made, and upon all real estate which the defendant may thereafter acquire situated in said county." As the lien is the creature of the statute, it follows that, until the conditions to the lien fixed by the statute have been complied with, the lien is not established. The indexing, so carefully described and provided for, cannot be dispensed with by the courts. The terms used in the statute are simple and clear. The meaning and intent are expressed. It is not for courts to question the policy of the law. They can only apply it to a state of facts as ascertained when rights are litigated and the jurisdiction of the courts invoked.

The deed from Cassaday to Moody sufficiently identified the interest conveyed. The right to select the locality of the 200 acres was valid, and will be protected. *Wofford v. McKinna*, 23 Tex. 46. The subsequent levy and sale were subject to Moody's rights. That the field-notes were subsequently attached to the deed would not lessen its effect as a recorded instrument.

There was no error in the judgment below, and it is affirmed.

NYE *et al.* v. GRIBBLE.

(*Supreme Court of Texas.* April 13, 1898.)

1. TRESPASS TO TRY TITLE—ANSWER—PLAINTIFF'S TITLE A MORTGAGE—AMENDMENT ASKING ALTERNATIVE RELIEF.

In trespass to try title to certain lands, defendants answered that the deed under which plaintiff claimed was in reality only a mortgage. *Held*, that plaintiff may amend his petition so as to demand foreclosure in case his deed should be declared a mortgage.

2. SAME—AMENDMENT ASKING ALTERNATIVE RELIEF—PARTIES.

In trespass to try title, defendants answered that the deed under which plaintiff claimed was in reality only a mortgage. Plaintiff was allowed to amend his pleadings, and ask for a foreclosure of the mortgage, if it proved to be such. *Held*, that plaintiff was entitled to have his grantor made a party defendant under the new pleadings.

3. MORTGAGES—FORECLOSURE—ALLEGING INDEBTEDNESS.

Plaintiff is not entitled to a decree of foreclosure unless his petition alleges an indebtedness as a foundation of the mortgage.

4. EVIDENCE—CERTIFIED COPY OF DEED—AFFIDAVIT—REV. ST. TEX. ART. 2257.

Under Rev. St. Tex. art. 2257, providing that certified copies of recorded instruments may be admitted in evidence upon the filing of an affidavit by the party wishing to introduce such copy, to the effect that the original has been lost or that he cannot procure it, an affidavit by defendants, stating that they "cannot procure the original," is sufficient, and need not show a search for the original.

5. JUDGMENT—FAILURE TO INDEX WHEN FILED—LIEN—REV. ST. TEX. ART. 1113.

Under Rev. St. Tex. art. 1113, requiring indexes of judgments, etc., to be made by the clerks of county courts, a judgment duly filed and recorded, but not indexed, creates no lien on lands of the judgment debtor.

Appeal from district court, Wichita county.

Action of trespass to try title to 538 acres of the Charles L. Harrison one-third of a league of land in Wichita county, brought by appellee, Gribble, against appellants, Thomas C. Nye and Fred K. Fisher, who summoned Heber Stone and wife, M. L. G. Stone, and Mrs. Ann M. Giddings as warrantors to appear and defend the title. The defendants and warrantors answered that Gribble claimed under a conveyance from one W. A. Casseday, dated April 23, 1880, and recorded January 31, 1881; that it was fraudulent, and made with the intention and design on the part of Gribble and Casseday of hindering and delaying Stone and Giddings in the collection of a judgment and debt against Casseday; that at about the time of the recovery of the judgment against Casseday he made a transfer of this land and other lands to Gribble, and took a power of attorney from Gribble, which authorized him to act as Gribble's agent in selling the lands; that he had made many sales as Gribble's agent, but had never accounted to him for the proceeds, although they lived in the same city, to-wit, Waco, and had been fast friends for years, and that in this way Casseday's land was shielded from his creditors by Gribble; that an abstract of the Giddings and Stone judgment against Casseday was legally registered and recorded on January 21, 1881, and constituted a lien on the land prior to the record of Gribble's deed from Casseday; that the land was subsequently sold under execution issued on the judgment in favor of Stone and Giddings, and was bought in by them, and afterwards sold to Nye and Fisher; that Gribble's claim, if he had any claim at all, which was expressly denied, was that of a mortgage and security for some feigned debt due by Casseday to Gribble, and that Casseday, not Gribble, was the owner of the land at the time Stone and Giddings acquired a lien or title thereto, and at the time this suit was instituted, and hence Gribble ought not to recover if he only held an incumbrance; that Gribble has the title in his own name to many tracts of land owned by Casseday; that Casseday has made many sales, pretended as Gribble's agent, more than sufficient to pay off his debt, if any; that an accounting ought to be forced between them, and all the remaining lands in Gribble's name ought to be sold before the land in controversy should be taken for any balance that might be due Griffin. Defendants also pleaded

an outstanding title in Sam Casseday, brother of W. A. Casseday. Plaintiff thereupon asked permission to amend his pleadings, with reference to securing a foreclosure of the mortgage if his deed should be adjudged to be such, and also asked that W. A. Casseday be made party defendant in the suit. The court granted both requests. The amendment inserted was as follows: "But if the court should find that plaintiff's deed to the land does not convey the fee-simple estate, and that the same is a mortgage and lien thereon, then he prays the same be foreclosed for such amount, and interest thereon, as the court may find due him by said Casseday." There was no statement in the petition as to any debt due plaintiff from Casseday. Defendants made a motion to strike out that part of the petition making Casseday a party to the suit, which motion was overruled. Defendants offered in evidence a certified copy of a deed from W. A. Casseday to Sam Casseday, of Zanesville, Jefferson county, Ky., to "all my right, title, interest, and claim in and to all lands, land scrip, land-warrants, and contracts of all sorts owned by me at this date in the state of Texas," dated the 29th of August, 1879. Plaintiff Gribble objected to the introduction of this certified copy, (1) because the affidavit on file, stating that defendants were unable to procure the original, failed to show what efforts or diligence, if any, had been used to procure the original; (2) because the affidavit did not state that the attorney of defendants who made the affidavit could not procure the original of said deed. These objections were sustained, and the deed was excluded, to which ruling defendants duly excepted. The affidavit referred to was as follows, after styling case, etc.: "Defendants offer in evidence certified copy from the proper records of the following paper, [which was the deed referred to, and its place of record.] Defendants say that they cannot procure the original of said deed, wherefore they ask that said certified copy be used as evidence." Article 2257, Rev. St. Tex., provides that "whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument * * * has been lost, or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted in evidence in like manner as the original." Section 1154, Rev. St., makes it the duty of the clerks of county courts to make indexes of the names of the parties to all suits, with references to the respective pages of the book in which the judgments are entered, etc. Trial was had, and a judgment rendered for plaintiff, which was declared to be a lien on the land as against defendants Nye and Fisher. Judgment was also rendered against Casseday by confession. All the defendants except Casseday appeal.

R. E. Huff and Herring & Kelley, for appellants. *W. W. Flood and Hunter & Stewart*, for appellee.

WALKER, J. It was competent for plaintiff, by amendment, to frame his petition with a view to the foreclosure of the lien, if his title should prove to be only a mortgage. *Moreland v. Barnhart*, 44 Tex. 283. In such amendment it was necessary to set out facts as basis for the decree of foreclosure. Discussing a similar case, (*Mann v. Falcon*, 25 Tex. 271,) Chief Justice **WHEELER** well remarks: "They [the plaintiffs] were the actors seeking the aid of the court to enforce their supposed rights. They are supposed to have known what their rights were, and the facts upon which they depended; and if they were such as, in any event, to entitle them to a decree of foreclosure, and they desired that alternative relief in case their deed should be adjudged a mortgage instead of an absolute conveyance, they should have framed their petition with a view to that alternative aspect of the case. It was incumbent upon them to state a case which entitled them to the relief they sought." In this case the answer, among other defenses, alleged that the plaintiff's deed to the land was but a mortgage. At the end of the second amended petition, plaintiff adds merely the prayer for foreclosure, if the court shall find his deed

a mortgage. There is no allegation in the pleadings of the amount of indebtedness secured. There is testimony to some indebtedness from Casseday to Gribble, with testimony in the record that Casseday had conveyed other lands to Gribble also, to secure Gribble for his advances in money to Casseday. Objection was made to testimony of any debt, and attention was called to the condition of the pleadings of the plaintiff on the trial, and the defect is assigned as error. There being no allegations in the petition of the fact of indebtedness, the foundation of a mortgage, and without which no lien could exist, it is evident that there was no basis for the decree of foreclosure. If the pleadings were such as to admit the testimony to the several transfers of land by Casseday to the plaintiff, the decree should have provided that the sale of the Harrison 538 acres should be made after the lands of Casseday still in Gribble's name had been sold. The copy of the deed from Casseday to his brother was wrongfully excluded. The statutory oath (Rev. St. art. 2257) does not require that search for the original be shown. This, however, is immaterial, save in the action of trespass to try title. The other copies after Gribble's testimony were important, as in effect he had admitted them. There was no error in the findings of the court that the omission to index the abstract of the judgment of *Stons v. Casseday* when recorded was fatal to the lien. This court has passed upon this identical act in *Nye v. Moody*, ante, 606. The certificate of the clerk does not state that he had indexed the paper upon the record. There must be testimony to the indexing beyond the mere presumption of regularity in the discharge of his duties on the part of the officer charged with the duty of making the index after recording the instrument. The clerk should certify to having indexed the paper. The production of competent testimony to the indebtedness could be insisted upon by the defendants, Nye and others, claiming the land. The confession of judgment by Casseday could not conclude the rights of the other defendants in the land. The action of the court below was correct in limiting it to a personal judgment against Casseday. Casseday was properly made a party defendant when the plaintiff changed his petition so as to attempt to secure in his action his rights as a mortgagee. For the error in decreeing foreclosure, in absence of pleadings authorizing such decree, the judgment below must be reversed.

STEPHENS v. GEISER *et al.*

(*Supreme Court of Texas. May 22, 1888.*)

EVIDENCE—DOCUMENTS—CERTIFICATE OF COMMISSIONER OF LAND OFFICE—FORM.

The usual form of certificate attached by the commissioner of the general land office to certified copies of patents was changed in the certificate to a copy of patent offered in evidence by the interlineation of the words, "as said patent was originally recorded." Held that, although unusual in form, the certificate did not render the copy incompetent.

Appeal from district court, Bexar county.

Houston Bros., for appellant. *F. G. Morris*, for appellees.

WALKER, J. This was a suit brought by Stephens against Geiser *et al.* for a survey of land in Bexar county patented to Stephens, October 3, 1883. The appellees claim under patent to S. H. Luckie, assignee, dated April 10, 1850. Appellant contends that there was no sufficient proof of the patent to Luckie; and, further, that such patent had been canceled by decree of the United States circuit court, and thereby the land had been restored to the public domain. The case was tried without a jury, and judgment rendered for defendants, and Stephens appealed. Appellant only relies upon his first assignment of error. The proposition and statement under it are as follows: "Where a party seeks to establish title to land under a grant from the state, such grant

must be established and proved by the production of the original patent, as the same is shown to be recorded in the records of the general land-office, and it is not sufficient to produce a copy of the patent as it 'was originally recorded,' leaving the inference that it is not a copy of the patent, as it now appears in the records of the general land-office, because such patent may have been changed after it was first recorded, or the records may show that it was properly canceled after it was first issued, and is not now an existing patent entitled to credit in the courts, or even that such patent may never have been issued to the parties, and that fact may appear by a true copy of the records as they now stand. And the fact that the words, 'as the said patent was originally recorded,' being interlined, and varying the usual form of certificate, is sufficient in itself to discredit the copy offered." "Statement: The usual form of certificate attached by the commissioner of the general land-office to certified copies of patents was changed by the interlineation of the words, 'as said patent was originally recorded,' in the certificate to the copy of patent offered by the appellees on the trial, and admitted in evidence by the court. All these objections to the introduction of the instrument were properly made, overruled by the court, and exceptions taken." A patent at the time it is issued is evidence of the state parting with the title to the land, and the transfer of it to the patentee. If regularly issued, the patentee, from the instant of its issuance, is vested with the legal title. The record of the patent in the land-office is a record from which copies are subsequently given. These copies are evidence of the original. It would seem, then, that a copy at any time given of the patent, as it "was originally recorded," would be equivalent to a copy of the patent as it was when issued. And we know of no law or custom forbidding a party interested from obtaining such evidence from the land-office whenever the protection of his rights may require it. It does not require argument or illustration to show that the rights of the patentee in the land are protected under the law. An alteration of the land-office records, without his consent or without judicial sanction, could not affect his rights. Clearly, the land-office officials are authorized to note upon the records the changes so made. But such entries of themselves have no power. They are rather historical, and are useful in leading to the facts which may affect the *status* of the land. The presumption is that the records are kept intact. The certificate, as offered, while unusual in form, was not irregular, and the document certified to was competent testimony. After the patent offered by the defendants had been admitted, they showed title under it,—Luckie to Herndon, September 5, 1850; title bond, November 18, 1850, by Herndon to J. Luken *et al.*, whose estate defendants have for one-fourth league, including the land sued for; Herndon securing part cash, and taking two notes, one due January 1st thereafter, and the other 12 months after date, Herndon binding himself to make title upon payment of the purchase money. These purchasers at once went into possession, and made valuable improvements, and have held the land ever since. December, 1851, upon receiving payment of the purchase money in full, Herndon executed the deed as required by his bond. It appears that February 17, 1851, a suit was filed in chancery, No. 10, in United States circuit court for the Western district of Texas, styled *Howard's Heirs v. Hodge et al.* It is not shown when Herndon was served with subpoena or when he answered; nor does it appear that any of his vendors of the land here in controversy were made parties. The plaintiff, in rebuttal, offered a certified copy of the patent relied upon by the defendant, with indorsement across it, "canceled by decree of the U. S. circuit court, May 7, 1874. SHELLEY, Clk.;" and in connection with it was offered a certified copy of a consent decree in the suit No. 10, chancery, *Howard's Heirs v. Hodge et al.*, of date June 22, 1874. Objections were urged to these copies, and they were excluded. This exclusion is not urged as error in the brief of appellant. This summary of the case is given to show more fully the effect of the objection to

the form of certificate to the copy of patent offered by the defendants. From the testimony, including offered and excluded, we do not see any error requiring the reversal of the judgment below. It is affirmed.

HARRISON et al. v. McMURRAY et al.

(*Supreme Court of Texas. May 22, 1888.*)

1. PRACTICE IN CIVIL CASES—DISMISSAL—CONCLUSIVENESS—LIMITATION—RUNNING OF THE STATUTE.

The plaintiff in an action to recover land died September 24, 1878, and the case was dismissed in December, 1879. Before his death he had conveyed the property to his son. No application was ever made by his representatives, nor by his son, to set aside the order of dismissal. *Held*, that as to them the order of dismissal was final and valid; and, as the action was not prosecuted to effect, it did not stop the running of the statute of limitations.

2. POWERS—OF ATTORNEY—PRESUMPTION OF EXISTENCE FROM LAPSE OF TIME.

An instruction, in effect, that, from great lapse of time (nearly 30 years) and the circumstances attending the title sought to be established, the jury may find that a power of attorney existed, authorizing a conveyance made by persons purporting to be attorneys in fact, although such power cannot now be produced, is correct.

3. EXECUTORS AND ADMINISTRATORS—DEED—EXECUTION—EQUITABLE TITLE.

The probate court having directed that a deed be made to M., in accordance with a bond for title given by the deceased, an administrator's deed, reciting full payment of the purchase money, passed the equitable title, although not executed by both the administrator and administratrix, as it should have been.

4. DEED—RECORDING—PRESUMPTION.

When a deed has been filed for record, and the recording fees paid, it will be presumed that the clerk did his duty, and recorded the deed.

5. EJECTMENT—EVIDENCE—CONVEYANCE AFTER SUIT COMMENCED.

In an action to recover lands, plaintiff cannot introduce in evidence, in support of his title, a deed made to him by a third party after the institution of the suit.

Appeal from district court, Hill county.

Jo. Abbott and Tarlton & Jordan, for appellants. *S. C. Uphaw*, for appellees.

WALKER, J. January 31, 1885, the appellants, the widow and children of John O. Harrison, brought suit, as his heirs, for a 1,280-acre tract of land patented in 1852 to Charles L. Harrison, the vendor of John O. Harrison, against Mrs. M. J. McMurray, J. R. Harrington, and J. E. Wilson, and against Mrs. S. A. George and her children, and against J. H. Sears and Samuel Cassidy. The defendants McMurray, Harrington, and Wilson claim parts of a tract 813½ varas in width off the west or north-west side of the Harrison survey, (which is square in shape,) conveyed April 12, 1856, by deed purporting to have been made by John Thomas Lee for C. L. Harrison for locative interest. This deed was acknowledged August 12, and recorded August 16, 1856, in Navarro county, Tex. Mitchell conveyed to ——— Doyle by deed May 28, 1857, recorded May 7, 1860. Doyle deeded 30 acres off of the lower or south end to Rodman, May 28, 1857; and Rodman, December 3, 1865, conveyed the 30 acres to defendant Harrington. Doyle deeded 202½ acres, being the north or upper part of said Mitchell tract, to Joseph Wilson, under whom defendant Wilson holds the same tract. September 12, 1865, Doyle made a title-bond to William McMurray, whose widow is the defendant, for 180 acres, being the lower half of the tract, less the Rodman 30 acres. Doyle died, and Mrs. Mary A. Doyle and L. J. Huffman administered on his estate; and at August term, 1879, of probate court of Hill county, an order was made "that the administrator of the estate of J. W. P. Doyle make title to the heirs of Wm. M. McMurray to the land described in the bond filed in this court." October, 1869, deed was made by Mary A. Doyle, administratrix, etc., for the land, to defendant Mrs. McMurray, reciting the full payment of the purchase money. It was in evidence that the defendant McMurray had

resided upon the land, and claimed it, continuously since December, 1865, save a few months while she was absent to "school her children," during which time she left a tenant. She had buildings, and a field of from 20 to 25 acres in cultivation. Harrington had used and hauled timber, for fire-wood and other purposes, from his 30 acres ever since 1865. Defendant Wilson proved payment of taxes on his 202 acres, the hauling of timber from it for 10 years' continued assertion of ownership. The defendant Mrs. George showed possession of 160 acres of the 1,280-acre tract sued for, being the west half of the John Crenshaw 320 acres. By survey the conflict with the Harrison survey is shown. She proved continuous adverse possession for over 20 years. She also proved the existence and contents of a deed to her husband made about October 10, 1866, by Lewis Thomas and wife for the west half of the 320 acres; also the privy acknowledgment of Mrs. Thomas to the deed. It was shown that, in 1871 or 1872, defendant Mrs. George, in Hillsborough, handed the deed to Charles Warren, with request that he have it recorded. Warren testified that he thinks in 1872 he received a deed from her, and that he did as asked, and filed the deed for record, and paid the recording fees. The court-house subsequently was burned, and its contents, records, etc., destroyed. The defendant George made affidavit to the contents of the deed and its loss. She also testified on the stand, and was cross-examined. She proved payment of taxes on the land for the years 1880, 1881, 1882, 1883, and 1884. Her husband died in 1866, and she had resided on the land ever since. The rendition and payment of taxes was upon the land as part of the John Crenshaw survey. The defendants McMurray and George, in addition to pleading not guilty, pleaded limitation of five and ten years; Harrington and Wilson pleading not guilty. The defendant Sears also pleaded not guilty, and exhibited a conveyance by Charles L. Harrison, by W. A. Cassidy agent and attorney in fact, to John F. Barnes for 274 acres, of date December 15, 1875, also signed by Renick & Cassidy. The consideration for the deed was \$548 gold, to be paid as follows: One note for \$137, payable on or before December 1, 1876, to order of Charles L. Harrison; and one note for same amount, payable same date, to order of Renick & Cassidy; one note for \$137, payable December 1, 1877, to order of Charles L. Harrison, and one note, same date and amount, payable at same time to order of Renick & Cassidy, each of the notes retaining a lien upon the 274 acres. There is some obscurity in the relations between W. L. Harrison with Renick & Cassidy. But the testimony in the record is undisputed that, whatever may be the defects in the power, still John O. Harrison sanctioned the sale, by receiving the proceeds of the two notes made payable to the order of his father and vendor, C. L. Harrison. It was in evidence, for their services, Renick & Cassidy were to have half interest in the proceeds of sales of such lands as they should recover for C. L. Harrison. To avoid the pleas of limitation, plaintiffs, in rebuttal, read the record of an action to try title in the district court of Hill county, filed March 31, 1875, by Charles L. Harrison against S. A. George, Martha McMurray, and J. E. Wilson for the land in controversy. The minutes of the court showed continuances from term to term until December, 1879, when it was dismissed for want of prosecution by judgment of said court on motion of the defendants. In rebuttal to the case made by defendant Sears, the plaintiffs offered to prove (1) that the two notes by Barnes to Renick & Cassidy had never been paid; (2) agreement showing that on May 19, 1879, Renick "has this day sold unto Cassidy all his right, title, interest, and claim in and to all partnership lands of Renick & Cassidy;" (4) deed from W. A. Cassidy to Samuel Cassidy conveying all "grantee's right, title, and claim and interest in and to all lands, and scrip, land-warrants, locations, and contracts of all sorts owned by grantor, August 27, 1879; (5) power of attorney by Samuel Cassidy to Anderson & Flint to sell and convey all right, title, interest, and claim he had under former deed;" deed from Sam-

uel Cassiday by John T. Flint, attorney in fact, to plaintiffs, dated September 30, 1885, conveying to them all the right, title, and interest of grantor in the 1,280 acres sued for; (7) it appeared that Samuel Cassiday was defendant in the suit, had pleaded not guilty, but did not appear by counsel at trial, nor was his plea read. To the testimony defendant Sears objected, and it was excluded, because the deed was made after the suit had been instituted, and the title, if any, was acquired since the filing of the suit. The court adds to the bill the further reasons of his actions: "The vendors had parted with their title, and had only a vendor's lien upon the land. They could not convey by deed a legal title to the land, but only such interest as they possessed; that is, an equitable interest, and not a legal title." The verdict was for defendant McMurray, under deeds introduced by her, and by statute of limitations of 10 years; for J. R. Harrington and J. E. Wilson, under deeds introduced by them; for Harrington, 30 acres; for Wilson, 202½ acres; for defendant Mrs. S. A. George, 160 acres of land, under five and ten years' statute of limitations; and for defendant J. H. Sears, 274 acres.

Upon the effect of the suit by C. L. Harrison brought March 31, 1875, upon the defense of limitations we are referred to *Armstrong v. Nixon*, 16 Tex. 610. This was an appeal from the refusal of the district court to allow Armstrong, the administrator of Whitman, the original plaintiff, to be made a party and to reinstate the case. The application was made at the next term after the order of dismissal, which was entered October, 1854. Whitman had died February 24, 1854. On appeal by the administrator, the judgment was reversed, and the order of dismissal declared a nullity. The opinion further states that, "where the plaintiff dies before the verdict, the suit does not abate until failure to prosecute on *scire facias* issued by the defendant." Against the application of this rule to the case before us, this court has held "that an application to the district court to set aside a void judgment, and proceed with the case, comes too late, unless made within the time allowed for a bill of review." *Weaver v. Shaw*, 5 Tex. 286, cited with approval in *Milam Co. v. Robertson*, 47 Tex. 239. Besides, in numerous cases, our courts have held that such judgments (against a defendant who had died before verdict) are "not void but only voidable, and can be set aside by a proceeding *coram nobis*; that is, by proceedings in the same court where rendered, showing the fact of the death at rendition of the judgment." *Giddings v. Steele*, 28 Tex. 756; *Taylor v. Snow*, 47 Tex. 464, and cases cited. In this case the plaintiff died September 24, 1878. The case was dismissed December, 1879. He had conveyed the land to his son John O. Harrison, December 14, 1875; and the deed was recorded April 15, 1877. No application was ever made by the representatives of the plaintiff, or by John O. Harrison, to set aside the order of dismissal. A new suit was brought March 31, 1885. Under these facts, it is held, under authority of our own courts, that the order of dismissal, as against the plaintiffs, is final and valid. It follows then, that, as the suit was not prosecuted to effect, it did not have the effect of stopping the running of the statute of limitations. *Shields v. Boone*, 22 Tex. 198; *Chambers v. Shaw*, 23 Tex. 169; *Hughes v. Lane*, 25 Tex. 366; *Connelly v. Hammond*, 58 Tex. 20.

Upon her defense of limitations, Mrs. George recovered upon the five and ten years' statute. As the testimony to her continuous adverse possession is satisfactory and undisputed, it does not become necessary to discuss the questions raised in the record upon the effect of the testimony introduced in support of her plea of five years. The execution and contents of the deed to her husband for the west half of the Crenshaw 320-acre survey were proven. It was shown that she had caused the deed to be filed for record in 1872 in the clerk's office, and had the recording fees paid. The presumption is that the clerk did his duty, and recorded the deed. Lawson, Pres. Ev. 53, and nota. The court-house and records had been burnt, and presumably her deed.

Whether the filing, which for some purposes is equivalent to the actual record, is sufficient as a basis for the claim under the five-years statute of limitations, or whether the testimony be sufficient to establish the registry of the deed by circumstantial evidence, or whether secondary evidence be competent to prove it, need not be determined. The jury could not have found against her upon the 10-years statute without a total disregard of the testimony. The 10-years adverse possession concluded the plaintiffs as to the 160 acres so held by defendant George, and the result would have been the same if all testimony under the claim of five years' limitation had been omitted.

The defense of Harrington and Wilson depends alone upon the power of Lee, as attorney in fact, to convey to Mitchell the alleged locative interest of 813 varas in width off one side of the 1,280-acre tract. The trial was on March 11, 1886. The deed by Lee for C. L. Harrison to Mitchell bore date April 12, 1856. It was duly recorded August 16, 1856. Mitchell sold to Doyle, May 28, 1857. Doyle sold to Murray, September 12, 1865; and when Murray moved upon his purchase, soon after, there were improvements upon it. The entire locative interest has been claimed by Doyle's vendees ever since; Murray and his widow actually residing upon their purchase. In *Watrous v. McGrew*, 16 Tex. 513, Judge WHEELER remarks: "A power to execute a deed will in many cases be presumed. 2 Phil. Ev. (Cow. & H. notes) 812, 813. In most cases where a deed would be evidence as an ancient deed, without proof of its execution, the power under which it purports to have been executed will be presumed. *Tolman v. Emerson*, 4 Pick. 162; *People v. McLeod*, 1 Hill, 389; *Doe v. Phelps*, 9 Johns, 169. In Louisiana it has been held that, where possession had followed a sale made by an attorney in fact for a period of 20 or more years, the authority of the act might be presumed. *Buhols v. Boudousguie*, 6 Mart. (N. S.) 153. So it has been held that the acquiescence of the principal in possession, under the conveyance, for nearly 20 years, will authorize the presumption that a condition precedent on which the attorney was to convey the land had been fulfilled, and that he had not transcended his power. *McConnell v. Bowdry*, 4 Mon. 395. A like presumption has been indulged, under particular circumstances, where possession had not followed the deed, and considerably less than 20 years elapsed after its execution by the attorney. *Forman v. Crutcher*, 2 A. K. Marsh, 69. This was cited, with approval, *Dailey v. Starr*, 26 Tex. 565; followed in *Leland v. Wilson*, 34 Tex. 90, and *Hooper v. Hall*, 35 Tex. 87. Again, in *Johnson v. Shaw*, 41 Tex. 484, Justice DEVINE recognizes the authority, in principle, of *Watrous v. McGrew*, 16 Tex. 506, and applies it as authority to the facts of that case. In *Veramendi v. Hutchins*, 48 Tex. 552, Justice GOULD cites the full paragraph above, and, by analogy, suggests that community debts might be presumed from lapse of time as a foundation for the power of the surviving husband in selling community property. The principle is again recognized by Chief Justice MOORE in *Williams v. Conger*, 49 Tex. 600, as by Justice BONNER in *Johnson v. Timmons*, 50 Tex. 534, and in *Veramendi v. Hutchins*, 56 Tex. 420, by Judge WATTS of the commission of appeals, with approval of the supreme court. See, also, *Lawson*, Pres. Ev. 419; *Delabigarre v. Municipality*, 3 La. Ann. 280; *Simson v. Eckstein*, 22 Cal. 581; *Winkley v. Katme*, 32 N. H. 268.

The trial judge gave the charge following: "No power of attorney has been read in evidence; but it has been alleged by affidavit that said power of attorney, if any such there was, has been lost or destroyed. You will look to all the evidence before you to ascertain whether said C. L. Harrison ever executed and delivered such power of attorney, if any, to said Lee to sell the land described in the aforesaid deed; and you may consider the date of the deed, the time of its acknowledgment, as well as the time of the record of the same, the use, occupation, possession, claims of ownership, if any such there were, by the said defendant, * * * and the claim of plaintiffs and their

ancestors, Chas. L. and John O. Harrison, to said land, such as may be shown by any patent and deeds introduced in evidence, together with any other evidence tending to show that said power of attorney, if any, was or was not executed by said C. L. Harrison to said Lee; and, if the preponderance of the evidence tends to show that said power of attorney was so executed and delivered to said Lee, then you may presume that said Chas. L. Harrison did execute and deliver a power of attorney to said Lee to sell the said 505 acres described in the deed from Harrison to Mitchell; and, if you so find, then you are instructed that said deed is sufficient to divest all the right, title, and interest Harrison had in the land, and to vest it in said Mitchell." This charge is an application of the principle announced in *Watrous v. McGrew*, and repeated in the cases following, which have been cited, that from great lapse of time, and the circumstances attending the title sought to be validated, the jury may, if satisfied of its existence, find the fact of the existence of such power. It seems that after 30 years the presumption becomes one of law as an ancient document. It should not require authority to reach the conclusion that if a power can be inferred or presumed as a fact from possession under it, and other circumstances, such as its recitals, publicity of claim, etc., accompanying, for a less period than 30 years, that in this case, where less than 5 weeks were wanting of the full 80 years, the verdict should be conclusive. The charge was sanctioned by authority, and the verdict supported by the testimony.

The validity of the conveyance to Mitchell being established, it concludes the litigation against the defendant McMurray, and it is of no consequence whether the deed from the administrator of Doyle was sufficient to pass the legal title. The order of the probate court directed that a deed be made to McMurray, in accordance with the bond for title made by the deceased. The deed from the administrator recited the full payment of the purchase money. These would constitute an equitable title, although the administrator and administratrix both should have joined in the execution of the deed. Evidently the mesne conveyances from Mitchell down to the defendant McMurray are of little importance to the final result reached. In finding the existence of the power in Lee to convey the locative interest to Mitchell, the right of the plaintiffs was concluded; and, upon the verdict upon the defense of 10 years' adverse possession, the deed to defendant McMurray was useful only as defining the boundaries limiting her possession, and to which the actual occupancy of her field and house by construction extended.

The judgment in favor of defendant Sears depends upon the legal effect of the deed from C. L. Harrison to Barnes, vendor of Sears, made by W. A. Cassiday, attorney in fact, December 15, 1875. It is in evidence that C. L. Harrison empowered Renick & Cassiday to recover his Texas lands; that, by contract, B. & C. were entitled to one-half of the proceeds of sale of lands recovered, and which Harrison should order to be sold, or they might have their half conveyed to themselves. The power made September 14, 1875, by C. L. Harrison to R. & C., authorizing them, or either, to sell this Harrison survey, is sufficiently proved. Cassiday was not a party to this suit, nor is his interest in it apparent. He was therefore a competent witness to declarations by Harrison to him. The loss of the power of attorney was shown, and search for it. Cassiday's testimony to the contents and execution of it was competent, and, in connection with the imperfect record of it, was satisfactory. Besides this, it is undisputed that the purchase money to the extent of the one-half evidenced by the two purchase-money notes made by Barnes to C. L. Harrison were in fact collected and received by John O. Harrison, whose heirs are the plaintiffs. They cannot recover the land, and retain the purchase money thus paid. The testimony showed both the legal and equitable title, only incumbered with the lien for the one-half the purchase money owing upon the notes to Renick & Cassiday.

The court properly excluded the release by Renick to Cassiday, from Cassiday to his brother Samuel Cassiday, and from the attorneys of Samuel Cassiday to the plaintiff. The reasons given by the trial judge are well taken, and satisfactory. The quitclaim to plaintiffs bore date eight months after the institution of suit. Renick & Cassiday, upon the sale to Barnes, were entitled to half the proceeds; that is to the two notes taken in their name, reserving the vendor's lien. These notes carried the lien; and, aside from this lien, Renick & Cassiday, after the sale, held no other interest in the land. Sears, on buying from Barnes, took the land subject to the lien. The superior title in the land may have remained in Harrison; but, upon payment of the two notes to Harrison, there remained nothing against the title of Sears but the lien to secure the notes to Renick & Cassiday. The attempted release of title to the land by Samuel Cassiday, after the suit, did not pass any right in the land as against Sears, nor against the lien following the notes. The rights of the holders of these notes are not before the court for adjudication. The deed to Barnes bore date December 15, while the deed to John O. Harrison bore date December 14, 1875. The latter was executed in Kentucky, and was not recorded until 1877. But the vendee, John O. Harrison, in his settlement with his father's agents, (Renick & Cassiday,) recognized the sale, and received the money from the sale as above stated.

These conclusions dispose of the case. Some matters are urged in the briefs for appellants not directly passed upon. It is insisted that the payment of taxes upon the west half of the Crenshaw 820 acres-tract could not be such payment upon the Harrison tract as is contemplated by the five-years statute of limitations. The actual conflict between the west half of the Crenshaw with the survey claimed by the plaintiffs is shown by the testimony of the county surveyor. The payment was upon the identical land. So defendant George entered upon the land under the Crenshaw survey, her actual possession of part extended, by construction, to the lines of her title; there being no actual possession upon the older survey not limited by specific boundaries. Whether Renick & Cassiday sold for cash, as their authority required, is not material, when it is shown that their sale on credit was sanctioned by John O. Harrison in taking the notes, and receiving the purchase money upon them. His heirs are bound by his ratification, regardless of the terms of the power.

There is no error in the record which could have altered the result of the case. The judgment below is affirmed.

MONKS v. McGRADY.

(Supreme Court of Texas. May 22, 1888.)

JUDGMENT—EFFECT—RES ADJUDICATA.

In an action by A. against B. for damages, the petition alleged that B. sold A. a tract of land, represented that the title was perfect, and agreed to give a deed with general warranty; that they went together to C., and procured him to draw such a deed; that, when it was handed to B. to sign, he secretly and fraudulently inserted, after the warranty, the words "in, under, or through me,"—thereby making it a special warranty; that A., in ignorance of the insertion, paid the purchase price, and accepted the deed; that subsequently D. brought suit against A., and, under a superior title, recovered a portion of the land. B. answered, and gave evidence to prove, that, in the suit between A. and D., A. made him (B.) a party defendant, alleging the same grounds for relief as in this suit; that under B.'s plea that the agreement was only for a special warranty, and on the evidence, the court in that suit adjudged that he go hence without day, and recover of A. his costs. *Held*, that the question as to the character of the warranty agreed upon was *res adjudicata*.

Appeal from district court, Fannin county.

This was an action by S. J. McGrady against James Monks to recover damages for alleged fraud in the execution of a deed. There was a verdict and judgment for plaintiff, and defendant appeals.

Taylor & Galloway, for appellant. *Jas. H. Lyday* and *Lusk & Thurmond*, for appellees.

WALKER, J. June 2, 1885, McGrady sued Monks, alleging that May 19, 1888, the parties made a contract; Monks agreeing to convey to McGrady, by a good and sufficient deed, 142½ acres of land described, at four dollars per acre. That Monks made and delivered a deed for the land, receiving the price. That January 8, 1885, H. J. McRae instituted a suit against McGrady, and thereafter recovered judgment, for 88 acres of said land, (referring to the papers, judgment, records, and decree in said suit,) and for costs. That, before the sale, Monks took McGrady over the land, and pointed out the corners; and represented falsely and knowingly that he had a good title to the whole tract, that he had had the title examined by eminent counsel, and that he would give McGrady as good a title as could be made in Texas. That all these representations were false, and known by him to be false, and were made for the purpose of overreaching McGrady. That McGrady, believing said representations were true, paid the purchase money on assurance of receiving such deed as Monks promised. That the parties came to Bonham, and employed G. W. Blair, district clerk, to draw up a general warranty deed for the land. That said deed was so drawn. McGrady, examining and accepting it, closed the sale, and handed the deed back to Monks to sign and acknowledge, which he proceeded to do; but, while he was signing his name to the deed, he, without McGrady's knowledge, covertly, after the deed had been examined, inserted the words "in, under, or through me;" thus changing the general warranty to a special warranty. That McGrady was not aware of the alteration until after he was sued by McRae. That, induced by the fraudulent representations of Monks, McGrady had paid out the purchase money, \$352; had expended money, in costs, \$43, and attorney's fees, \$50,—with very full allegations as to Monks' conduct. Plaintiff asks \$3,500 vindictive damages. The defendant Monks answered (1) excepting to the petition; (2) general denial; (3) the plea of former judgment: "For that in the case of *H. J. McRae v. S. J. McGrady*, No. 2,659, this defendant was made a party to said suit as a defendant by the plaintiff (McGrady) in this suit, wherein this plaintiff charged this defendant with being a warrantor, and having fraudulently changed said warranty deed to a quitclaim deed; that this defendant answered said charge by a general denial and allegation that he only agreed to make said McGrady a special warranty deed, and asking the court to dismiss him, with his costs; that said issues were submitted to the court, and there tried upon evidence of the parties *pro* and *con.*, and, after hearing the evidence, and the presentation of the case by the attorneys, the court rendered judgment for defendant, discharging him, with his costs against the plaintiff. Wherefore he says that the issues involved in this case are the same as were involved in the case of *McRae v. McGrady*, and were tried and adjudicated," etc., and that he had a good title to the land, and had conveyed such title to McGrady. The general demurrer of defendant was sustained, and also the items of costs and attorney's fees. By trial amendment plaintiff alleged that, at the time of his purchase, the 88 acres belonged to McRae, and that Monks knew or might have known the fact; the suit and recovery by McRae. On the trial, McGrady testified substantially as his allegations in the petition. It appeared, however, that he had negotiated for the land with Monks' vendors 10 or 12 years before, and that Monks offered more for the land, and got it. He had lived near the land for many years. Blair testified that he wrote the deed on printed blank forms. He did not remember the change, or the addition of the words. Defendant Monks testified: "I told McGrady I would give him a special warranty deed; did not tell him I would give him a general warranty deed. We agreed on the trade, and got Blair to write the deed. It was written on a blank general warranty deed. I did not give Blair any instructions

how to write the deed. McGrady seemed to know the title, and claimed to be satisfied with it. I wrote the words 'in, under, or through me' before I signed the deed. McGrady paid me the money,—four dollars per acre." On cross-examination: "We were both present at Blair's office at the time of the writing and signing of the deed. Don't recollect that that we told Blair to write a general warranty deed. I made the insertion of the words 'in, under, or through me' at the time I signed the deed. I did not tell Blair or McGrady that I was putting in said insertion; did not think it was necessary to tell them of it." The pleadings and judgment were read from the case of *McRae v. McGrady*. In the original answer, after plea of not guilty, defendant McGrady alleged his purchase of the 142½ acres from Monks on May 19, 1883; and that "by agreement with Monks in the purchase, that said Monks agreed with this defendant he would warrant and forever defend the said premises, so conveyed by him to defendant, against all persons lawfully claiming or to claim the same, or any part thereof; that after said trade was made, and all the terms of said sale agreed upon, and the deed had been drawn up according to said agreement, the said Monks, without the consent or knowledge of defendant, added, after the clause of warranty of said title, the words 'in, under, or through me;' that said words were discovered by defendant in said deed for the first time since the institution of this suit; that said words were no part of said contract of sale, and the said deed, without said words, was the true deed agreed upon by defendant and said Monks as evidence of said contract, and was so written by Blair, who wrote said deed for defendant and Monks. Wherefore, defendant prays the court to cite said Monks to appear and defend this suit, and for the other relief, general and special, proper in the premises." The answer of Monks, filed February, 1885, after a general denial, is as follows: "For answer, defendant Monks denies all and singular the allegations contained in said petition, wherein it is charged that he is liable on said warranty. For special answer, this defendant says it is true that he sold the land," etc.; "but he says there was nothing said between him and said McGrady about a general warranty; that he got Blair to write the deed conveying the premises to said McGrady; that Blair wrote the deed on a blank warranty deed; that he read the deed to this defendant, who inserted the words 'in, under, and through me;' that said deed was afterwards read to McGrady by Blair, who then and there accepted the same, and expressed himself satisfied; that McGrady took possession of said deed, and paid the consideration." The judgment in *McRae v. McGrady* was read. McRae recovered the land. Provisions were made for payment, etc., for improvements; and that McGrady take nothing by this suit as to defendant Monks, and that defendant Monks go hence without day, and recover of McGrady all costs herein expended. It was also shown that on the trial of the *McRae v. McGrady* suit, February, 1885, and in which McRae recovered judgment for the land, the same testimony as to the writing of the deed, the agreement to make the deed, and the kind of deed, was submitted to the court by Monks, McGrady, and the clerk, Blair, as given on the trial of this cause, for the same purpose. Among other things, the court charged the jury: "If the qualification to the warranty, the words 'in, under, or through me,' were put in the deed before its delivery, and plaintiff accepted the same knowing such words were in it; or if plaintiff agreed to accept the deed with these words in it, or to accept a special warranty deed, and that he did accept such deed, then you will find for the defendant." The defendant asked the court to charge the jury "that if you believe from the evidence that, in the suit of *McRae v. McGrady*, McGrady answered and alleged that James Monks agreed to give him a warranty deed, and that, after said deed was written up, said Monks, without his knowledge and consent, inserted the words alleged in plaintiff's petition, and that defendant answered, denying said allegations; that said issue was tried before the district judge in said cause of *McRae v. McGrady*, and that the court rendered

judgment on said issue, then I charge you that said plaintiff is estopped from denying the effect of said judgment." This was refused; the judge indorsing on it, "because I do not think the pleadings or issues made in the case of *McRae v. McGrady and Monks* are the same as those involved in this case." Judgment was for plaintiff for \$——, and defendant appealed.

Whatever right McGrady had to call Monks into the suit by McRae was based upon the allegation that Monks was his warrantor for the land in controversy. McGrady alleged that his deed from Monks had been tampered with, so as not to contain the contract between them as to the warranty, asserting that the restricting words had been added without his knowledge. Monks denied this, insisting that the deed, when executed, had the restricting clause to the warranty, and that its terms were understood by the parties. Whether this proceeding on the part of McGrady was to avail himself of his right to make his alleged warrantor a party, (Rev. St. art. 4788,) or was an effort to have the instrument reformed so as to express the actual contract between him and his vendor, it is clear that the matter in issue was the inquiry whether the qualifying words formed part of the deed when it was executed. The judgment of the court, that McGrady take nothing, and that Monks recover his costs, was an adjudication of this matter between the parties. The suit brought by McGrady against Monks in its results depends upon whether the limited warranty was in fact in the deed. The court submitted it as a controlling fact to the jury, but refused to submit the plea of former judgment upon the issue, although pleaded, and there was evidence supporting it. Whether the deed had in it a general warranty or not was distinctly in issue in both suits; the same testimony for and against was used, and would be necessary to sustain or defeat the action or defense; the cause of action, the liability of Monks for the defective title, was the same; the former trial was upon its merits. These facts meet all the ordinary tests requisite to judgment estoppels. *Freem. Judgm.* 256-259; *Philpowski v. Spencer*, 63 Tex. 607; *Teal v. Terrell*, 48 Tex. 508; *Tadlock v. Eccles*, 20 Tex. 791; *Foster v. Wells*, 4 Tex. 101. It was error to refuse the instruction asked by defendant as to the effect of the former judgment. The trial amendment was sufficiently specific to show cause of action. What means of knowledge McGrady had, and whether he was deceived, was a matter of defense. If the deed, when executed, had in it the general warranty, the right to recover would result upon the failure of title. The judgment in the former suit bound all parties to the suit. If the deed was only a special warranty, no liability followed the judgment against McGrady for the land. Where it is sought to rectify a deed for mistake or fraud, the evidence must be clear and satisfactory. *Adams, Eq.* 168, and cases; *Railroad Co. v. Garrett*, 52 Tex. 139; *Cook v. Sparks*, 47 Tex. 28; *Grooms v. Rust*, 27 Tex. 284, and cases cited; *Biglum v. Biglum*, 57 Tex. 238. It is questionable whether the testimony in the record to the alleged alteration is satisfactory. McGrady and Monks contradict each other; while the only other witness present can give no help, remembering nothing on the matter in dispute.

For the error above noted, the judgment is reversed, and cause remanded.

LOW *et al.* v. TANDY.

(*Supreme Court of Texas.* May 26, 1888.)

1. HOMESTEAD—PREMISES FOR EXERCISE OF BUSINESS.

Under the Texas homestead law, one residing on property which he does not own may claim as a homestead a lot upon which are erected a gin and mill buildings, for the exercise of his business and calling.

2. SAME—FIXTURES—CHATTEL MORTGAGE.

Where a mortgage was given upon the machinery of a gin-mill, which was attached as a fixture to the realty, and the mortgagee, instead of foreclosing the mortgage, sues on the note secured thereby, and levies on such machinery, the mortgagor may claim it as his homestead.

8. EVIDENCE—SECONDARY—FOUNDATION.

Where a seller of machinery indorsed the purchaser's notes, and delivered the contract of purchase to the indorsee, evidence that he afterwards wrote to the indorsee for such contract, without obtaining it, does not show sufficient effort to obtain the original to admit secondary evidence of its contents.¹

4. EXEMPTIONS—WRONGFUL SEIZURE—MEASURE OF DAMAGES.

In an action for levying upon exempt property, the value of the property taken, with interest, is the limit of damages.

5. APPEAL—PRACTICE—ASSIGNMENTS OF ERROR.

An assignment that "the court erred in its charge to the jury" is too general to require attention.

Appeal from district court, San Saba county.

Action by W. W. Tandy against R. M. Low and another for levying upon exempt property. Plaintiff purchased machinery for a gin-mill of defendants, and attached it to buildings on a lot which he used for the purposes of the gin-mill, residing upon another lot not his own. He mortgaged the machinery and the lot to defendants, who, instead of foreclosing the mortgage, levied on the machinery under a judgment obtained on the note secured thereby. Plaintiff claimed the property as his homestead, and obtained judgment for \$800, the value of property being only \$447.50, and defendants appeal.

W. M. Allison, R. H. Ward, and F. G. Morris, for appellants. *Fisher & Towner*, for appellee.

WALKER, J. The use by Tandy of the lot upon which the gin and mill-buildings were erected, for the exercise of his business and calling, made the premises a homestead under the law. His residence upon leased property could not affect the right to exemption for his place of business given by the constitution and laws of the state. *Gage v. Neblett*, 57 Tex. 377. The judgment on the note against Tandy and his sureties, without foreclosure of the mortgage upon property incumbered with the note, only authorized execution against property not exempt; that is, property liable to forced sale. The mortgage upon the property seized, not being enforced, did not affect the question of liability of the property to levy and sale. *Hargrave v. Simpson*, 25 Tex. 397; *Fisher v. Foote*, 25 Tex. Supp. 316; *Bradshaw v. House*, 43 Tex. 146; *Cannon v. McDaniel*, 46 Tex. 315. The cotton-gin and other machinery seem to have been placed in buildings upon the lot, and to have been attached as fixtures to the realty. While the mortgagor of personal property has a restricted control of it, he cannot sell or remove it; still, subject to foreclosure, either by sale by trustee or by judicial order, the mortgagor can so use it as to make it exempt from seizure and sale by any other creditor or in any other mode than by foreclosure. The court then did not err in sustaining exception to that part of the answer setting up the mortgage by Tandy to secure the note upon which the judgment had been rendered as a defense to the seizure without foreclosure of property exempt from execution, nor for excluding the mortgage when offered in evidence. As to the exclusion of secondary evidence of the contract of purchase of the machinery, the record does not show sufficient effort to secure the original. Low & Low, as agents, had sold the gin, etc., to Tandy, and had indorsed his notes for the property, and forwarded them to parties at Dallas, who subsequently failed in business, and did not return the contract when written to for it. Nor does it appear that these parties were its proper custodians. But the testimony is not material to the issues upon which it is evident the case was decided. The assignment,

¹ As to what is necessary to render admissible secondary evidence of the contents of written instruments, see *Silva v. Rankin*, (Ga.) 4 S. E. Rep. 756, and note; *Roll v. Rea*, (N. J.), 12 Atl. Rep. 905, and note; *Crafts v. Dougherty*, (Tex.) 6 S. W. Rep. 850; *McCormick v. Joseph*, (Ala.) 3 South. Rep. 796; *Railway Co. v. Strickland*, (Ga.) 6 S. E. Rep. 27; *Roehl v. Haumesser*, (Ind.) 15 N. E. Rep. 345; *Village of Ponca v. Crawford*, (Neb.) 37 N. W. Rep. 609; *Leak v. Covington*, (N. C.) 6 S. E. Rep. 241.

"the court erred in its charge to the jury," is too general to require attention. The verdict as to the use made by Tandy of the lot, and the manner of use of the machinery as fixtures, is sufficiently sustained by the testimony. The verdict, however, is excessive, and the *remittitur* in excess of the testimony is allowed. Judgment below is reversed, and here rendered for \$479.28.

MCINTYRE v. DE LONG.

(*Supreme Court of Texas.* May 20, 1888.)

VENDOR AND VENDEE—VENDOR'S LIEN—FAILURE OF TITLE AS DEFENSE.

In an action to enforce a vendor's lien, it appeared that defendant, with full knowledge of the facts, and without fraud or mistake, took a defective tax title, and, being aware of the danger of loss thereby, accepted a deed with special warranty; plaintiff having refused to convey with general warranty. *Held*, that defendant could not avoid payment of the purchase money on the ground of failure of title.

Appeal from district court, Tom Green county.

Action by H. C. McIntyre against G. W. De Long to foreclose a vendor's lien. Defendant pleaded failure of title as to one tract; and judgment as to the note for the purchase money for that tract was rendered in his favor, from which judgment plaintiff appealed.

Tarver & Cochran, for appellant. *J. W. Hill* and *T. C. Wynn*, for appellee.

WALKER, J. This is an appeal from a judgment against McIntyre in a suit brought by him upon a promissory note made by De Long to plaintiff for \$800, and to enforce the vendor's lien retained upon one-third interest in the Mary Harrison survey of 1,280 acres of land, being one-half of a two-thirds interest in said survey conveyed by tax deed, May 7, 1878, by A. McIlvaine, sheriff of Tom Green county, to John Lackey, and to said McIntyre. The petition contained appropriate averments for the judgment and decree asked. Another note and foreclosure were included in the petition, about which there is no controversy. The defendant pleaded failure of title to the land for which the note was made; alleging that the only title held by McIntyre at his sale was a tax deed void on its face. Prayer, also, for \$250, cash payment on the land. The testimony showed the note, as alleged, made by the defendant to plaintiff of date January 4, 1884, and payable one year thereafter, with interest at 12 per cent. from date, and payable annually; vendor's lien retained. The deed of same date by McIntyre to De Long recited a cash payment of \$250, and the making of the note for \$800, as consideration for which "I have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release and quitclaim, unto the said G. W. De Long all that tract of land known and described as follows: My undivided half interest in and to the undivided $\frac{2}{3}$ of survey No. 809, abstract No. 321, in name of Mary Harrison, lying and being situated in the South fork of the Concho river, * * * and containing 425 acres more or less,—it being the undivided half of the same land conveyed by A. McIlvaine, sheriff of Tom Green county, to John Lackey and H. C. McIntyre by deed dated May 7, 1878, and recorded in records of Tom Green county, in Book B, p. 628; together with all and singular the rights; * * * to have and to hold all and singular the said premises, unto the said G. W. De Long, his heirs and assigns, forever," with warranty "against every person whomsoever lawfully claiming or to claim the same, or any part thereof, by, through, or under me;" and specially retaining vendor's lien. It appeared in evidence that McIntyre refused to give a general warranty, and for that part of the land which he held by tax title he would only give a quitclaim deed. He fully explained the character of his title. Leach, the agent of De Long in making the purchase, testified: "I told De Long, at time of signing notes and before trade was closed, that McIntyre

only held a tax title to the land conveyed by special warranty deed, and he might lose it at any time. He [De Long] said that tax titles were generally regarded good in this section of the country, and he would make the trade anyhow." The defendant, De Long, testified that, in buying, he "expected to get a good title to the land,—not a mere chance at the title." The court below held that plaintiff was not entitled to recover on the note, nor the defendant to recover his cash payment on the purchase money.

In an action upon a purchase-money note for land conveyed by special warranty, on appeal Justice BELL (*Rhode v. Alley*, 27 Tex. 445) clearly and fully declares the principles governing such cases: "It cannot be questioned that it is competent for a purchaser of land who has received a deed with special warranty to show that a fraud has been practiced upon him in respect to the title. If a vendor of land has a perfect title in himself, his vendee may well be content to accept from him a deed with special warranty, because such a deed would in that case vest an unimpeachable title in the vendee. Ordinarily, when a vendee accepts a quitclaim deed, or a deed with special warranty, the presumption of law is that he acts upon his own judgment and knowledge of the title, and he will not be heard to complain that he has not acquired a perfect title. But when, in the negotiations preliminary to the execution of the contract, the purchaser stipulates for a perfect title, and is afterwards induced by false or fraudulent representations of the vendor to accept a quitclaim deed with special warranty, in the belief that he is acquiring a perfect title, and one free from litigation at the time, he will be permitted to show that he was deceived in respect to the title, and may be relieved against such contract;" citing *Mitchell v. Zimmerman*, 4 Tex. 75; *York v. Gregg*, 9 Tex. 85; *Hays v. Bonner*, 14 Tex. 629; *Wells v. Groesbeck*, 22 Tex. 429. In the absence of fraud or mistake, the note and deed express the contract between McIntyre and De Long. The note contained a promise to pay absolutely, without any condition. The deed limits responsibility in the warranty. The nature of the title was discussed before the note and deed were executed, and De Long was advised by his agent, Leach, that it was but a tax title he was buying, and he was liable to lose it any time. After this assurance, defendant declared "he would make the trade anyhow." There is undisputed testimony that De Long took the defective title with full knowledge of the facts. From his contract, so made, courts cannot relieve him.

The judgment below, so far as recovery is refused upon the \$800 note, with interest at 12 per cent. from January 4, 1883, is reversed, and judgment will be here rendered, in addition to the recovery in the judgment below, for said \$800, and interest at 12 per cent. from January 4, 1883.

VOIGHT *et al.* v. MACKLE.

(Supreme Court of Texas. May 20, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—GOOD FAITH.

One who conveys land to another by deed, and continues to live on the land in question, cultivating it and paying taxes thereon, cannot avail himself of the statute of limitations to defeat the title of his vendee.

2. APPEAL—REVIEW—EXCEPTION TO JUDGMENT.

On appeal, it is immaterial that no exception was taken to the findings of the court, when an exception is taken to the judgment, and the record discloses that the findings of fact do not support such judgment.

Appeal from district court, Bastrop county.

Dyer Moore, for appellants. *G. W. Jones* and *Garwood & Batts*, for appellee.

GAINES, J. This suit is an action of trespass to try title, brought by appellee against appellant A. E. Voight. By leave of the court, the other appellant, Max Voight, made himself a party defendant to the action. The conclusions of fact found by the court show that the land in controversy was con-

veyed to appellee in 1864, and that his deed was duly registered at the time of its delivery; that in 1874 he conveyed the land by deed to one Henry Mackle, his nephew; and that the consideration recited in the conveyance was \$500. Henry Mackle was living with his uncle at the time the latter conveyed the land to him, and they continued to live on the land together for about five years thereafter, at the end of which time the nephew went away. There was testimony tending to show that the deed was made to the nephew in consideration of services rendered by him to his uncle; while, on the other hand, there was evidence going to establish that it was executed merely for the purpose of defrauding the grantor's creditors. The findings of the court do not determine the question raised by this conflict of testimony, but we do not deem the omission material. In either event, Henry Mackle acquired by the deed a perfect title as against appellee. After the nephew left, he demanded rent of his uncle, but it was not paid. He testified that the uncle was to pay the taxes. After his departure, the uncle remained in possession of the land, using and cultivating it, and paying all taxes for the period of five years. In 1886, Henry Mackle conveyed the land to appellants. Under this state of facts, the court found, among other conclusions, as a matter of law, that appellee, by remaining in exclusive possession of the land, using and cultivating and paying taxes, under the duly-registered deed made to him, in 1864, had acquired title by the statute of limitations of five years, and gave judgment for him accordingly. In this we think the court erred. In *Harris v. Hardeman*, 27 Tex. 248, it is said, and perhaps authoritatively decided, that, when the ancestor had conveyed the land in his life-time, his heirs, upon regaining possession, had no title, and could not set up the statute of limitations either of three or five years under the grant to him. The same principle is announced in the same case in 15 Tex. 467. The statement of the case does not clearly show whether the point, as to limitations of five years, was presented or not, though the language of the court in the opinion in 27 Tex. would indicate that it was. However that may be, the principle announced is sound. The reason upon which the statute of five years is based would seem to be that the party, by taking possession under a deed which is spread upon the records, gives distinct notice of his claim to the land, and of the deed through which he derived his title. If, after this open challenge of the rights of all adverse claimants, his possession, use, cultivation, and payment of taxes continues for five years, the statute means that he shall be conclusively presumed to be the owner of the land. But can a possessor who has received a deed which has been duly registered, but who has subsequently conveyed the land, be said to claim that which under the conveyance which he has transferred to another? We think not. In order to avail himself of the statute as a claimant under a recorded deed, he need not have the lawful title, but he must retain at least during the statutory period such claim as the deed purports to convey. It is insisted in appellee's brief that, because the findings of the court were not excepted to, the appellants cannot take advantage of the errors of the trial judge in this court; and in support of the proposition we are referred to the case of *Insurance Co. v. Milliken*, 64 Tex. 48. In that case neither the findings nor the judgment were excepted to. Here there is an exception to the judgment, and the record discloses that the facts found by the court do not support it. We think, therefore, that the exception to the judgment of the court is sufficient, and are of opinion that the exception and assignment of error upon it are well taken. The judgment will accordingly be reversed, and remanded.

MCDANIELL v. RAGSDALE.

(Supreme Court of Texas. May 29, 1888.)

HOMESTEAD—ABANDONMENT—WHAT CONSTITUTES.

A man who had a homestead in Texas went to Arizona, bought property, and located there, with intent to remain. His wife and children continued to reside on the homestead, intending, in accordance with his wishes, to follow him as soon as they could get the means by sale of the homestead. This they endeavored to do, but had not succeeded, and were still living on the homestead, when it was levied on for the husband's debts. *Held*, that there was no abandonment of the homestead, and that the levy and sale were invalid.¹

Appeal from district court, Tom Green county.

Action for the recovery of real estate, brought by M. C. Ragsdale against Page McDaniell. Plaintiff claimed under deed from one Weber and wife, and defendant derived title by levy and sale under execution against said Weber, prior to plaintiff's deed. The property in question was decided not subject to the levy, and judgment rendered for plaintiff. Defendant appealed.

Neill v. Freiderich, and *Fisher, Townes & Fisher*, for appellant. *W. A. Wright, West & McGown*, and *Walton, Hill & Walton*, for appellee.

WALKER, J. The question involved here is whether the wife and minor children of a man who has left the state, and desires that they follow him, still retain the protection of the homestead exemption while they remain upon the homestead left by the husband and father. It is held that one family is not entitled to exemption for two homesteads at the same time; and that where two places of residence are owned by the head of the family within the state, that the husband, as the head of the family, can designate which of the two shall be the home of the family,—thus selecting the homestead and designating the place of exemption. *Holliman v. Smith*, 39 Tex. 362; *Clements v. Lacy*, 51 Tex. 158. It is also settled that the creditors of the husband have no interest in the homestead as property which may be used in payment of his debts, and therefore that in the sale or disposition of it there can be no fraud against the creditor. *Cox v. Shropshire*, 25 Tex. 123. It may be also assumed that, if the wife determines to do so, she cannot be prevented from remaining in the state, and continuing the occupancy of the home after the husband has left, whatever may be the purposes or success of the husband after leaving the state. It would follow, then, that until the wife shall follow the husband, or part with the home to which the laws extend their protection, the creditor of the husband could not interfere with her rights and that of her children in the homestead. Upon the husband's leaving the state, she became the head of the family. *Kelley v. Whitmore*, 41 Tex. 648, and cases cited. In this case the ability of the wife to join the husband with their children seems to have depended upon a sale of the property. Her wish to sell, and desire for further abandonment, should not render it subject to seizure and sale while so occupied in fact. The court submitted the issues raised by the testimony in the charge: "(3) If you find from the evidence that Joseph Weber (the husband) in good faith, without any intention to defraud his wife in the homestead rights, left his homestead on the land in controversy prior to June 4, 1883, [the day of the levy under which plaintiff claims,] with intent never to return to it and occupy it as a homestead, (unless he left with

¹In general, as to what constitutes an abandonment of a homestead, see *Newman v. Franklin*, (Iowa), 28 N. W. Rep. 579, and note; *Newton v. Calhoun*, (Tex.) 4 S. W. Rep. 645; *McElroy v. Magoffin*, Id. 547; *Ryce v. Renfro*, Id. 545; *Gates v. Steele*, (Ark.) Id. 53, and note; *Kaes v. Gross*, (Mo.) 3 S. W. Rep. 840; *Sanders v. Sheran*, (Tex.) 2 S. W. Rep. 804; *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 892, and note; *Repenn v. Davis*, (Iowa), 34 N. W. Rep. 326; *Finley v. Saunders*, (N. C.) 4 S. E. Rep. 516; *Root v. Brewster*, (Iowa), 36 N. W. Rep. 649; *Baker v. Jamison*, Id. 647; *Nethercutt v. Herron* (Ky.) 3 S. W. Rep. 18; *Ullman v. Jasper*, (Tex.) 7 S. W. Rep. 763; *Davis v. Prichard*, (Ky.) Id. 549.

the intention in subdivision No. 4 of this charge,) you will return a verdict for plaintiff. In this connection you are instructed that, no matter how long or how far Weber may have wandered from his homestead, (if he had one,) yet if he had an intention to return thereto it would not constitute an abandonment of the homestead. Moreover, before the homestead character will be lost, it must be undeniably clear and beyond all reasonable ground of dispute that there has been a total abandonment without an intention to return and claim the exemption, but it is not necessary that another should be acquired, provided there is the intention to abandon and an actual abandonment of it. (4) If you find from the evidence that Joseph Weber did leave his homestead, and emigrate to the territory of Arizona, with intention never to return and claim it, yet if you find that he intended his family to remain on said homestead until it could be sold, and the family did so remain until the 4th day of June, 1883, then there was not such an abandonment of the homestead as would render it liable to execution, and if you so find you will return a verdict for defendant." These propositions are as favorable to the plaintiff's case made in the testimony as the law as held by our courts will permit. Holding, as we do, that the homestead, once acquired is not abandoned while the wife and children are in fact residing thereon, it was not error in the court to refuse the instructions asked as to the effect of the husband's acts and purposes for the future after he had left the state, upon the homestead character of the premises occupied by his family in Texas. The acts and declarations of both the husband and the wife on the subject of the removal to Arizona were properly in evidence. There would be no fraud in the purpose, if shown that the wife and children should remain until they could effect a sale of the homestead. She had the legal right to do so. There is some conflict in the testimony. If the witness Westbrook is to be believed, the wife in fact had followed her husband to Arizona before the levy. This would have authorized a verdict for the plaintiff. This testimony is contradicted, and the jury were the judges of the credibility of the witnesses examined. The case, as it appears from the testimony, is that the husband left Texas to seek a location. After wandering for months, he stopped at a railroad village in Arizona, bought property with his wages, and wrote to his wife to join him. She had remained with her children, and did not have the means to join her husband without making sale of the homestead. At the time of the levy she and her children were living on the premises levied upon. The husband was insolvent, having failed in business as saloon keeper in Texas. In Arizona he had taken up his former trade as barber. On hearing of her husband's wishes as to change of residence, the wife put the place into hands of land-agents for sale, intending to leave as soon as she could sell. The lot was levied upon June 4, 1883, and sold October 4th thereafter. The sale and conveyances down to plaintiff were regular. The defendant, Ragsdale, claimed under a deed from Weber and wife, acknowledged by the wife September 4, 1883. She and her family resided on the lot until September 11, 1883. Ragsdale was her son-in-law, and knew all the facts. The premises being in fact the residence of the family at the levy, and the parties, Weber and wife having conveyed to defendant by the forms of law, there was no injustice done by the verdict and judgment. Finding no error, the judgment below is affirmed.

ROBERTS v. CONNELLE *et al.*

(Supreme Court of Texas. May 29, 1883.)

1. EXECUTORS AND ADMINISTRATORS—QUALIFICATION—EFFECT.

Under Rev. St. Tex. arts. 1942, 1943, providing that a person may so make his will that the probate, registration, and return of inventory, appraisement, and list of claims, shall be all the action to be had by the county court in reference to his estate, and an executor of such will may be sued for a debt against the estate, and execu-

tion shall run against the estate in the hands of the executor, the qualification and return of inventory by one of two executors of such a will is sufficient to withdraw the estate from administration by the court, and subject property in the hands of such executor to levy and sale on execution.

2. EVIDENCE—BEST AND SECONDARY—PROOF THAT AN EXECUTOR QUALIFIED.

Under act Tex. Aug., 1870, which requires all official oaths of executors and administrators and all inventories to be spread upon the county records, and gives the same effect to certified copies of those records as to copies of the originals, the fact that an executor qualified and rendered an inventory cannot be shown by parol.

3. JUSTICES—EXECUTION—ISSUE OF.

Under act of 1870, (Pasch. Dig. 6840,) providing that a justice shall, when required by a party having a judgment in his court, issue execution to enforce such judgment, an execution may properly issue upon a judgment which did not specifically direct the issuance of execution.

4. SAME.

Rev. St. Tex. art. 1618, requiring a judgment of a justice of the peace to direct the issuance of such process as may be necessary to carry the judgment into execution, does not apply to a judgment rendered before the statute was enacted, notwithstanding the execution was issued after its enactment.

Commissioners' decision. Appeal from district court, Eastland county.

Action by John C. Roberts against C. W. Connelle and another to quiet title, and to recover section 497, patented to the Southern Pacific Railroad Company. Judgment for defendant. Plaintiff appeals. Plaintiff claims title by regular conveyances down to M. J. Hall, Sr., deceased, and by deeds from his heirs. Defendant claims through a sheriff's deed under an execution against M. J. Hall, Jr., executor of the will of M. J. Hall, Sr. Rev. St. Tex. art. 1942, provides that any person capable of making a will may so provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate. Article 1943 provides that, in the cases mentioned in the preceding section, any person having a debt or claim against said estate may enforce the payment of the same by suit against the executor of such will, and, when judgment is recovered against the executor, the execution shall run against the estate of the testator in the hands of the executor that may be subject to such debt.

J. M. Moore and J. C. Walker, for appellant.

COLLARD, J. On the trial of this case the court allowed M. J. Hall, the acting executor, to testify: "I alone qualified. I duly returned an inventory of the estate," etc. The witness attached a part of the inventory to his depositions. Plaintiff objected to the testimony because not the best evidence. The objection should have been sustained. There was no other evidence adduced showing that Hall qualified as executor, or that any inventory was filed as required by law. The statute in force at the time the will of M. J. Hall, Sr., was probated, and the inventory was filed, required that all official oaths of executors and administrators, and all inventories, should be copied at length in the records of the county, and that "certified copies taken from the record of all papers required to be recorded should have the same effect as copies taken directly from the original." Act Aug. 1870, (2 Pasch. Dig. arts. 5772-5774; Id. 5573.) The original will and inventory it seems had been lost. It does not appear, however, that the records were lost or destroyed. Certified copies from the records were evidently the best evidence, and parol evidence of what they contained was not admissible. The plaintiff also urged the same objection to the statements of the witness J. P. Alford, clerk of the county court of Harrison county, as to what the records of his office contained. He testified by depositions that "the records of this office show the will has been duly recorded, and also that the executor returned an inventory of all property belonging to the estate." A certified copy of the record of the will, with evidence upon which it was probated, was produced, and the statements of the witness that the will was duly recorded, though not admissible, would have

been harmless error; but the fact that a full inventory had been returned by the executor was a material fact, and could not be shown by parol while the record existed. For these errors the cause, in our opinion, should be reversed.

Other questions raised by the assignments of error depend upon the main question in the case; that is, whether the qualification and return of inventory by only one of the executors under the will would have the effect to withdraw the administration of the estate and the executors of the will from the control of the probate court. If the facts stated would have such effect, the executor could be directly sued, and judgment rendered against him, and the property in his hands as executor would be subject to levy and sale under execution. Pasch. Dig. 5628; Gen. Laws 1876, p. 124, § 117; Rev. St. art. 1943. In *Johnson v. Bowden*, 43 Tex. 670, the supreme court decided that a renunciation of the trust by one of two executors under an independent will, similar to the one now under consideration, would not deprive the other executor, who qualified, from executing the trust as independently of the orders of the court, and with the same discretion as both could have done had they both qualified. The question was afterwards before the court in the case of *Blanton v. Mayes*, 58 Tex. 424. The opinion was delivered by WATTS, of the commission of appeals. Independent powers were given by the will to certain named executors, or the survivor of them. It was argued in the opinion that a less number of executors than the will provided for could not execute the trust without an order of the probate court to that effect. It was admitted in the opinion that the act of 1870 engrafted upon our probate system the statute of 21 Hen. VIII. c. 4, to the fullest extent, which provided that where there are several executors, and one of them only qualifies, he may execute the will. In the case of *Johnson v. Bowden*, before cited, the court held that article 1835, Pasch. Dig., in effect adopted the statutes of 21 Hen. VIII., and declared that the provisions of that statute applied so as to allow one of several executors alone to carry out the directions of a will independently of the court. The case of *Blanton v. Mayes* was before the supreme court a second time, (67 Tex. 247, 3 S. W. Rep. 40;) and the court on the last appeal, in commenting upon the doctrine laid down by Judge WATTS, uses the following language: "On a former appeal it was decided that one of the trustees had no power under the will, the others living, to sell the property conveyed in trust; and the opinion questions the power of all the trustees and the provisions of the will to sell. While the opinion there given recognizes the correctness of the ruling in *Johnson v. Bowden*, 43 Tex. 674, reasserted in *Anderson v. Stockdale*, 62 Tex. 54, there is much in the argumentative part of the opinion to deny the rule laid down in the cases above mentioned; but it will be seen that there was no evidence in the case, as there presented, which tended to show that the estate owed debts which alone, under the terms of the will, would have empowered the qualified executor, or all of them, had they qualified, to sell property as executors. We do not understand that it was decided, on the former appeal, that the executor who qualified was not empowered to sell property of the estate to pay debts unless he did so under an order of the probate court in course of a regular administration. "The opinion of the court in the last appeal clearly intimates that, if debts were shown to exist, all the executors, had they qualified, could have executed the provisions of the will without any orders from the court, and if all were so empowered the qualifying executor could so act alone. The right of one of the executors to sell property was made to depend upon the conditions and directions in the will, and not upon the doctrine that one executor had no power to act. So the court held, by plain inference, that if debts were shown to exist, and the sale was made to pay the same, it would be valid; if no debts could be shown, then by the terms of the will the sale was not authorized, in which case the plaintiff would recover the land back, and the purchaser the price he had paid for it." The court left the doctrine as laid down in *Johnson v. Bow-*

den. We think it is the correct rule. We therefore conclude that the qualification of M. J. Hall, Jr., and return of inventory by him as required by the will, if the facts can be established by legal evidence, had the effect to withdraw the estate from administration by the courts, and that the property in his hands as such executor was subject to execution and forced sale.

Plaintiff insists that no execution could issue upon the judgment rendered by the justice of the peace, because it does not direct execution to issue, but, on the contrary, directs that the claim be paid in due course of administration. The judgment was rendered July 12, 1875; the *alias* execution was issued November 14, 1879. We do not understand that a justice of the peace must award execution as a part of the judgment in order to authorize its issuance under the laws in force at the time the judgment was rendered. The execution issued as a consequence of the judgment as an immaterial act to enforce the judgment. There is no provision of the law of 1870, in force at the time the judgment was rendered, requiring the award of execution to be made in the judgment. The act of 1870, upon the subject of final process upon judgments in general, is: "And every justice shall, from time to time, when required by a party having a judgment in his court, issue such executions or other writs as may be necessary to enforce such judgments until the same shall have been satisfied." Pasch. Dig. 6340. This plainly indicates that the writ follows the judgment already rendered as a matter of course. Even in a suit for specific articles, if the plaintiff recover, the statute directs that "judgment shall be rendered for the specific articles if to be had, but, if not, then for their value. Here the judgment ends, and to enforce it the statute proceeds: "And the justice shall issue thereon his writ, directed to some lawful officer, commanding him to put the plaintiff in possession of the article or articles so recovered, if to be found, but, if not, then to proceed to make the value of such article or articles, with legal interest from the date of the judgment, and costs, as under execution." Pasch. Dig. 6340. It is certainly the rule that an execution must be authorized by and must conform to the judgment; that is, there must be a judgment for costs, for instance, to authorize the clerk to issue execution for them, (*Criswell v. Ragsdale*, 18 Tex. 445;) but there was no law in this state at the date of the judgment requiring the court to award execution as a judicial act in a simple judgment for debt. Our statutes simply directed that the clerks and justices of the peace shall, after judgment, after a time stipulated, or upon the rising of the court, issue execution. If the contrary were true, no judgment would be final without an order that execution issue. It has been held in this state that an entry by the justice of the peace on his docket of the amount sued for, and that "the defendant came forward and acknowledged judgment," giving the date, was a final judgment. *Wahrenberger v. Horan*, Id. 59. The docket entries of a justice of the peace, styling the suit, amount of debt, and the following: "APRIL 28th. Offset proved and allowed for \$20.50. Decree for balance, \$70.50,"—were held sufficient as a judgment. *Howerton v. Luckie*, Id. 236. An entry of a verdict on the docket of a justice of the peace was treated as sufficient entry of judgment. *Davis v. Pinckney*, 20 Tex. 341. In the case of *Clay v. Clay*, 7 Tex. 251, the justice entered upon his docket opposite the verdict: "Judgment rendered 17th April, 1849." This was held sufficient as a judgment in justice's court. The supreme court, in commenting upon it, say: "The entry of judgment is informal and defective, and does not pursue the directions of the statute; but great liberality and indulgence are extended to the proceedings of justices of the peace, who are not supposed to be skilled in the forms of judicial proceedings observed in courts of record. If their proceedings are intelligible, and attain the ends of substantial justice, they are generally sustained." See *Freem. Judgm.* § 55, and note. We conclude that the judgment of the justice of the peace in the case before us was a final judgment, notwithstanding it failed to allow execution; that an execution

would follow as a consequence of the judgment, and would run against the property of the estate in the hands of the executor Hall. The fact that the judgment required the claim should be paid in due course of administration is immaterial. There was no administration in the probate court, and the judgment could not be so collected. Such being the case, it was collectible by execution as allowed by law in case where the executor controls the estate and executes the will independently of the court.

The Revised Statutes of this state, which took effect September 1, 1879, requires that a judgment of a justice of the peace shall "direct the issuance of such process as may be necessary to carry the judgment into execution." Rev. St. art. 1613. The judgment in the case before us is not affected by the recent statute, notwithstanding it was enacted before the execution issued. The statute quoted is directory only of judgments to be thereafter rendered. Other errors assigned need not be noticed further, as they are incidentally disposed of in our conclusions above stated. On account of errors of the court in admitting illegal evidence, we conclude the cause should be reversed, and remanded for a new trial.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed and cause remanded.

SCOTTISH UNION & NAT. INS. CO. v. CLANCY.

(*Supreme Court of Texas. May 29, 1888.*)

1. INSURANCE—CONDITIONS OF POLICY—PROOF OF LOSS—APPRAISEMENT.

Where a policy of fire insurance provides that the extent of any loss shall, upon demand of either party, be appraised by arbitrators, that the report of such appraisement shall be made part of the proofs of loss, and that nothing shall be payable on the policy until such proofs are furnished, such appraisement when demanded, is a condition precedent to right of action by the assured.

2. SAME—WAIVER.

An inspection and partial adjustment of loss, with an offer to pay a certain sum in satisfaction of damages, and the acceptance of an inventory of lost and damaged goods without objection, will not constitute a waiver of a stipulation in a policy of insurance requiring proof of loss to be produced, and appraisement of damage to be made; the assured being notified that such proof and appraisement would be required according to the policy.

Commissioners' decision. Appeal from Dallas county court.

Action by C. H. Clancy against the Scottish Union & National Insurance Company on a policy of insurance. Judgment for plaintiff, and defendant appeals.

Cranford & Cranford, for appellant. *R. E. Cowart*, for appellee.

ACKER, J. Appellant, by its policy of insurance, issued to appellee, contracted to insure him against loss or damage by fire to his stock of merchandise in the sum of \$1,000, or not exceeding the value of the loss or damage. Appellee's stock was damaged by fire, and immediately thereafter he gave notice to the local agent of appellant, who, with the adjuster for the company, visited the premises, inspected the stock, and adjusted the damage upon a portion of the goods. Failing to agree in their estimates of damage, the attempt at adjustment was abandoned, and the adjuster, who was also the adjuster for another company carrying \$1,000 insurance upon the same goods, offered appellee \$850 in settlement of his claims against the two companies. The proposition was declined; and this suit was brought July 25, 1884, to recover the amount of the policy. The attempt to adjust the damage was made on the 20th of May, 1883. On the 29th of the same month, appellee handed to the local agent of appellant an inventory of the goods which were claimed to have been damaged and destroyed by fire, amounting to \$3,125.52. This in-

ventory was sworn to as being complete and correct. On the 19th of May, and again on the 22d of May, appellant's adjuster made written demand on appellee for an appraisal of the loss under the terms of the policy, and in each demand notified appellee that the company did not waive compliance with any of the requirements of the policy. Appellee refused to submit to an arbitration or appraisal of the amount of damage and loss. No formal proofs of loss were furnished by appellee, as required by the policy. The policy of insurance contains the following stipulations: "Loss or damage to property partially or totally destroyed, unless the amount of said damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons, one to be selected by the company, and one by the assured; and, when either party demand it, the two so chosen may select an umpire to act with them, in case of disagreement; and, if said appraisers fail to agree, they shall refer the differences to said umpire; each party to pay their own appraiser, and one-half of the umpire's fee; and the award of any two, in writing, shall be binding and conclusive as to the amount of such loss or damage." And also: "And upon each article the damage shall be separately appraised, * * * and the report of the appraisers, in writing, under oath, shall form a part of the proofs of loss hereby required; and, until such proofs * * * are produced * * * and appraisal permitted, the loss sustained shall not be payable." The policy contains the further provision that "the amount of loss or damage * * * to be paid to assured, or his legal representatives, sixty days after due notice and satisfactory proofs of the same are made by the assured, and received at their office in Hartford in accordance with the terms of this policy." It is contended by appellant that the suit was prematurely brought, (1) because no proofs of loss had been furnished, as required by the terms of the policy; and (2) because of appellee's refusal to submit to appraisal the amount of loss and damage sustained. Upon the part of appellee it is contended that the inventory of goods lost and damaged, furnished to appellant's agent, was sufficient proof of loss; and, (2) if the inventory was not sufficient proof of loss, then the acceptance of it by appellant's agent, without indicating any objection thereto, together with the inspection of the premises, the adjustment of the damage to a portion of the goods, and the offer to pay \$850 in full of loss and damage, were a waiver of any other or further proof of loss, and of the appraisal, by the assured, and received at their office in Hartford, in accordance with the terms of this policy.

By the express terms of the contract, it was made conditions precedent to the right of action by appellee that the damages to the goods should be appraised upon demand of either party to the contract, and that the report of such appraisal, under oath, should be made a part of the proofs of loss, which were required by the policy to be furnished to appellant. It is not denied that appellant made proper demand to have the damage appraised, nor that appellee refused to comply with the demand. However injudicious it may be for parties to bind themselves by such agreement, it seems to be well settled that, having done so, they cannot disregard it. If the stipulation was to deny or repudiate the jurisdiction of the courts to determine the rights and liability of the parties arising upon the contract, we would hold, with the weight of authority, such stipulation void. But here the stipulation does not divest the courts of jurisdiction, but only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts. In the absence of fraud, accident, or mistake, the parties having agreed that the amount of loss shall be determined in a particular way, we are constrained to hold that such stipulation is valid; and as the contract requires that the report of the appraisal of loss shall be made a part of the proofs of loss, and that the loss shall not be payable until after such proofs are furnished, we must hold that such appraisal and proofs of loss are conditions preced-

ent to right of action by the assured. *President v. Culver*, 30 N. Y. 313; *Holmes v. Richet*, 56 Cal. 307; *Herrick v. Belknap*, 27 Vt. 673; *U. S. v. Robeson*, 9 Pet. 319; *Hudson v. McCartney*, 33 Wis. 345; May, Ins. § 493.

But it is insisted by appellee that the stipulation for appraisalment of the amount of loss, as well as the formal proofs of loss, were waived by appellant. The acts relied upon as constituting the waiver are the inspection and partial adjustment of the loss, the offer to pay a certain sum in satisfaction of the damage, and the acceptance of the inventory of lost and damaged goods without objection. It is not denied that these acts were performed by a duly-authorized agent of appellant. The agent to whom the inventory of lost and damaged goods was delivered, testified that, on receiving the inventory, he notified appellee that the company expected and required proofs of loss, as required by the terms of the policy. This is not contradicted by appellee. To constitute waiver, the acts relied on must be such as are reasonably calculated to induce the assured to believe that a compliance by him with the terms and requirements of the policy is not desired, or would be of no effect if performed. The acts relied on must amount to a denial of liability, or a refusal to pay the loss. *Insurance Co. v. Coffee*, 61 Tex. 292; May, Ins. § 469. It does not appear that appellant at any time denied its liability, or refused to pay whatever amount of loss and damage might be determined in the manner required by the policy to be due to appellee. (We think the court erred in charging the jury that the acts relied on by appellee constitute a waiver of the proofs of loss as required by the policy,) and in refusing to give the special instruction requested by appellant as to the effect of the stipulation in the policy that the amount of the loss or damage should be determined by appraisalment.

For the errors indicated, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

NEUMANN v. SCHROEDER.

(*Supreme Court of Texas. May 29, 1886.*)

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.

A verbal acceptance of a bill of exchange is not within the statute of frauds.

Appeal from district court, Bexar county.

Oscar Bergstrom, for appellant. *Shook, Dittmar & Van Der Hoeven*, for appellee.

STAYTON, C. J. This action was brought in justice's court, and by appeal taken to the district court. The appellant had sold hides to Croll & Hansen, who drew on the appellee for payment therefor the following instrument: "No. 378. SAN ANTONIO, TEX., 9-21, 1886. *George Schroeder*: Pay William Neumann one hundred and seventy dollars. (Not negotiable.) \$170.00. CROLL & HANSEN." The evidence in the case is as follows: "My name is William Neumann. I am plaintiff in this cause. On or about the 21st day of September, 1886, Croll & Hansen were indebted to me in the sum of one hundred and seventy dollars, (\$170,) for hides sold and delivered to Croll & Hansen, in payment whereof Croll & Hansen gave me the following order: 'No. 378. SAN ANTONIO, TEX., 9-21, 1886. *George Schroeder*: Pay to William Neuman one hundred and seventy dollars. (Not negotiable.) \$170.00. CROLL & HANSEN.' On the 22d day of said month, or next day after it was given to me, I presented it to George Schroeder, and he told me he was very busy then, buying cotton, and said, 'Come back this evening.' In the evening I presented the order to him again, and he said: 'You seem to be terribly anx-

ious about it. It is good, and would be if it was for three hundred and seventy dollars. Come in the morning and I will give you a check for it or the money. You cannot use the check this evening, anyhow.' Next morning I called upon George Schroeder again, and he laughed at me, and said Croll & Hansen are busted. 'I will not pay that order, but if you will find Hansen, and bring him to me, I will pay you two hundred dollars.' George Schroeder then refused to pay said order, and has not paid the same, or any part of it, since that time. I delivered the hides to Croll & Hansen. I have not sold any of the hides for which the order is given to George Schroeder. Croll & Hansen are here now, and have been for some time. I did not present it to them for payment, because I had nothing to do with them. I looked to George Schroeder for payment of the order, because he had accepted it. George Schroeder did not accept the order in writing, nor did he give me any writing about the matter. George Schroeder said that Croll & Hansen were shipping a car-load of hides, but I knew nothing about it. Schroeder did not tell me that he had no funds with which to pay the order; nor that, as soon as Croll & Hansen had shipped the hides, and realized the money on them, he would pay me. If he had told me that I had to wait for payment of the order until he realized on the hides, I would not have waited, but could have protected myself by attachment of Croll & Hansen's hides or otherwise. George Schroeder was backing Croll & Hansen. I don't know what arrangement there was between them. I generally collected my money from Croll & Hansen on the last or the first of the month. I got it this time on the 21st, because I wanted the money. I did not know they were going to fail. I am a butcher by profession, and the amount for which the draft is given was due me for hides delivered to Croll & Hansen daily. I had been selling them hides for several months before that, and they were always paid by giving orders on George Schroeder, as was done in this case; and George Schroeder had always paid them." The instrument drawn by Croll & Hansen is the basis of the action, and it was admitted in evidence, over the objections of the appellee. The cause was tried, on the evidence here given, by the court, and a judgment was rendered in favor of the defendant. There are no conclusions of fact and law found in the record, but the briefs for both parties concede that the action of the court was based on a holding that a verbal acceptance or promise to pay the draft was not binding on the appellee, because within the statute of frauds, which provides that "a promise to answer for the debt, default, or miscarriage of another" must be in writing, signed by the party to be charged therewith. There are many cases holding that a verbal acceptance or promise to pay a check or bill of exchange may be enforced when made in a state having a statute similar to that in force in this state. The following English and American cases so hold: *Lumley v. Palmer*, 2 Strange, 1000; *Windle v. Andrews*, 2 Barn. & Ald. 699; *Sproat v. Matthews*, 1 Term R. 185; *Miln v. Prest*, 4 Camp. 395; *Fatlee v. Herring*, 3 Bing. 628; *Jarvis v. Wilson*, 46 Conn. 90; *Mason v. Dousay*, 35 Ill. 424; *Sturges v. Bank*, 75 Ill. 596; *Leonard v. Mason*, 1 Wend. 524; *Williams v. Winans*, 14 N. J. Law, 341; *Walker v. Lide*, 1 Rich. Law, 251; *Grant v. Shaw*, 16 Mass. 343; *Edson v. Fuller*, 2 Fost. (N. H.) 186; *Barnet v. Smith*, 10 Fost. (N. H.) 265; *Fisher v. Beckwith*, 19 Yt. 34; *Stockwell v. Bramble*, 3 Ind. 428; *McCutchen v. Rice*, 56 Miss. 458; *Spaulding v. Andrews*, 48 Pa. St. 412; *Wells v. Brigham*, 6 Cush. 6; *Dunavan v. Flynn*, 118 Mass. 539; *Cook v. Baldwin*, 120 Mass. 318; *Dull v. Bricker*, 76 Pa. St. 260; *Pierce v. Kittredge*, 115 Mass. 375. Elementary authorities to same effect: Chit. Bills, 288; 2 Pars. Notes & B. 285; Byles, Bills, 237; 3 Kent, Comm. 83; 1 Daniel, Neg. Inst. 504; Edw. Bills, 409. The English and American cases here cited were divided within jurisdictions within which the fourth section of the statute of 29 Car. II. c. 3, was in full force; and many of them expressly, and all necessarily, hold that the statute has no application to a verbal acceptance or promise to pay a check or bill of ex-

change. Notwithstanding the existence of the statute known as the statute of frauds, on July 2, 1821, a statute was enacted by the British parliament which provided "that from and after the 1st day of August no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part, on one of said parts." 1 & 2 Geo. IV. c. 78, § 2. The ninth section of the statute of 19 & 20 Vict. provides that no oral acceptance of any bill of exchange shall be binding. In view of the English decisions to which we have referred, made while the statute of frauds was fully operative, and of the subsequent legislation to which we have referred, we cannot avoid the conclusion that this legislation was deemed necessary to render verbal acceptances or promises to pay checks and bills of exchange invalid; for, if such acceptances or promises to pay had been deemed within the statute of frauds, the subsequent legislation expressly made applicable to that matter was necessary. The English courts had decided that such acceptances and promises to pay were not within the statute of 29 Car. II. c. 3, and hence the necessity for the subsequent legislation. In several of the states of this Union in which the fourth section of the statute of 29 Car. II. is in force, statutes have been passed expressly requiring acceptances to be in writing. This illustrates the common understanding that such promises were not within the statute of frauds. Such being the construction of the statute of frauds by the English and American courts prior to its adoption in this state, the presumption is that it was intended it should here receive the same construction which has been given to it elsewhere. Distinguished elementary writers have questioned the correctness of the construction placed on the statute of frauds, and courts have regretted the ruling, but still followed it. 1 Reed, St. Frauds, § 174. It seems to us that verbal acceptances in many cases come within the evil which it was the purpose of the statute of frauds to prevent, and, were the question one which we felt at liberty to consider solely in the light of the evil intended to be remedied by the statute, we would be much inclined to give it a broader application than the decided cases. A statement of the grounds on which that statute has been held to have no application to verbal acceptances or promises to pay would serve no useful purpose. They will be found stated in the cases and by the elementary writers to which we have referred. The instrument made the basis of this action was not negotiable, nor was it necessary that it should be presented for acceptance; but under the statutes of this state this is unimportant in considering the effect of the verbal promise to pay made by the appellee. We are of the opinion, under the evidence and the presumptions to be drawn from it, that the appellant was entitled to a judgment, and, if there were facts which would have defeated that right, under any of the decided cases the appellee should have shown them. If the legislature be of the opinion that verbal acceptances or promises to pay bills of exchange and like instruments ought not to be sustained, a statute so declaring will doubtless be enacted; but, in the absence of such a statute, the courts are not authorized to depart from what seems to be the settled construction of the statute of frauds in order to reach what may seem to be an evil that another and perhaps better construction would have reached. The judgment of the district court will be reversed, and here rendered for the appellant.

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GAÑO *et al.* v. PALO PINTO COUNTY.

(*Supreme Court of Texas.* June 1, 1888.)

1. COUNTIES—CONTRACTS—MISTAKE—PLEADING.

In an action by G. & Sons upon a contract made between the commissioners' court of P. county and the firm of V., H. & C., by which the latter were employed to subdivide, map, and classify the school lands of the county, plaintiffs alleged that, when the contract was made, the commissioners knew that V., H. & C. had no personal fitness to perform the work; that they expected to employ some competent person

to do it, and that the contract was made with that understanding; but that, by inadvertence in entering the order upon the minutes of the court, the clerk omitted so much of the agreement as authorized the contractors to employ substitutes. *Held*, that the allegations were not sufficient to admit of a correction of the order on the ground of mistake. It was the duty of the contractors, before entering upon the work, to see that the order as entered was in accordance with the terms of this agreement.

2. CUSTOM AND USAGE—EFFECT—PLEADING.

Plaintiffs also alleged "that it had long been the custom in the state of Texas, where similar contracts were made by counties, * * * for the party contracted with to employ competent parties to do the work, even when no express authority to do the work was given in the contract with the county." But it was not alleged that the commissioners' court, with whom the contract sued on was made, had knowledge of such custom. *Held*, that the allegations were not sufficient to make the custom a part of the contract.

Appeal from district court, Palo Pinto county.

E. P. Nicholson and *W. B. Gano*, for appellants. *McCall & McCall*, for appellee.

GAINES, J. The appellants brought this suit in the court below. Upon a former trial they obtained a judgment, which was reversed on appeal, upon the ground that the court erred in overruling the demurrer to the petition. 30 Tex. 250. After the cause was remanded to the district court, the plaintiffs amended their petition. Upon the second trial a demurrer was sustained to the amended petition, and the suit dismissed. In the former opinion it was held that the contract made between the commissioners' court of Palo Pinto county and Veal, Haynes & Caruthers, by which the latter were employed to subdivide, map, and classify the school lands belonging to the county, and which is here sued upon, was an agreement for the performance of services involving a personal trust in the agents or contractors, and that, therefore, they could not perform the work through subcontractors so as to bind the county. The amended petition seeks by additional allegations to avoid the effect of that ruling. The additional averments, briefly stated, are that, when the contract was entered into with the commissioners, they knew that Veal, Haynes & Caruthers had no personal fitness to perform the work; that they expected to employ some competent person to do it, and that they were employed with that understanding; but that, by inadvertence, in entering the order upon the minutes of the court, the clerk made a mistake, and omitted so much of the agreement as authorized the contractors to employ substitutes. It is also alleged "that it had long been the custom in the state of Texas, where similar contracts were made by counties to have their school lands surveyed, classified, and mapped, for the party contracted with to employ competent parties to do the work, even when no express authority to do the work [was] given in the contract with the county." The order of the court is sued upon as a written contract, and a copy of it is annexed to the petition as the foundation of the action. The plaintiffs cannot be permitted to prove simply that there was an understanding between the commissioners and the contractors that they should employ subcontractors, because this would be to introduce oral evidence to vary a written contract. Are the allegations sufficient to admit of a correction of the writing on the ground of mistake? We think not. In order to reform an instrument for a mistake so as to embody in it additional terms, and enforce it as reformed, it must be alleged and proved that the instrument does not express the terms of the contract as agreed upon, and that both parties were ignorant of the omission at the time it was executed. It seems to us that it was the duty of Veal, Haynes & Caruthers to look to the order as actually entered before beginning the discharge of the work, and, if the contract as set forth in the entry was not in accordance with the terms of their offer, to decline to proceed until it was properly corrected. The commissioners' court is a court of record, and speaks through its minutes, and not by the mouths of the members of the body. The

proper method to amend the minutes, when they fail to speak the truth, is by a motion made in that court, and not by allegation and proof in another tribunal in which a litigation concerning its orders may arise. This court has held that the orders of the directors of a corporation entered upon the minutes of their proceedings, if intended as an agreement, is itself a written contract. *Railway Co. v. Gentry*, ante, 98, (Galveston term, 1888.) The order of a commissioners' court may in like manner constitute a contract, but it does not follow that the proper mode to reform it is not by a motion in the court where entered to correct the minutes so as to represent truly the order as actually passed by the body. We are also of the opinion that the allegations of a custom among the commissioners' courts of the several counties in the state are not sufficient to make such custom a part of the contract in this case. We think it the duty of these courts to select themselves such agents as may be necessary to assist them in the discharge of their functions, when such agents have necessarily to exercise judgment and discretion in the performance of the work assigned them. The duty of making such selection should not be delegated. Such a custom would, therefore, be unreasonable, and upon that ground should not be held binding upon such of these courts as have not expressly authorized their agents to employ substitutes. But it is not alleged that the custom was known to the commissioners' court of Palo Pinto county. If there could be a usage among these courts, such as might be presumed to constitute a part of a contract with one of them, (which we seriously doubt,) it would seem that such a usage would not necessarily be known to every other court of the same character, and that in order to bind another court it should be alleged and proved that the custom was known to it. We conclude that the court did not err in sustaining the demurrer to the petition, and in dismissing the suit, and the judgment is therefore affirmed.

MAVERICK v. FLORES et al.

(Supreme Court of Texas. June 1, 1888.)

1. EXECUTION—UPON DORMANT JUDGMENT—COLLATERAL ATTACK.

A sheriff's deed, under an execution issued more than seven years after entry of judgment, and the docket showing the issuance of such execution, are admissible in evidence to show title in the purchaser at the sheriff's sale, although no execution had been issued on the judgment within one year after its rendition, since an execution issued on a dormant judgment is only voidable.

2. LANDLORD AND TENANT—ATTORNMENT TO STRANGER—ESTATES.

One in possession of land as tenant of one of the joint owners conveyed his tenancy to another, and he to another, who attorned to the defendants. The plaintiff acquired the title under which the first tenant entered. *Held*, that the attornment to defendants did not subordinate their title to that of plaintiff.

Appeal from the district court, Bexar county.

Trespass to try title, by Mary A. Maverick against Francisco Flores, José Flores, and Oscar Crawford. Judgment for the defendants, and plaintiff appeals.

R. B. Minor, for appellant. *Oscar Bergstrom*, for appellees.

WALKER, J. Both parties claimed under one Petra Zambrano y Flores,—the appellant, who was the plaintiff below, under an execution sale and transfers down to her; the defendants, by inheritance. The defendants had possession of the lot for 12 years before 1875. In February, 1875, one Adams took possession under one of the joint owners, (whose estate plaintiff has,) and remained in adverse possession for about two years. He had a lease from defendants for an adjoining lot on the north, and in 1877 sold out to one Dunn, who sold to Brown, who attorned to José Flores, and paid him rent. Brown was succeeded in possession by Tatum, also paying rent to Flores. The lots held by these tenants were used together. On the trial the plaintiff

read a judgment and order of sale of the district court made in 1884 in favor of *John W. Smith, Guardian, etc., v. Petra Zambrano y Flores*. Plaintiff then offered the execution docket of the court, and the entries thereon, in said case of *Smith, Guardian, v. Petra Zambrano y Flores*, as follows: "Execution issued 4th September, 1851, directed to any lawful officer of Bexar county. Too late to levy on real estate, according to law, to the next term of the district court, September 29, 1851. JOHN CRAWFORD, Sheriff B. Co., by R. J. JONES, Deputy." "Pluries execution issued 5th April, 1852, directed to sheriff B. Co. No property found in my county. JOHN CRAWFORD, Sheriff B. Co., by JAMES GROSS, Deputy." "Execution (order of sale) issued 11th April, 1853, executed by levying on within described property, and advertised and sold according to law on 1st Tuesday May, 1853, 3d of said month, to S. G. Newton, for ten dollars, he being the best bidder for the same. W. B. KNOX, Sheriff, by R. J. JONES, Deputy." Objection was made to the testimony, and sustained, upon the ground "that it did not appear from said entry that execution had issued upon said judgment within one year from its date." Plaintiff then offered certified copy of deed of date May 3, 1853, made by W. B. Knox, sheriff of Bexar county, by R. B. Jones, deputy, for the lot in controversy, reciting sale under the judgment and execution, and conveying to S. G. Newton all of the right, title, and interest of the said Petra Zambrano y Flores in said lot. Objections were sustained, because no basis remained after exclusion of the docket entries above. Plaintiff then offered together the entries on the execution docket in said case, and the copy of the sheriff's deed to Newton. They were excluded, because it did not appear that execution had issued upon the judgment within one year from its rendition. Regular transfers were read from Newton down to plaintiff for the lot. The plaintiff objected to evidence of title offered by defendants, on alleged ground that, by their entry through the attornment of Brown and Tatum, they were estopped from denying her title. The court rendered judgment for the defendants, and the errors complained of, so far as necessary to be noticed here, are the exclusion of the testimony to the sale by the sheriff, and the failure to render judgment for plaintiff upon the testimony. Plaintiff insists that the tenancy of Adams, Dunn, Brown to Tatum in succession under her title, and the attornment by Brown and Tatum to the defendants, subordinated their title to that of the plaintiff; and that, such relation appearing, plaintiff was entitled to recover. There was no tenancy in fact by defendants under plaintiff, and the testimony is insufficient to constitute a constructive tenancy under the law. It was the duty of Brown to notify plaintiff of the attack by defendants upon his possession. And it is questionable under the testimony whether Tatum owed fealty to the plaintiff. The title was put in issue in this action. The court did not err, therefore, in the judgment upon the testimony admitted. There is no sufficient testimony to support the pleas of limitation. There is no connecting link with the sovereignty of the soil, unless, perhaps, both parties claiming under common source, such link may be presumed; no deed duly recorded with payment of taxes, nor possession continued consecutively for 10 years after deducting the period during which the statute of limitation was suspended. It has been repeatedly held that a sale under an execution issued under a dormant judgment is not void, but only voidable, and at the instance of the defendant in execution. *Boggess v. Howard*, 40 Tex. 158; *Hawley v. Bullock*, 29 Tex. 225; *Andrews v. Richardson*, 21 Tex. 287; *Hancock v. Metz*, 15 Tex. 209; *Sydnor v. Roberts*, 13 Tex. 598. See, also, *Freem. Ex'ns*, §§ 29, 30. Upon these authorities we hold that the exclusion of the entries in the execution docket and of the sheriff's deed was error, and for such error the judgment below is reversed, and the cause is remanded.

SCHMIDTKE *et al.* v. MILLER.

(Supreme Court of Texas. June 1, 1888.)

1. DESCENT AND DISTRIBUTION—LIABILITY OF HEIR FOR ANCESTOR'S DEBTS.

Upon *scire facias* to revive a judgment against the heirs of a deceased defendant, it is error to render judgment against the heirs without proof that they inherited assets from their ancestor.

2. SAME—PLEADING.

Under Rev. St. Tex. art. 1248, which provides that, when a defendant dies before judgment, his administrator or executor, and, in a proper case, his heir, may be substituted as defendant, a petition for *scire facias* to revive a money judgment against a deceased defendant, which alleges that deceased left assets which came into the possession of his heirs, but does not show that there was no administration on his estate, or no necessity for such administration, does not show a proper case for citing the heirs as defendants.

3. JUDGMENT—REVIVOR BY SCIRE FACIAS—COURT.

Scire facias to revive a judgment is properly brought in the court in which the judgment was rendered, although some of the defendants live in another county.

Appeal from district court, Bexar county.

Scire facias by John A. Miller to revive a judgment against H. Hamilton and Charles Schmidtke. The latter defendant having died pending suit, his heirs, who lived in another county, were substituted as parties defendant. Plaintiff obtained judgment, and defendants appeal.

Minter & Altgelt, for appellants. Wurzbach & Boone, for appellee.

WALKER, J. The objection to the jurisdiction of the court is not well taken. *Scire facias* to revive a judgment lies in the court where the judgment was rendered, regardless of the residence of the defendants. It is a continuation of the same suit. *Masterson v. Cundiff*, 58 Tex. 474.

Article 1248, Rev. St., provides that, when a defendant dies before judgment, *scire facias* may issue to "the administrator or executor, and, in a proper case, to the heir, of such deceased defendant, requiring him to appear, and defend the suit." It would seem that article 1249 indicates the rule when it is proper that the heir, be cited, viz., "where there is no administrator, and no necessity therefor," taken with other statutory rules, as where suit is for land, where both heir and administrator should be cited. The rule at common law is, as given in *Freem. Ex'ns*, § 83: "Upon the death of a defendant leaving a judgment which is not a lien on any real estate, no one but his personal representative need be made a party to the *scire facias*." The administration of estates is vested in the probate courts organized specially for that purpose. Interference with this jurisdiction by other courts has not been favored, and exceptions to it are but cautiously allowed. It is against the policy of our laws for the administration of estates to allow one unsecured creditor to sell, under execution, property to which all other creditors in like condition have equal claims. *Webb v. Mallard*, 27 Tex. 83; *McMiller v. Butler*, 20 Tex. 405; *Chandler v. Burdett*, Id. 44; *Conkrite v. Hart*, 10 Tex. 140. In this case the petition alleged that deceased left assets which came into the possession of the heirs, but no allegation appears that there was no administration, nor necessity for it. The judgment sought to be revived is simply a money judgment. These allegations do not show a proper case for citing the heirs. On the trial, so far as the statement of facts shows, no evidence was produced that assets were left by the deceased at his death. Without inheriting assets, no liability rests upon the heir for the debts of the ancestor. It was error, therefore, to render any judgment whatever against the appellants upon the testimony. *Mayer v. Jones*, 62 Tex. 365; *Webster v. Willis*, 56 Tex. 472. The case, evidently, was tried upon the theory that the plaintiff was entitled to call in the heirs, and to have the judgment revived, upon the suggestion of the death, and the production of the original judgment after the heirs had been cited.

The judgment will be remanded. If there is an administration pending,

the executor or administrator should be made parties. If none, nor any necessity for one, then such facts should appear in the pleadings. With heirs as proper parties, and testimony to their having received assets, judgment would follow, reviving the original at least to the amount of assets. With executor or administrator as party defendant, judgment would be revived, but to be paid in due course of administration.

LIFE ASS'N OF AMERICA *et al.* v. GOODE.

(Supreme Court of Texas. June 1, 1888.)

1. LIMITATION OF ACTIONS—WHEN BARRED—ABATEMENT OF FORMER ACTION.

Plaintiff, in March, 1879, began action against a foreign insurance company to recover premiums he had paid, basing his claim upon false representations of defendant as to its solvency. Pending the action, the corporation was dissolved, causing the action to abate. In May, 1885, plaintiff filed new pleadings, making defendants the representatives of the dissolved corporation. *Held*, that the action against defendants was barred by limitation.

2. SAME—WHEN BARRED—DISSOLUTION OF DEFENDANT CORPORATION—PROCEEDINGS IN REM.

In such a case it matters not whether the proceeding was one *in rem* because of real property within this state belonging to the dissolved corporation out of which plaintiff sought to enforce his claim.

3. INSURANCE—ACTION TO RECOVER PREMIUMS—FALSE REPRESENTATIONS—SOLVENCY OF COMPANY.

In a suit to recover annual premiums paid on an insurance policy on the ground of false representations by the company as to its solvency, proof of insolvency long after the payment of the premiums sought to be recovered does not entitle plaintiff to recovery.

Appeal from district court, Grayson county.

Action by F. M. Goode against the Life Association of America, William S. Relfe, John F. Williams, and Alfred Carr, to recover the amount of premiums paid by plaintiff to defendant company. Judgment for plaintiff, from which defendants appeal.

Finley & Pasco, for appellants. *A. E. Wilkinson*, for appellee.

STAYTON, C. J. On March 1, 1879, the appellee brought an action against the Life Association of America, a corporation chartered under the laws of the state of Missouri, to recover \$1,630, with interest, which he claimed to have paid to the corporation on policy of insurance issued to him in the year 1872. He based his claim on averments that the corporation was insolvent at the time it issued the policy to him, and so continued until it was dissolved by a judgment rendered by a circuit court in the state of Missouri on November 10, 1879. He alleged that the insolvency of the corporation was known to its agents, who induced him to take out a policy, and that they falsely, fraudulently, and repeatedly informed him that the corporation was solvent, and thereby deceived him, and induced him to procure a policy for \$10,000 on his life, and thereon to pay the premiums he now seeks to recover. Pending the action, the corporation was dissolved. On the dissolution of the corporation, in accordance with the laws of the state of Missouri, all the property belonging to it was transferred to W. S. Relfe, "superintendent of the insurance department of the state of Missouri," in a mode which was held in the case of *Relfe v. Rundle*, 103 U. S. 222, sufficient to pass title to its property to Relfe in his official character. It was also held in the same case that this superintendent of the insurance department of the state of Missouri, by reason of the laws of the state of Missouri, the charter of the association, and other attendant facts, became the representative of the dissolved corporation in states other than the state of Missouri. As to the entire correctness of the propositions announced in that case it is unnecessary to express any opinion. In succession, Relfe was followed in the superintendency by John F. Williams and Alfred Carr. After the dissolution of the corporation, a judgment

was rendered against it in favor of the appellee, without making any new party defendant. From this judgment the superintendent prosecuted an appeal, and on its hearing the judgment was reversed. On that appeal it was held that the action abated; there being no law in force in this state authorizing a pending action by or against a private corporation incorporated under the laws of another state to be prosecuted after the dissolution of such corporation. It was further held that there was no statute in force in this state authorizing the further prosecution of the action after the dissolution of the corporation. *Association v. Sneed*, 2 Tex. Law Rev. 151. On May 4, 1885, the appellee filed new pleadings, by which, for the first time, defendant other than the dissolved corporation was made. By that pleading, Belfe, Williams, and Carr were made defendants, and they, by demurrer, urged the defense of limitation, which was overruled.

That upon the dissolution of the corporation the action abated there can be no question. *Bank v. Colby*, 21 Wall. 614; *Mumma v. Potomac Co.*, 8 Pet. 281; 2 Mor. Priv. Corp. 1031. At law an action abated by the death of a sole defendant ceases for all purposes, is entirely dead, and cannot be revived. This rule, however, has in England, and in most, if not all, of the states of this Union, been so changed by statute as to authorize the further prosecution or defense of the action by the legal representative or heir of the deceased person when the cause of action is one that survives. Such statutes in force in this state do not, however, apply to foreign corporations. The rule in courts of equity is thus stated: "An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed or ended; but, in the sense of a court of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At common law, a suit, when abated, is absolutely dead; but, in equity, a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived." Story, Eq. Pl. § 354; Mitf. Eq. Pl. 69-72. This is done by a bill of review. Story, Eq. Pl. §§ 354, 371; Mitf. Eq. Pl. 72, 83; Adams, Eq. 404. If the pleadings filed on May 4, 1885, may be deemed a bill of review, and the rule in equity be applicable to the case, then the inquiry arises whether the statutes of limitation ran from the time of the dissolution of the corporation until that pleading was filed. There can be no claim that the running of limitation was suspended, by reason of concealed fraud, at any time subsequent to the institution of the action against the corporation on March 1, 1879; for the action was brought on the ground of fraud, through which the appellee was alleged to have been induced to take a policy, and pay the premiums which he now seeks to recover. Fraud cannot be deemed concealed from a plaintiff after he alleges its existence, and bases his right to a recovery on that fact. From the time the corporation was dissolved until March 1, 1885, a sufficient time elapsed to bar the claim of the appellee; and the question arises whether limitation ran during that interval. The rule in equity is that limitation may be pleaded in bar to a bill of review. Story, Eq. Pl. § 831; Mitf. Eq. Pl. 290; 2 Daniell, Ch. Pr. 1542, 1543; Wood, Lim. 296; Ang. Lim. 325; *Hollingshead's Case*, 1 P. Wms. 742; *Richards v. Insurance Co.*, 8 Cranch, 91. In the absence of a statute suspending the running of the statutes of limitation on the death of a plaintiff or defendant, by analogies to other statutes, many courts have held that they should be held suspended for a reasonable time; and this period has been usually fixed at one year. Ang. Lim. 325; *Schermerhorn v. Schermerhorn*, 5 Wend. 514; *Huntington v. Brinckerhoff*, 10 Wend. 282; *Coffin v. Cottle*, 16 Pick. 383; *Baker v. Baker*, 18 B. Mon. 409; *Walker v. Peay*, 22 Ark. 109; *Wilcocks v. Huggins*, 2 Strange, 907. If it be conceded that article 3218, Rev. St., which is in terms applicable to cases in which an executor or administrator may be appointed, ought to be applied in a case in which an action abates by the dissolution of a corporation, this would

not relieve the appellee; for more than five years elapsed between the time the action abated and the time pleadings were filed to revive it. If, then, we apply the equitable rule in case of abatement of suit by the death of a sole party, and give to the appellee the benefit of any statute bearing any analogy to the question before us, it is evident that even then his action was barred by limitation; and, this appearing from his petition, the exception setting up the bar should have been sustained.

It is insisted that, after the dissolution of the corporation, the proceeding became one *in rem*, by reason of the fact that there was real property within this state that belonged to the dissolved corporation, out of which the appellee was seeking to enforce the payment of his claim. It matters not what the character of the action may be, whether *in personam* or *in rem*; for in either case it must be brought within the time prescribed by law. In legal contemplation, there was no action pending through which the property of the dissolved corporation could be subjected to the payment of the appellee's claim after November 10, 1879, until May 4, 1885; and during this interval there was no want of parties against whom the action might have been prosecuted.

There is another ground on which the judgment in this case would have to be reversed. The representations claimed to have been made by agents of the corporation related to its pecuniary ability to meet losses covered by its policies; and, if these representations were such as the agents had authority to make, it must appear that they were not substantially true, to give right to recover premiums paid. The uncontroverted evidence shows that the corporation had pecuniary ability to pay all losses accruing until about two years before its dissolution, and the great preponderance of the evidence shows that it had ability to pay all losses to policy-holders up to the time of its dissolution. There is no evidence tending to show that the corporation was not entirely solvent at the time the appellee obtained the policy and paid the premiums which he now seeks to recover; but there is evidence that it became insolvent long after, through a transaction by which it purchased a controlling interest in the stock of another insurance company. The evidence shows that had the policy held by the appellee become payable at any time prior to the 10th November, 1879, it would have been paid. Under this state of facts, we know of no rule of law that would entitle the appellee to recover premiums paid. The policy was not void, the risk attached, and for about seven years the appellee had the benefit of insurance, and the beneficiary would have received the sum due on the policy had he died. The premiums were to be and were paid annually, and this was to continue until the death of the insured, or the time arrived when the policy was made payable, without reference to his death. The facts proved did not authorize a verdict for the appellee.

For the errors of the court in refusing to grant a new trial, and overruling the exception that set up the defense of limitation, the judgment will be reversed, and the cause remanded. It is so ordered.

ROMERO v. STATE.

(Court of Appeals of Texas. May 2, 1888.)

LARCENY—EVIDENCE—RECENT POSSESSION.

Where a horse, alleged to have been stolen, was found three years afterwards in the possession of defendant, who sold it, without explaining his right of possession, and there was no proof of the taking, except the unexplained possession, the evidence was not sufficient to support a conviction for larceny, as the possession of stolen property, to raise a presumption of guilt, must be recent.¹

Appeal from district court, Atascosa county; D. P. MARR, Judge.

Estevan Romero was indicted for the larceny of a horse. There was a conviction, and defendant appeals.

¹ See *Young v. State*, (Fla.) 3 South. Rep. 881, and note.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. When last seen by the alleged owner, the animal charged to have been stolen "was at Pope's Lake, in this [Atascosa] county, on a horse round-up, in the spring of 1883." He next saw and found it in the possession of Julio Perez, in 1886. Perez testified that he bought the animal from the defendant in May, 1886; so that, as far as the evidence goes, from the time the animal was lost or taken from the owner until it was first known to be in defendant's possession was a period of three years. There is no evidence tending to connect defendant with the original taking of the animal, and no explanation as to his possession was made by him when he sold it to Perez.

The conviction rests solely upon defendant's possession and sale of the animal in 1886, three years after it was stolen. "Possession of property, to raise a presumption of guilt, must be recent." *Beck v. State*, 44 Tex. 430; *Bragg v. State*, 17 Tex. App. 219; *Barrett v. State*, 18 Tex. App. 64; *Curlin v. State*, 23 Tex. App. 681, 5 S. W. Rep. 186; *Boyd v. State*, 24 Tex. App. 570, 6 S. W. Rep. 853. We are of opinion that the evidence is insufficient to support the conviction, and the judgment is reversed, and the cause is remanded.

WASHINGTON v. STATE.

(Court of Appeals of Texas. May 2, 1888.)

HOMICIDE—MURDER—INSTRUCTIONS—OMISSION FAVORABLE TO DEFENDANT.

On an indictment for murder committed in the perpetration of rape, where the charge on murder committed with express malice aforethought is full and correct, and not objected to, nor additional instructions offered, defendant cannot, on motion for a new trial, complain of the court's omission to charge on murder in the perpetration of rape, as the latter crime is but evidence of the essential element of murder in the first degree, and the omission was favorable, rather than injurious, to defendant.

Appeal from district court, Colorado county; GEORGE McCORMICK, Judge.

On the night of December 27, 1887, William Washington went to the house of Mrs. Mary Miller, whose husband he knew to be absent, and, standing on the gallery, and looking through the window, saw her put the children to bed, and then disrobe herself; and when she approached the door, and looked out, defendant caught her; demanded submission to his carnal passion; on refusal and retreat, caught her, threw her down, cut her throat, and then had sexual intercourse. On trial for murder, the death penalty was assessed against defendant, and he appeals.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In the indictment it was charged that the murder of Mary Miller by this appellant was committed with express malice aforethought, and in the perpetration of the crime of rape. These allegations were most abundantly and conclusively sustained by the evidence adduced on the trial. There can be no reasonable doubt of the fact in the light of the evidence; consisting, in part, of two separate confessions made, after he was warned, by the defendant himself, of his guilt, and the horrible and sickening details of his atrocious crime. There are no bills of exception in the record. No objection was made to the charge of the court when delivered to the jury, and no additional instructions were asked for the defendant. The charge was full, correct, and sufficient, in so far as it presented the law applicable to a murder committed with express malice aforethought. In the motion for a new trial, it was for the first time objected to the charge that it failed and omitted to instruct the jury also upon the law with reference to a murder committed on the perpetration of rape. To entitle a party to a new trial for supposed error in the charge, it must be made to appear that the court "has misdirected the

jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." Code Crim. Proc. art. 777, subd. 2; *Bishop v. State*, 43 Tex. 390; *Leache's Case*, 22 Tex. App. 280, 3 S. W. Rep. 539; *Jackson's Case*, 22 Tex. App. 442, 3 S. W. Rep. 111; *Williams' Case*, 24 Tex. App. 17, 5 S. W. Rep. 655. In this case there is no apparent misdirection, in so far as the charge goes; and it only remains to inquire whether the omission or failure to instruct upon the law with reference to murder when committed on the perpetration of rape has injured the rights of this appellant. How such a result could be possible, under the facts of this case, we cannot imagine. To constitute murder of the first degree there must be "malice aforethought,"—"express malice;" and, when the malice aforethought is evidenced by the fact that the crime was committed in the perpetration of rape, then there can be no question of degrees in such murder. It is *ipso facto* murder of the first degree, and made so by the statute. Pen. Code, art. 606. But a murder committed in the perpetration of rape, or any of the other enumerated felonies in that article of the Code is none the less a murder upon malice aforethought; and when one of those modes is named in the indictment, while it may be essential to prove it as charged, the proof, when made, is but evidence of the malice aforethought, which is the controlling constituent element of the crime. *Tooney v. State*, 5 Tex. App. 163; *Roach v. State*, 8 Tex. App. 478; *Sharpe v. State*, 17 Tex. App. 486; *Gonzales v. State*, 19 Tex. App. 394; *Moreland v. Metz*, 24 W. Va. 126; *Newcomb v. State*, 37 Miss. 383.

As stated heretofore, there was no exception to the charge as given, and no additional instructions were asked; and we cannot see how the defendant could have been injured by the court's simply limiting the finding of the jury to a murder committed upon express malice aforethought. The facts showing both express malice and a murder in the perpetration of rape, the failure to charge upon the latter, instead of being an injury to, if it could have any effect at all, it appears to us could only have been favorable to the defendant. We do not think the omission, complained of for the first time in the motion for new trial, shows, under the circumstances of the case, such error as requires a reversal of the judgment. This is the only question of any moment presented upon the record upon this appeal. Two confessions made by appellant show him to be guilty of one of the most atrocious murders ever perpetrated in this or any other civilized country; and, when the sickening details are considered, we can but admire that fortitude and forbearance of the community in which it occurred in permitting the law to vindicate itself in its punishment with its own extreme penalty. The judgment is affirmed.

LYONS v. STATE.

(Court of Appeals of Texas. May 7, 1883.)

DISTURBANCE OF PUBLIC WORSHIP—SUNDAY-SCHOOLS—SUFFICIENCY OF PROOF.

On an information for disturbing a Sunday-school "by loud and vociferous exclamations and swearing," where it appeared that defendant and two other boys were sitting on a bench in a back part of the building, and witnesses heard laughing and talking, but none of them heard loud and vociferous exclamations or swearing, the allegation is not sustained by the proof.

Appeal from Karnes county court; J. C. WILSON, Judge.

Information against Huston Lyons for disturbing a Sunday-school "by loud and vociferous exclamations and swearing." Witness testified that they heard laughing and talking in the back part of the building, and were disturbed by it. Defendant and two other boys were sitting on a bench in the back part of the building, but the witnesses did not hear any loud and vociferous exclamations or swearing. Judgment of conviction, and defendant appeals.

C. H. Mayfield, for appellant. *Asst. Atty. Gen. Davidson*, for the State

WHITE, P. J. This appeal is from a conviction for disturbing a Sunday-school. It was alleged in the information that appellant disturbed the congregation "by loud and vociferous exclamations and swearing." The evidence wholly fails to support the manner of disturbance in either of the modes alleged. There was no loud and vociferous exclamations and no swearing proved. If any disturbance was created, it was in a different manner from that alleged. Allegation and proof must correspond to warrant a conviction for a criminal offense. Because the evidence is insufficient to support the conviction for the offense as alleged in the information, the judgment is reversed, and the cause remanded.

WALKER v. STATE.

(Court of Appeals of Texas. May 23, 1888.)

INTOXICATING LIQUORS—SALES TO MINORS—EVIDENCE.

For the purpose of proving that the purchaser of liquor was a minor, the testimony of witnesses, that it was reasonably apparent to the observation of a prudent man that such purchaser was not of age, is inadmissible.

Appeal from Mitchell county court; W. S. SMALLWOOD, Judge.
Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction for selling intoxicating liquor to a minor. At the trial, over defendant's objection, as shown by bills of exception, three witnesses were permitted to testify that, in size and physical appearance, the party to whom the liquor was sold was not a man, and that it was reasonably apparent to the observation of an ordinarily prudent man that he was not 21 years of age. As was said by this court in *Koblen-schlag's Case*, 23 Tex. App. 264, 4 S. W. Rep. 888: "The age, appearance, etc., of the minor, might very properly be shown; but it is not permissible for the witness to give his opinion as to how others would be impressed by these physical marks of age. It was the province of the jury to determine whether from these the defendant knew that in fact the party was a minor." The assistant attorney general confesses error on account of the ruling of the court in admitting this testimony, and the judgment is reversed, and the cause remanded.

ORR v. STATE.

(Court of Appeals of Texas. May 23, 1888.)

1. INDICTMENT AND INFORMATION—OMISSION OF VENUE—CODE CRIM. PROC. TEX. ART. 430.

Under Code Crim. Proc. Tex. art. 430, subd. 5, providing that "it must appear" from an information "that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed," an information omitting the allegation of venue is fatally defective, and that the complaint alleges the venue does not cure the defect.

2. SAME—OMISSION OF VENUE—HOW REMEDIED.

Where an information fails to allege the venue as required by Code Crim. Proc. Tex. art. 430, subd. 5, but such venue is alleged in the complaint, the prosecution will not be dismissed, but the cause will be remanded, that a new information may be presented.

Appeal from Erath county court; W. W. MOORE, Judge.
Alfred Orr was convicted of playing cards in a public place, and fined \$20. From the conviction he brings this appeal.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. There is no allegation of the venue of the offense, and therefore the information is fatally defective. Code Crim. Proc. art. 430, subd. 5;

Jack v. State, 8 Tex. App. 72; *Collins v. State*, 6 Tex. App. 647; *Robins v. State*, 9 Tex. App. 666. In the complaint the venue is properly alleged, but this does not supply the want of such allegation in the information. *Lawson v. State*, 13 Tex. App. 83. Because of the defect in the information the judgment is reversed, but, as the complaint is a sufficient one, another information may be based upon it, and the prosecution is not therefore dismissed, but the cause is remanded, that a new information may be presented should the county attorney see proper to do so. *Johnson v. State*, 19 Tex. App. 545. Reversed and remanded.

SMITH v. STATE.

(Court of Appeals of Texas. May 23, 1888.)

1. INDICTMENT AND INFORMATION—OMISSION OF VENUE—QUASHING INDICTMENT.

Where an information fails to sufficiently allege the venue of an offense, a proper and sufficient allegation thereof in the complaint does not cure the defect, and the information will be quashed.

2. SAME—OMISSION OF VENUE—HOW REMEDIED.

Where an information is quashed for a failure to sufficiently allege the venue of the offense, and there is a sufficient allegation thereof in the complaint, though the judgment of conviction thereon will be reversed, the prosecution will not be dismissed, and leave will be granted to file a new information.

Appeal from Erath county court; W. W. MOORE, Judge.

Complaint and information against Dan Smith for playing cards in a public place. Judgment of conviction, and defendant appeals.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In this case the assistant attorney general confesses error, in that the information fails to sufficiently allege the venue of the offense. The venue is properly and sufficiently alleged in the complaint, but this does not cure the defect in the information. *Lawson v. State*, 13 Tex. App. 84. The information will be quashed, but, the affidavit or complaint being good, the prosecution will not be dismissed. The judgment will be reversed, in order that the prosecution may file a new information, if so desired. A good affidavit is not vitiated by a bad information. *Johnson v. State*, 19 Tex. App. 545; *Orr's Case*, ante, 644. Reversed and remanded.

Ex parte STANLEY.

(Court of Appeals of Texas. May 2, 1888.)

1. EXTRADITION—WARRANT FOR—SUFFICIENCY.

A warrant issued by the state executive for the apprehension and extradition of fugitives from justice, is sufficient when it recites, without setting out in full, the affidavit on which it is based.

2. SAME—RECITALS IN WARRANT FOR—CERTIFIED COPY OF AFFIDAVIT.

The recital in an extradition warrant that the demand for the arrest of the fugitive was accompanied by a copy of the affidavit on which it was based, "duly certified as authentic," is equivalent to a recital that the copy was "certified as authentic by the governor" of the state who made the demand, as it could not have been duly certified by any other authority.

3. SAME—RECITALS IN WARRANT—FUGITIVE FROM JUSTICE.

An extradition warrant stating that the persons whose arrest and surrender is thereby ordered, stand charged with a certain crime in the demanding state, and that they "have taken refuge in the state of Texas," sufficiently shows that they were fugitives from justice.

4. SAME—VALIDITY OF WARRANT—ALLEGING COMMISSION OF CRIME.

It is not essential to the validity of an extradition warrant that it should show that the crime with which the fugitives are charged in the indictment, recited in the demand, is a crime by the law of the demanding state.

5. HABEAS CORPUS—EVIDENCE—RETURN OF SHERIFF—AFFIDAVIT FOR ARREST.

Where, on requisition of the governor of a sister state, a person is arrested as a fugitive from justice, it is error on habeas corpus to admit in evidence, as part of

the sheriff's return, the affidavit on which the warrant of arrest was based, but to which it was not attached, yet is no ground for the reversal of an order remanding the prisoner.

Appeal from district court, Bexar county; GEORGE H. NOONAN, Judge. *Teel & Haltom*, for relator. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Appellant was arrested by virtue of the following warrant issued by the governor of Texas, to-wit: "*The State of Texas*: To all and singular the sheriffs, constables, and other civil officers of the said state: Whereas, it has been made known to me by the governor of the state of California, that William H. M. Stanley and Bertha Stanley stand charged, by proper affidavit, before the proper authorities, with the crime of obtaining money under false pretenses, committed in said state, and that the said defendants have taken refuge in the state of Texas; and, whereas, the said governor, in pursuance of the constitution and laws of the United States, has demanded of me that I cause the said fugitives to be arrested and delivered to James W. Gillen and John Parrott, who are, as is satisfactorily shown, duly authorized to receive them into custody and convey them back to said state; and whereas, said demand is accompanied by a copy of said affidavit, duly certified as authentic: now, therefore, I, L. S. Ross, governor of the state of Texas, by virtue of the authority vested in me by the constitution and laws of this state, and of the United States, do issue this, my warrant, commanding all sheriffs, constables, and other civil officers of this state to arrest, and aid and assist in arresting, said fugitives, and deliver them, when arrested, to the said agents, in order that they may be taken back to the said state, to be dealt with for said crime. In testimony whereof," etc. Appellant applied to the Hon. GEORGE H. NOONAN, judge of the Thirty-Seventh judicial district, for the writ of *habeas corpus*, which was granted by said judge, and was heard by him in term-time, and appellant was remanded to the custody of respondent, the sheriff of Bexar county, who had arrested him by virtue of said warrant. From said judgment appellant prosecutes this appeal, and insists that he should be discharged upon the following grounds: (1) Because the warrant of arrest does not set out the pretended affidavit upon which the demand upon the governor of the state of California upon the governor of Texas is based. (2) The warrant of arrest does not state that it is based upon an affidavit, certified to be authentic by the governor of California. (3) The warrant of arrest does not show that applicant fled from the state of California, nor does it state that applicant has fled from the justice of the state of California. (4) The warrant of arrest does not state that the applicant has fled to the state of Texas, or has taken refuge in the state of Texas. (5) The warrant of arrest does not state or show that obtaining money under false pretenses is punishable by the laws of the state of California. We will dispose of these grounds in the order in which they are presented.

It is not essential to the validity of the warrant that it should set out in full or be accompanied by the indictment or affidavit upon which it is based. *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 29 Ind. 10; *People v. Pinkerton*, 77 N. Y. 245; *People v. Donohue*, 84 N. Y. 438. In *Ex parte Thornton*, 9 Tex. 635, this question is referred to, and while the court did not decide it, it intimated that the indictment or affidavit should be set out in full in the warrant; citing *Clark's Case*, 9 Wend. 212, and *Smith's Case*, 3 McLean, 121. Upon examination of those cases, we do not understand either of them as supporting the view intimated by the court in *Thornton's Case*. Mr. Church, in his work on Habeas Corpus, says: "A warrant for the arrest and return of a fugitive criminal must recite or set forth the evidence necessary to authorize the state executive to issue it; and unless it does, it is illegal and void." He cites, in support of his text, *Doo Woon's Case*, 18 Fed. Rep. 898. That case fully supports the text, and cites as authority *Smith's*

Case, 3 McLean, 121, and *Thornton's Case*, 9 Tex. 685. In *Doo Woon's Case* the warrant neither recited nor set forth the evidence upon which it was issued, and for that reason was held invalid. In the case we are considering, the warrant recites, but does not set forth in full, the affidavit upon which it is issued. We have found no decision or authority which requires that the warrant should set forth the evidence in full, except the intimation referred to in *Thornton's Case*. The correct rule is, we think, laid down in *Donohue's Case*, 84 N. Y. 498, in a syllabus, as follows: "When the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issuance have been complied with, and it is sufficient if it recites what the law requires."

The second ground is not, we think, a substantial one. The warrant states that the demand of the governor of California for the fugitives was "accompanied by a copy of said affidavit, duly certified as authentic." It would have been a literal compliance with the statute if it had stated that said copy was certified as authentic by the governor of the state of California. But the statement that it was "duly certified as authentic" must mean that it was certified according to law; that is, that it was certified by the governor or chief magistrate of the state of California, as it could not have been duly certified by any other authority. Rev. St. U. S. § 5278.

The third and fourth grounds are, we think, untenable. While there is no direct statement in the warrant that the appellant fled from the state of California, or from the justice of that state, to the state of Texas, and had taken refuge in the latter state, it states facts which clearly and unmistakably show that he was a fugitive from justice from the state of California to the state of Texas, within the meaning of the constitution and the statute. Spear, Ext. 278.

The fifth and last ground is not a valid one. It is not required that the warrant should show that the crime charged in the indictment or affidavit is a crime by the law of the demanding state. Spear, Ext. 287 *et seq.* We are of opinion that the warrant is in substantial compliance with the statute. No form for such a warrant is prescribed by law, and when it shows upon its face, with reasonable certainty, as does the warrant in question, that the essential prerequisites to its issuance have been complied with, it must be held *prima facie* valid.

It appears by a bill of exception that the respondent, over the objection of the applicant, read in evidence a copy of an affidavit made in California charging applicant with obtaining money under false pretenses. This affidavit was not a part of the respondent's return; was not authenticated as evidence; was not shown or claimed to be the evidence upon which the warrant was issued. It was error to admit it in evidence, but error which cannot operate to discharge the applicant.

The judgment appealed from is in all things affirmed, and it is adjudged that the appellant pay the costs of this appeal.

WALKER v. STATE.

(Court of Appeals of Texas. May 28, 1888.)

FALSE IMPRISONMENT—EVIDENCE—NEGLECT TO PREVENT COMMISSION OF OFFENSE.

Where informant, on the way to his cotton-patch, was intercepted by several persons, and abused for having made certain statements, and finally forced to sign a "lie bill," on paper admitting such statements to be false, and defendant, separated from the others by a fence, did nothing further than to observe what was going on, the fact that he did nothing to prevent the commission of an offense is not sufficient to sustain his conviction for false imprisonment.

Appeal from Hood county court; H. T. BERRY, Judge.

On an information charging the false imprisonment of William Barnett, the appellant, G. B. Walker, was jointly impleaded with Lee Walker, Henry Walker, Bill Moore, and Waddy Moore, and being alone upon trial, was convicted, and fined in the sum of \$10. It appears from the record that, some time before this alleged offense, a dispute about some cotton arose between the several parties named in the information, on one side, and one Boyd, a tenant of Barnett, the alleged injured party, and that the several parties named in the information took exceptions to certain statements about the cotton transaction made by Barnett, either in conversation with neighbors, or as a witness on a trial in court involving the cotton matter,—it is not clear from the record which. It further appears from the testimony of the witnesses that, on the day alleged in the information, Barnett was intercepted on his way to his cotton-patch by the four co-defendants of the accused, and was by one or more of them threatened, cursed, and abused for his statements or testimony about the cotton matter, and finally forced by them to sign a "lie bill," or a paper admitting that his said statements or testimony was false. It was shown that, while Barnett was being thus restrained, abused, and cursed by his co-defendants, the accused, flushed and apparently angry, and having a penknife in his hand, came to a point on his own land, separated by a fence from his co-defendants and Barnett, sat down on the ground, and observed all that transpired, without saying or doing anything, either to aid or encourage or prevent his co-defendants from restraining said Barnett.

N. L. Cooper, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is a conviction for false imprisonment. Appellant, and Lee Walker, Henry Walker, Bill Moore, and W. Moore were jointly indicted. Appellant was tried separately, and convicted, and appeals to this court. We have given the statement of facts a careful examination, and the conclusion we have reached is that the evidence fails to connect the appellant with the commission of the offense for which he stands convicted, with reasonable certainty; and it would be a dangerous precedent to sustain this conviction. The burden was upon the state to prove that the acts and declarations of the defendant constituted the offense charged. Proof that he did nothing to prevent others from the commission of the offense did not tend to show inculpatory facts, and hence the defendant's objections to such evidence should have been sustained. The judgment is reversed, and the cause remanded.

SPENCER v. STATE.

(*Court of Appeals of Texas. April, 1888.*)

1. APPEAL—REQUISITES—FAILURE TO FILE STATEMENT OF FACTS.

Under the Texas act of March 8, 1887, (Gen. Laws, p. 17,) providing that, when a statement of facts on appeal is not filed within the time allowed by the court, the party omitting so to do must show that he used due diligence to obtain the signature of the judge thereto, and to file it within the time prescribed, and that the failure was the result of causes beyond his control, he is not excused by sickness, when it appears that he was in court at the time, and the statement was agreed to in the presence of the trial judge.

2. SAME—REQUISITES—EXCUSING NEGLECT TO FILE STATEMENT—BURDEN OF PROOF.

Where an attorney neglected to file a statement of facts on appeal, and, in excuse of the neglect, files an affidavit stating that he prepared and signed the statement, and delivered it to his opponent's counsel, with the request that he get the approval of the trial judge, and such affidavit is denied by a counter-affidavit of the opponent's counsel, the latter neutralizes the former; and, the burden of proof being on the party guilty of the neglect, his excuse fails.

Appeal from district court, Wilbarger county; **P. M. STINE**, Judge.

P. C. Spencer was indicted for stealing a horse. There was a conviction, and defendant appeals.

M. V. La Baume, J. L. L. McCall, and B. G. Johnson, for appellant. W. L. Davidson, Asst. Atty. Gen., for the State.

HURT, J. An order was entered allowing appellant 10 days after the adjournment of the court to file a statement of facts, but the statement found in the record was not filed until after the 10 days allowed had passed. The appellant seeks to avail himself of the provisions of the act of March 8, 1887, (Gen. Laws, p. 17,) and to this end counsel for appellant makes affidavit to the effect that when the motion for new trial was overruled, the court being still in session, he prepared and signed the statement of facts, and handed it to the district attorney, with the request that he get it approved by the judge, and file it; and that, being ill, he then left the court-room, relying on the promise of the district attorney, and was not advised of the failure to file until it was too late. This statement is directly contradicted by the affidavit of the district attorney on file here. He states that the statement was presented to him by counsel, and that he agreed to and signed it before the counsel for the defendant did, and returned it to the counsel, after which he had no connection with the matter; that the counsel never requested him to get the approval of the judge, or to file it with the clerk; and that he never undertook to do so.

When a statement of facts has not been filed within the time prescribed by law, or within the 10 days allowed by the order of the court, in order that the same may be considered under the provisions of the act cited, the party so desiring must show, to the satisfaction of this court, that he has used due diligence to obtain the approval and signature of the judge thereto, and to file the same within the time prescribed, and that his failure to file the same within said time is not due to the fault or laches of said party or his attorney, and that such failure was the result of causes beyond his control. The statement of facts being approved and filed after the expiration of the 10 days, appellant must bring himself within the above rule; must show that due diligence has been used to obtain the approval, in order that the statement of facts may be filed in time; must show that his failure to file the same within the proper time was not due to his fault or laches, and that such failure was the result of causes beyond his control. These facts must be shown, to the satisfaction of this court, by the party desiring the statement of facts to be considered. The burden of proof being upon such party, he must establish with reasonable certainty the facts which would bring him within the rule contained in the act of March 8, 1887. Has this been done? We have the affidavit of La Baume, appellant's counsel, to the facts above stated. Those facts are positively denied by Mr. Miller, the district attorney. We must presume that these gentlemen are of equal veracity, and that Mr. La Baume's affidavit is neutralized by that of Mr. Miller. This being the case, and the burden being upon appellant, the scales are equally balanced; hence a failure of proof of the facts essential to invoke the assistance of the statute cited. But it may be insisted that La Baume was physically unable (rendered so by sickness) to present the statement to the judge for his approval and signature. It appears that the statement was agreed to and signed by the district attorney and La Baume in open court, and in the immediate presence of the trial judge. All that was required of counsel for appellant was for him to hand the statement to the judge, with a request to approve and sign the same; and if the judge had failed, within the proper time, to approve and sign the same, so that it could be filed in time, appellant, in that case, would be without fault. We are of opinion that appellant has not complied with the requirements of the act of March 8, 1887, and hence we cannot consider the statement of facts; and the errors assigned must be considered by this court in the absence of a statement of facts.

The overruling of the application for continuance, and the admissibility of certain evidence, cannot be revised, without a statement of facts, unless the

bills of exception are sufficiently full to show that there was error under any state of case. The bills of exception in this case show no such error. The charge of the court, when considered with reference to the allegations in the indictment, is correct. If there are errors, they are so because of the nature of the evidence, and hence do not appear upon the face of the charge.

We find no error for which the judgment should be reversed, and it is therefore affirmed.

BILES v. STATE.

(Court of Appeals of Texas. May 28, 1888.)

1. GAMING—PERMITTING GAMING ON PREMISES—EVIDENCE—DEED TO PREMISES.

On indictment for permitting a game at cards to be played on premises appurtenant to a house for retailing liquors, a deed of conveyance to defendant is admissible to show ownership in him.

2. SAME—EVIDENCE—OWNERSHIP OF PREMISES—DEED OF CONVEYANCE.

On prosecution for permitting a game at cards to be played in a house appurtenant to a liquor saloon, where a deed of conveyance was introduced to show defendant's ownership, it is error to exclude evidence by one of the grantors that defendant was not present when the deed was signed, that it was not delivered to him, that he did not pay the grantor's anything, nor that he had any knowledge of the deed other than that derived from the indictment.

Appeal from Llano county court; E. C. BONHAM, Judge.

W. S. Biles was indicted, tried, and convicted for permitting gambling on his premises, and prosecutes this appeal.

Flack & Moore, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. The appellant was convicted for permitting a game at cards to be played on his premises; the same being appurtenant to a house for retailing spirituous liquors. To establish that the premises belonged to the defendant, the state introduced in evidence a deed to the same from Rogers & Simmons to the defendant. This deed was signed by Rogers & Simmons, (they being partners,) and acknowledged by W. J. Rogers, a member of the firm. There was no error in admitting this deed. Appellant proposed to prove by W. J. Rogers that he (appellant) was not present when the deed was signed; that he had never paid the grantors anything for the premises; and that he never knew that there was such a deed until after the indictment was presented, and that said deed was never delivered to him. To this counsel for the state objected, (1) because defendant had not filed an affidavit that said deed was a forgery; (2) that defendant could not in this way impeach the recitals in this deed. The objections were sustained, and defendant reserved his bill. This evidence was clearly admissible, and the objections were without merit. The accused must be convicted for his own acts and omissions, and not for the deeds of others. The judgment is reversed, and the cause remanded.

LANN v. STATE.

(Court of Appeals of Texas. May 29, 1888.)

1. CARRYING WEAPONS—SOLDIER—STATE LAWS.

A United States soldier, while in the actual discharge of his duty, carrying a pistol issued to him by a superior officer to be used while on duty, is not amenable to the state law prohibiting the carrying of a pistol.

2. SAME—EVIDENCE OF GOOD CHARACTER.

On an indictment for unlawfully carrying a pistol, the intent being a material part of the offense, the defendant may prove his general character as a peaceable, law-abiding man.

Appeal from Kinney county court; J. F. ROBINSON, Judge.

This was an action by the state against Sam Lann for carrying a pistol. From a verdict of guilty the defendant appeals.

Joseph & J. W. Jones, for appellant. *Asst. Atty. Gen. Davidson*, for appellees.

WILLSON, J. This conviction is for unlawfully carrying a pistol, and is based upon facts, in substance, as follows: Defendant was found with a pistol upon his person in a saloon in the town of Brackett, about 12 o'clock in the night, by a deputy-sheriff, who arrested him, and took the pistol away from him. Defendant, at the time, was a United States soldier, and the pistol was the property of the United States, and had been issued to him by his commanding officer for use in protecting a government garden, which defendant had been detailed to take care of, which garden was situated some distance from the barracks, and from the town of Brackett. Defendant went into the town of Brackett with the pistol on his person, about 8 o'clock in the evening, and into the saloon, where he was afterwards arrested. He deposited the pistol in the saloon with the bar-keeper, saying at the time that he would call and get it when he got ready to return to the garden. He then left the saloon, and did not return thereto until about 12 o'clock. Upon returning to the saloon he called for the pistol, and the bar-keeper gave it to him, asking him at the same time if he did not know that it was against the law to carry a pistol. Defendant replied that he did, but that he was going at once to the garden, and started to go out of the house, but, before getting out, turned and went into the back portion of the house, where he was seen in conversation with other soldiers, and was arrested, and the pistol taken from him.

It is contended by appellant's counsel that our statute prohibiting the carrying of a pistol on or about the person is not applicable to a soldier. This position is, we think, correct, if the soldier, at the time of carrying the pistol, be in the active discharge of his duties as such. But if he be not in the actual discharge of duty as a soldier, but is acting without authority, and beyond the scope of his orders, he is amenable to the law to the same extent, and under the same rules, as any other individual. Thus, if the defendant, when he went into Brackett, was in the performance of a duty assigned to him by his officer, and in the performance of such duty was authorized by his officer, or by the regulations of the army, to bear arms, he was not guilty of a violation of law. If, therefore, he lawfully carried the pistol into Brackett, and desired to go about the town attending to his private affairs, or for any purpose not relating to the discharge of his duties as a soldier, it was his duty and privilege to lay aside the pistol, and to resume it again, when he again entered upon the actual discharge of his military duties. And if he did not resume the pistol until he actually resumed such duties, and was proceeding with reasonable dispatch to perform the same, he would not be guilty of violating the law in having the pistol on his person in the saloon. To constitute a violation of this statute, there must be an intent to violate it. *Mangum v. State*, 15 Tex. App. 362; *Lyle v. State*, 21 Tex. App. 158; *Sanderson's Case*, 23 Tex. App. 520, 5 S. W. Rep. 138. In this case, there is evidence tending to show that, in having and carrying the pistol, the defendant did not intend to violate the law, but, on the contrary, sought to obey it by divesting himself of the pistol while going about the town of Brackett. It is true that such innocent intent is not made clearly to appear by the evidence. The facts of the case bearing upon the defendant's intent are unsatisfactory, and evidently not fully developed on the trial. As bearing upon this issue, the defendant proposed to prove that his general character for being a peaceable, law-abiding man in that community was good. This proposed testimony was rejected, and he excepted, and in this ruling of the court we think there was material error. In all criminal cases, wherever a criminal intent is necessary to constitute the offense, evidence of the general character of the defendant is admissible in his behalf. *Lindsay v. State*, 1 Tex. App. 584;

Lastro v. State, 8 Tex. App. 367; *Jones v. State*, 10 Tex. App. 552; *Johnson v. State*, 17 Tex. App. 565. Because of the error committed in rejecting the evidence offered by the defendant to prove his law-abiding character, and because the evidence before us tends strongly to show an innocent intention on his part in having and carrying the pistol, the judgment is reversed, and the cause is remanded.

MOSELEY v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

1. BRIBERY—CONSTABLE—ESCAPE OF PRISONER—ILLEGAL ARREST.

A constable who arrests a person without a warrant, on an unsworn charge of theft, and then, in consideration of \$25 paid by the prisoner's father, allows him to escape, is guilty, under Pen. Code Tex. art. 186, for accepting a bribe, and punishable, under article 183, for permitting the prisoner's escape in consideration thereof, though the arrest was illegal.

2. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS.

A continuance of a criminal trial on the ground of absent witnesses is properly refused where no due diligence is shown, and the testimony sought to be procured is vague, uncertain, and merely negative, and not likely to influence the jury's finding.

Appeal from district court, Johnson county; J. M. HALL, Judge.

M. M. Moseley was indicted, tried, and found guilty of accepting a bribe and permitting a prisoner in his custody to escape, and his punishment was assessed at a term of three years in the penitentiary. He appeals.

W. H. Skelton and *M. A. Otis*, for appellant. *Asst. Atty. Gen. Davidson*, *Co. Atty. Plummer*, and *C. V. Myers*, for the State.

WILLSON, J. 1. It was not error to refuse defendant's application for a continuance. Sufficient diligence to secure the attendance, at the trial, of the absent witnesses, was not shown. Furthermore, the allegations as to the facts expected to be proved by said witnesses, in so far as said alleged facts are material, are vague and indefinite, and are merely negations of the state's testimony, which, if they had been in proof, could not properly have influenced the jury in its finding.

2. This conviction is under article 186 of the Penal Code, which reads: "If any sheriff, or other executive or peace officer, shall accept or agree to accept a bribe offered, as mentioned in articles 183, 184, and 185, he shall receive the same punishment as is affixed to the offense of giving or offering a bribe in the particular case specified." And article 183, applicable to this case, reads: "If any person shall bribe, or offer to bribe, any sheriff, or other peace-officer, to permit any prisoner in his custody to escape, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than five years." The facts of the case are, as shown by the evidence, that the defendant was constable of precinct No. 4 of Johnson county. As such officer, he arrested, and had in his custody as a prisoner, one John Gable. He arrested and held said prisoner without a warrant, and upon the verbal and unsworn statement of one Thomas, charging said prisoner with the theft of a pair of shoes. L. F. Gable, the father of the prisoner, learning of the arrest and custody of his son, went to the defendant, and proposed to release the prisoner on bail. The defendant replied to this proposition that he would have to place the prisoner in jail, as the justice of the peace was absent. He then proposed to the father, L. F. Gable, that, if he would pay him (the defendant) \$25, the prisoner should be released. This proposition was accepted by the father, and he paid the defendant said sum; whereupon the defendant released the prisoner from custody. The foregoing are the facts as testified to by L. F. Gable, and his testimony is strongly corroborated by other witnesses, who testified on the trial, and there was no evidence adduced on the trial even tending to question the truth of the facts above recited. It is insisted by

counsel for defendant that the arrest and custody of John Gable by the defendant was without authority of law, and that, therefore, it was no offense for the defendant to accept a bribe to release him. We do not so understand the law. It was by virtue of his official authority that the defendant arrested and held John Gable. It matters not whether the arrest and custody were legal or illegal; the said Gable was a prisoner in the custody of the defendant, a peace-officer, and was permitted by the defendant to escape, in consideration of money paid him to effect such escape. We are of the opinion that, in a prosecution for this offense, it is not permissible for the defendant to question the legality of his custody of the prisoner. Such an issue is irrelevant and immaterial. The moral obliquity of this offense is the same where the custody of the prisoner is illegal as where it is legal, and the injury to public justice is the same. *Florez v. State*, 11 Tex. App. 102. The law abhors even a tendency to official corruption, and it is official corruption that this statute is intended to punish, and not the illegal arrest and detention of a citizen. There are other provisions of the Code which protect the citizen in his liberty. We hold that the facts of this case bring it within articles 183 and 186 of the Penal Code, and that there is no error in this conviction.

We have considered other questions presented in the record, but deem them unimportant and without merit. The judgment is affirmed.

WILLIAMS v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

HOMICIDE—EVIDENCE.

Evidence that defendant went to and was seen in the kitchen of the house where his wife served as a cook, and that soon after he left she was found senseless, and severely beaten on the head with a blunt instrument, from which beating she died two days later, fully sustains a verdict of murder in the first degree, in connection with evidence of defendant's confessions, on the night of the murder, that he had beaten his wife and killed her with a steelyard.

Appeal from district court, Falls county; EUGENE WILLIAMS, Judge.

Wesley Williams, the appellant, was convicted in the first degree, and was awarded the death penalty for the murder of his wife, Eliza Williams. The first witness for the state testified that the deceased, when killed, was in his employ as cook. Witness' kitchen and dining-room were separated by a narrow passage. Deceased rang the supper bell on the evening of March 5, 1887, and retired from the dining-room to the kitchen just as witness and his family sat down to the table. Witness had been eating but a short time when his son and a companion came to the kitchen, and excitedly called witness to the kitchen. When witness stepped into the kitchen, he found his cook lying senseless on the floor. She had been stricken twice across the side of the head with a blunt instrument of some kind. A steelyard pea, which was usually kept in the kitchen, was soon found in the yard by the witness. Deceased had been in witness' service about a week when she was stricken. She died two days later. Witness did not know defendant. This witness' son and his companion testified that when they went from the house to the cow pen, just before the supper bell rang, they saw the defendant sitting in the kitchen. They heard the deceased decline to go with him to enter the service of some person named by him. They then went to the cow pen, and upon finishing their work out there, and returning, they found deceased lying on the floor, senseless, and severely beaten over the head. Another witness for the state testified that early in the night the defendant came to his house, and called to him. On replying to defendant, defendant said to him: "I got my wife." Witness asked: "Where is she?" He replied: "I mean that I have beat hell out of her. I killed her with a steelyard pea." He then disappeared. Another witness testified that later in the night the defendant came to his house,

and told him that he had killed his wife with a steelyard pea, and asked his advice about surrendering. Defendant, however, eluded arrest for seven months. It was also proved that, some weeks before the killing, the defendant was prosecuted and convicted for beating and choking the deceased. Two witnesses for the defense testified that for a time the defendant and deceased lived happily together as man and wife, but that finally they separated, and deceased took up and lived in adultery with one Hutchison, which fact appeared to greatly distress the defendant. Defendant and deceased came together and separated two or three times. The separations always appeared to depress defendant, and each time he declared his inability to live without deceased.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for murder of the first degree, and the penalty assessed by the jury is death. No question requiring discussion is presented in the record. The indictment is a good one. The charge of the court is full and correct, and more favorable to the defendant, in some particulars, than the evidence demanded. There can be no doubt as to the sufficiency of the evidence, none of which was objected to on the trial. Not only did the defendant confess his guilt of the crime, it was conclusively proved, independent of such confession, by circumstantial evidence. The deceased was the wife of the defendant, and express malice on his part towards her, as well as motive actuating him to perpetrate the murder, are shown by the evidence. It was a cruel and deliberate murder, well meriting the extreme penalty assessed by the jury. The judgment is affirmed.

COOPER v. STATE.

(*Court of Appeals of Texas. June 6, 1888.*)

1. ELECTIONS AND VOTERS—OFFENSES AGAINST ELECTION LAWS—CARRYING WEAPONS AT THE POLLS.

Pen. Code Tex. art. 163, prohibiting any person, under penalty, from carrying a dangerous weapon on election day, during polling hours, within a half mile of the polls; and article 320, with a different penalty, prohibiting any one from going where any portion of the people of this state are collected to vote at any election with a dangerous weapon about his person,—do not define the same offense, so that defendant, convicted upon indictment of the offense defined in article 163, may object that the two provisions fix different punishments for the same offense, and are therefore not enforceable.

2. SAME—CARRYING WEAPONS AT THE POLLS—VOID ELECTIONS.

The defendant, on trial for carrying dangerous weapons on election day, cannot object that it was no offense because the election was void; the election being actually held under color of law.

Appeal from district court, Karnes county; **H. C. PLEASANTS**, Judge.

Trial and conviction of Lewis Cooper for carrying a dangerous weapon on election day. The defendant appeals. Article 163 of the Penal Code of Texas provides: "If any person other than a peace officer shall carry any gun, pistol, bowie-knife, or other dangerous weapon, concealed or unconcealed, on any day of election, during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be punished as prescribed in article 161 of this Code." Article 161 prescribes a punishment by fine of not less than \$100 nor more than \$500, and, in addition thereto, imprisonment in the county jail for a period not exceeding one month. Article 320 provides: "If any person shall go into any church or religious assembly, any school-room, or other place where persons are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball-room, social party, or social gathering, or to any election precinct on the day or days of any election, where any portion of the people of this state are collected to vote at any election, or to any other

place where people may be assembled to muster or to perform any other public duty, or to any other public assembly, and shall have or carry about his person a pistol or other fire-arm, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of a knife manufactured and sold for the purposes of offense and defense, he shall be punished by fine not less than \$50, nor more than \$500, and shall forfeit to the county the weapon or weapons so found on his person." Article 3 of the Code of Criminal Procedure provides: "No citizen of this state shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Article 553 provides: "A former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further proceedings for the same offense, but shall not bar a prosecution for any higher grade of offense, over which said court had not jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offense."

E. R. Lane, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. The appellant was convicted for carrying a gun on a day of election, during the hours the polls were open, within a half a mile of the voting place. His counsel moved to quash the indictment because article 163 of the Penal Code, upon which this indictment is predicated, and article 320 of the Penal Code, "define the same offense set forth in the indictment, and they provide different punishments, and therefore no certain punishment is affixed by law to the offense charged." If the same acts constitute an offense, though found in different statutes or articles of the same Code, and these acts are punished differently, we would be inclined to hold that article 3 of the Code of Criminal Procedure would be infringed, and that neither could be enforced for want of certainty in the punishment. But is this the case presented in this record? Article 163 makes it a crime for any person, other than a peace officer, to carry a gun on any day of election, during the hours the polls are open, within a half a mile of the voting place, and the punishment fixed is a fine of not less than \$100 nor more than \$500; and, in addition thereto, the offender may be imprisoned in the county jail for a period not exceeding one month. Now, what are the elements of this offense? (1) A gun or pistol must be carried on a day of election; (2) the gun must be carried during the hours the polls are open; (3) it must be carried within a half a mile of the voting place. What are the ingredients of the offense defined by article 320 of the Penal Code? (1) Going to an election precinct on the day or days of an election; (2) there must be a going when any portion of the people of this state are collected to vote at an election; (3) a having or carrying about the person any fire-arm, etc. The penalty attached to this offense is a fine not less than \$50 nor more than \$500. By comparing the provisions of these articles it will readily be found that the elements of the offenses are quite distinct, while there may be one common to both, and that these articles define different offenses. If a person should be convicted under article 320, upon evidence which not only establishes the offense charged, but also that defined in article 163, and the State were to attempt to convict for the offense defined by article 163 under an indictment drawn under that article, in such state of case a very serious question would arise. But let us suppose that the party is being tried upon an indictment drawn under article 320, and that the evidence clearly shows a violation of article 163, as well as article 320, can the accused take advantage of this matter or complain? Evidently not, unless the trial is upon complaint before a court which has no jurisdiction of the greater offense,—that shown, not by the complaint, but by the evidence. Code Crim. Proc. art. 553. There was no error in refusing to quash the indictment.

Appellant insists that the election was void, and hence there was no offense

in carrying the gun. The record furnishes ample proof that an election was being held to determine whether the sale of intoxicating liquors should be prohibited in a certain precinct in Karnes county. This election was had under color of law; and, if not in strict compliance with the statute, certainly the appellant cannot object. The judgment is affirmed.

SAMUELS v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

ASSAULT AND BATTERY—CRIMINAL PROSECUTION—PLEADING FORMER CONVICTION.

Upon an information of aggravated assault and battery, after a plea merely of "not guilty," defendant was convicted of simple assault. The bill of exceptions states that before the mayor the defendant pleaded guilty of simple assault "growing out of the same difficulty." *Held*, that as a number of assaults may grow out of the same "difficulty," and as under Code Crim. Proc. Tex. art. 526, providing that "the only special pleas * * * for defendant are (1) that he has been before convicted, legally, in a court of competent jurisdiction, upon the same accusation," and article 528, that "every special plea shall be verified," former conviction must be specially pleaded, and the plea be verified, judgment will be affirmed.

Appeal from Falls county court; JOHN N. WHARTON, Judge.

Hyman Samuels was convicted of assault and battery, and appeals from the judgment of conviction. Article 525 of the Code of Criminal Procedure, referred to in the opinion, provides: "The only special pleas which can be heard for the defendant are (1) that he has been before convicted, legally, in a court of competent jurisdiction, upon the same accusation, after having been tried upon the merits for the same offense; (2) that he has been before acquitted by a jury of the accusation against him, in a court of competent jurisdiction, whether the acquittal was regular or irregular." "Art. 526. Every special plea shall be verified by the affidavit of the defendant."

J. A. Martin, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Appellant was tried and convicted for simple assault upon an information presented in the county court of Falls county, charging him with aggravated assault and battery upon one Joe Richardson, with a knife, a deadly weapon. The only plea interposed to the information was, "Not guilty." The learned judge instructed the jury as to aggravated assault and battery, and also as to what is commonly known as simple assault. Counsel for appellant objected to any charge upon the latter, contending that defendant must be convicted of the aggravated offense or be acquitted. There is no statement of facts in the record, but it appears from the bill of exception that defendant had pleaded guilty before the mayor of the city of Marlin to a simple assault and battery, and was fined five dollars. The bill states that "defendant had pleaded guilty to a simple assault and battery on said Richardson, growing out of the same difficulty." We hold (1) the accused must specially plead former conviction. Code Crim. Proc. art. 525. The plea must be verified by the affidavit of the defendant. Article 526. That former acquittal or former conviction must be specially pleaded is the common-law rule. That the state proves the former conviction does not alter the rule. This rule has this exception: When the accused has been tried and convicted of a less offense than that charged, if the judgment is reversed, or a new trial awarded, when again placed on trial in the same case and the same court, he need not plead the acquittal of the greater offense. (2) A number of assaults may grow out of or result from the same "difficulty," and still be separate and distinct transactions, for which the parties thereto may, for each transaction, be prosecuted to conviction. There is no error for which the judgment should be reversed, and it is affirmed.

WELCH v. STATE.

(Court of Appeals of Texas. June 9, 1888.)

JAIL AND JAILER—WHAT CONSTITUTES—QUESTION FOR JURY—CARRYING ARMS INTO A JAIL TO AID ESCAPE.

Where the evidence on an indictment for carrying instruments and arms into a jail, with the intent to facilitate the escape of a prisoner, shows that the instruments and arms were carried inside a wall which was constructed about the house in which the prisoners were confined, it was a question for the jury to decide whether the inclosure between the house and wall constituted a part of the jail; a "jail" being defined by Pen. Code Tex. art. 226, to be a place of confinement used for detaining prisoners.

Appeal from district court, Edwards county; WINCHESTER KELSO, Judge.

John Welch was indicted for carrying instruments and arms into a jail, with the intent to facilitate the escape of a prisoner lawfully confined and detained in such jail on an accusation of felony. Defendant was convicted, and appealed. The evidence showed that the jail of Edwards county consisted of two iron cages placed in a plank house; that the said house was surrounded by a wall over eight feet high, which was built as a protection against the escape of prisoners; that on the night alleged in the indictment defendant forced his way into the space between the wall and the house, and was shot by the guards; that he was armed with a gun, and that several small steel saws and a bottle of nitric acid was found inside the wall on the next morning.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for carrying into a jail instruments and arms with intent to facilitate the escape of a prisoner lawfully confined and detained in such jail on an accusation of felony. Pen. Code, art. 210. But two questions are presented: (1) Was the place into which the instruments and arms were conveyed a jail within the meaning of the law? (2) Did the court err in submitting to the jury the determination of the question above stated? Our Code defines a "jail" to be "any place of confinement used for detaining a prisoner." Pen. Code, art. 226. It was a question of fact for the jury to determine from the evidence whether or not the place into which the instruments and arms were conveyed was a place of confinement used for detaining the prisoner named in the indictment. It was not a question of law, and it would have been error if the court had so treated and decided it.

After instructing the jury in the statutory definition of the word "jail," the court further instructed as follows: "If the wall on the outside of the frame building which incloses the cages is also a part of the jail, then the conveying the said instruments and arms inside said wall would be a conveying into the jail. It is for the jury to determine from the evidence what constitutes the jail of Edwards county," etc. We hold these instructions to be correct, and we think the evidence fully warrants the finding that the instruments and arms were conveyed into the jail; that is, into the place of confinement used to detain the prisoner. A jail is not necessarily a house. It may be a pen, an inclosure of any kind; in fact, any place of confinement used for detaining a prisoner. In the case before us the outside wall which surrounded the house in which was the cell occupied by the prisoner, was, as shown by the evidence, constructed with a view to confining prisoners securely, and constituted in fact a stronger and more reliable safeguard against the escape of prisoners than the house or cell. It was the principal protection; the most important portion of the place of confinement. We find no error in the conviction, and it is affirmed.

OWENS v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

1. GRAND JURY—QUALIFICATIONS—JUSTICES AND SHERIFFS.

Under Code Crim. Proc. Tex. § 358, providing that no person shall serve as grand juror unless he is a citizen of the state and county in which he is to serve, qualified to vote in said county, is a freeholder in the state, or householder in the county, is of sound mind and good moral character, is able to read and write, has not been convicted of any felony, and is not under indictment or other legal accusation of theft or felony, the fact that one grand juror was a justice of the peace and two were deputy-sheriffs does not disqualify them from serving, although, under Rev. St. Tex. art. 3014, such officers are exempt from jury service when they claim such exemption.

2. SAME—PLEA IN ABATEMENT.

Under Code Crim. Proc. Tex. § 523, which provides only two grounds for setting aside an indictment, viz., that the record shows that the indictment was not found by at least nine grand jurors, and that some person not authorized was present during the deliberation and voting of the jurors on the charge, a plea in abatement on the ground of disqualification of some of the grand jurors will not be considered.

3. INDICTMENT—SURPLUSAGE—IRRELEVANT MATTER PRINTED AT TOP.

The words, "Empire print. Encourage home industry, and your money will circulate among the people," printed at the top of an otherwise valid indictment, does not render such indictment invalid.

4. CRIMINAL LAW—TRIAL—PROOF OF VENUE.

In a prosecution for a misdemeanor, the record failing to show that the offense was committed in the county laid in the indictment, a judgment of conviction will be reversed on appeal.

Appeal from Erath county court; W. W. MOORES, Judge.

Indictment for malicious mischief. Defendant was convicted, and appealed. Code Crim. Proc. § 523, provides that a motion to set aside an indictment or information shall be based on one or more of the following causes, and no other: (1) That it appears by the records of the court that the indictment was not found by at least nine grand jurors, or that the information was not presented after oath made as required in article 481. (2) That some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting on the same. Code Crim. Proc. § 358, provides that no person shall be selected or serve as a grand juror who does not possess the following qualifications: (1) He must be a citizen of the state and of the county in which he is to serve, and qualified under the constitution and laws to vote in said county. (2) He must be a freeholder within the state, or a householder within the county. (3) He must be of sound mind and good moral character. (4) He must be able to read and write. (5) He must not have been convicted of any felony. (6) He must not be under indictment or other legal accusation of theft or of any felony.

S. C. Buck, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction for malicious mischief. The indictment contained two counts,—one for willfully wounding the animal with intent to injure the owner, and one for willfully, wantonly, and unmercifully disfiguring and cruelly abusing the animal. A plea in abatement of the indictment was made by defendant upon the ground that three of the grand jurors who found and presented the bill were disqualified and incompetent to act as grand jurors,—one being a duly elected, qualified, and acting justice of the peace, and the two others being duly appointed, qualified, and acting deputy-sheriffs of the county.

A plea in abatement to an indictment is not, technically speaking, provided for in our Code of Criminal Procedure. There are two grounds, and two only, mentioned in our Code, as sufficient on motion to set aside an indictment. Code Crim. Proc. art. 523. Independent of these two grounds, jeopardy and want of jurisdiction are the only other grounds known, by which to avoid and vacate an indictment after its presentment. *Dodd v. State*, 10

Tex. App. 370; *Williams v. State*, 20 Tex. App. 357; *Johnson's Case*, 22 Tex. App. 206, 2 S. W. Rep. 609. But even if the plea was entitled to be considered in this case, we know of no statute in this state expressly prohibiting justices of the peace and deputy-sheriffs from acting as grand and petit jurors. It is true that as civil officers of the state they are declared as exempt from jury service, but it is only when they claim the exemption. Rev. St. art. 3014. Their official *status* does not disqualify them under the provisions of the Code of Procedure defining the qualifications of grand jurors, (Code Crim. Proc. arts. 353, 373,) and a challenge to the array of the grand jury does not embrace such grounds, (Id. art. 380.) It was not error to overrule defendant's plea in abatement.

Again, it is objected to the indictment that it does not commence, "In the name and by the authority of the state of Texas," but that, on the contrary, there is printed, above this beginning, the words: "The indictment. Empire print. Encourage home industry, and your money will circulate among the people." After this motto, the indictment commences properly, and is formal in all subsequent parts. An unnecessary written caption constitutes no part of an indictment, nor do mottoes on business cards, though unnecessary and unseemly, impair its validity if otherwise valid. *Winn v. State*, 5 Tex. App. 621; *West v. State*, 6 Tex. App. 485. The objection was properly overruled. As stated, there were two counts in the indictment, and the motion of the defendant to quash was sustained as to the second count, and it was quashed, and the defendant was tried alone on the first count, which charged that the act was done with intent to injure the owner of the animal. Pen. Code, art. 679; Willson, Tex. Crim. Laws, 234, 235. We are of opinion that the evidence fails to establish the intent charged. On the contrary, if any intent to injure was proved, it was the intent to injure the animal because of its breachy character and habits.

Without discussing other errors complained of, we will only notice the further one that the venue of the offense is not proved. The record fails to show that the offense was committed, as alleged, in Erath county. The judgment is reversed, and the cause is remanded.

ROBERTSON v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

CRIMINAL LAW—COMPLAINT—JURAT.

When the jurat attached to a complaint charging a criminal offense does not show the official character of the officer before whom it was verified, the complaint is fatally defective, and will not support an information and conviction.

Appeal from Bell county court; J. M. ROXBOROUGH, Judge.

Montieth & Furman, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. A complaint without a jurat will not support an information. *Scott v. State*, 9 Tex. App. 434. A jurat is the certificate of the officer before whom the complaint is made, stating that the same was sworn to and subscribed by the affiant before him, and it must be signed officially by such officer. In this case the original paper, which purports to be the complaint upon which the information is based, is sent up with and incorporated in the record. Upon an inspection of it, we find that it is not verified by a jurat. What purports to be a jurat is signed, "W. H. EDELL;" and following this name are some pen-marks which resemble the letter "W" more than any other letter or letters. This certainly does not constitute an official signature, and adds no more verity than if there had been no signature thereto whatever. It will not do for the courts to sanction such loose practice in proceedings which jeopardize the liberty of the citizen. Because the complaint is fatally defective, the judgment is reversed, and the prosecution is dismissed.

PERIGO *et al.* v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

1. FORNICATION—EVIDENCE—CONFESSIONS.

In a prosecution for fornication, where the defendant in her confession, which was relied upon to establish the fact of the misdemeanor, showed that she was a prostitute, the admission of such confession, though irrelevant, is harmless error.

2. SAME—EVIDENCE—SEPARATE CONFESSIONS OF DEFENDANTS.

On a prosecution for fornication, the confessions of the two defendants in a joint trial, though not made in the presence of each other, are admissible, and it is for the defendants to request the court to instruct the jury that such confessions could only affect the party making them.

Appeal from Bell county court; J. M. ROSBOROUGH, Judge.

This was a prosecution against Edward Perigo and Eva Pearl for fornication. Defendants were convicted, and fined \$50 each. They appeal.

Asst. Atty. Gen. Davidson, for the State.

HURT, J. The appellants were jointly indicted and convicted for fornication. Upon the trial, over Eva Pearl's objections, the state proved that she had the reputation of being a prostitute. In this case (but not in all cases) such proof is not admissible. But in making proof of the offense charged the confessions of each defendant were introduced in evidence, and these confessions clearly show Pearl to be a prostitute. An act, though a distinct offense from that being tried, being a circumstance tending to prove the offense being tried, is competent. With much stronger reason will an irrelevant fact be admissible when it is inseparably connected with a competent fact. Now, the confessions of the parties not only tend to establish the guilt of the offense charged, but they strongly show that Pearl was a prostitute,—not in terms, but the inference is inevitable. We think that no injury resulted to appellants from this evidence, especially when reference is had to the punishment,—the lowest permitted by law.

Appellants being jointly tried, the confessions of each, though not made in the presence of the other, were admissible; and, if desired, each defendant should have requested instructions to the effect that the confessions could bind the party making them only. This was not done, nor was there objection made at the time that the jury was not so instructed by the charge. This being a misdemeanor case, the accused should request proper instructions, and especially except to errors in the charge at the time, reserving bills of exceptions. We find no error for which the conviction should be reversed, and it is therefore affirmed.

LEGGETT v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

CRIMINAL LAW—TRIAL—PROOF OF VENUE.

Proof of the venue of an offense is essential to the sufficiency of a conviction.

Appeal from Hood county court; H. F. BERRY, Judge.

A. Leggett was indicted for cutting timber upon land not his own, and fined \$10 in county court, from which judgment he appeals.

W. A. Duke and N. L. Cooper, for appellant. *Asst. Atty. Gen. Davidson*, for appellee.

HURT, J. Appellant stands convicted for cutting down and destroying timber upon land not his own. The indictment is sufficient, and there was no error in overruling the motion in arrest. There is no evidence rendering it at all certain that the offense was committed in Hood county. The indictment alleged that the timber was cut on the James W. Moore survey. The only evidence tending to show the location of the Moore survey is found in

the testimony of Jo Buckhalter, who says: "I live in Hood county on the A. O'Brien survey, seven miles south from Granberry. The west line of the J. W. Moore survey and the east line of the O'Brien survey is the same." We are not informed that all of the O'Brien survey is in Hood county, nor that any part of the Moore is in Hood county. We cannot judicially know that Granberry is in Hood county, nor the distance from this place south to the county line, nor the shape and size of the O'Brien and Moore surveys. There being no proof of the venue, the judgment must be reversed. The learned judge in no part of his charge instructs the jury that the offense must be shown to have been committed in Hood county. Counsel for appellant assigns this for error, and urges that appellant excepted to the charge for this omission. The record shows general exceptions, indicating no particular error. This is a misdemeanor. See *Perigo v. State, ante*, 660. Because the venue is not proved the judgment is reversed, and the cause remanded.

CROOM v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

INTOXICATING LIQUORS—ILLEGAL SALES—SUFFICIENCY OF INDICTMENT.

An indictment for selling intoxicating liquor, in violation of the local option law, which charges that the sale was made "after the qualified voters of the said county had determined, at an election held in accordance with the laws of said state, that the sale or exchange of intoxicating liquor should be prohibited," is fatally defective. Following *Ninenger v. State, ante*, 480.

Appeal from Palo Pinto county court; R. E. HENDRY, Judge.

John Croom was indicted for selling liquor, in violation of the local option law. There was a conviction, and defendant appeals.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This prosecution was for the sale of intoxicating liquors, in violation of the local option law. The indictment follows literally form No. 257 of Willson's Criminal Forms, and charges that the sale was made "after the qualified voters of the said county had determined, at an election held in accordance with the laws of said state, that the sale or exchange of intoxicating liquors should be prohibited," etc. In *Ninenger v. State, ante*, 480, it was held that an information charging said offense in this manner was fatally defective. For the reasons for so holding, we refer to the opinion in that case. Because the indictment in this case is fatally defective, the judgment is reversed, and the prosecution dismissed.

MCGILL v. STATE.

(Court of Appeals of Texas. June 2, 1888.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

On a trial for murder, evidence that deceased was last seen in defendant's company, and that defendant was seen shortly after the homicide, walking away from where the body of deceased was found, near a pool of water, in which his coat was found sunken; that tracks leading from the body to the water corresponded to those made by defendant's shoes, and indicated that the person making them had knelt down by the water; that a handkerchief was found on defendant's person, appearing to have been used to wipe hands partially cleansed of blood; and that deceased came to his death by violence,—although circumstantial, amply sustains conviction when the only defense consists of an *alibi*, based only on evidence that, four or five days before the killing, defendant was in another county, which had communication by rail with the county where the offense was committed.

2. SAME—PROOF OF VENUE.

On a trial for murder, in the absence of direct proof of the venue of the crime, where the evidence shows that defendant and deceased were traveling westward on a straight railroad track, and had crossed the Brazos river, and were seen together, near where the body was found, at least a mile and a half from the river, the

court will take judicial notice of the fact that the Brazos river is the eastern boundary of Milam county, and not disturb a conviction of the crime in that county, as the *locus in quo* could not have been elsewhere.

8. SAME—RELEVANCY.

On a trial for murder of deceased, whose body was found not far from a pool of water where his coat was found sunken, the testimony of a witness that he went to the place pointed out to him as the place where the body was found, and there found, among many shoe-tracks, one leading to the water, made by a run-down and patched shoe, such as that worn by defendant, is relevant, however remote.

4. CRIMINAL LAW—REMARKS OF COUNSEL—HARMLESS ERROR.

Remarks of counsel for prosecution in argument, which are not strictly proper, if they are condemned by the court within the hearing of the jury, so that no prejudice arises to defendant, are not ground for reversal.¹

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

Defendant was convicted of murder of one W. T. Leonard, and was sentenced to be hanged. The evidence showed that W. T. Leonard, 15 years old, left his father's house on June 13, 1887, to go to the house of his uncle, in Rockdale, Milam county. He left on foot, taking a shotgun with him. He had no shoes when he left home. The deceased sold his gun in Hearne, on June 15th, for \$4.50, with which money he bought a straw hat and a pair of shoes. He left Hearne with the defendant, saying that he was going to Rockdale to visit his uncle, and that he was going to walk to Rockdale on the railroad. The defendant and deceased were seen together, at different points on the railroad, to within a short distance of the town of Gause. He was last seen with the deceased about noon on June 16th, going towards Gause. He was again seen, about 3 o'clock, going from the direction of Gause. Very soon after, the defendant was seen alone, going from the direction of Gause. The dead body of the boy was found near the railroad track, at a place from the direction of which the defendant was traveling, when last seen alone. His body lay partly in a hole of water. He had been killed by a blow on the head with a blunt instrument of some kind. The track of a large, run-down shoe led from the body to a water-hole in which the coat worn by the boy was found, wrapped around an iron railroad fish-bar. Defendant's shoes were run down, and would make just such a track as that which led from the body to the coat and fish-bar. The run-down track was trailed to the water-hole, where the party making it knelt down to get a drink of water or wash his hands. A bloody handkerchief was found on the person of defendant when arrested. The condition of the handkerchief indicated that it had been used to wipe or dry bloody hands which had been insufficiently washed. The defense attempted was an *alibi*, but it merely established the presence of the defendant in Montgomery county, 70 miles distant, on the 11th day of June, for or five days before the murder. Milam county was accessible to Montgomery by railroad. The testimony of John Pate, referred to in the opinion was to the effect that, after the removal of the body, he went to the place pointed out to him as the place where the body was found, and that he found at that place, among a number of shoe-tracks, a track that was made by a run-down and patched shoe, and that said track was such a one as would be made by the run-down, patched shoe worn by defendant,

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. 1. No error was committed with reference to the defendant's challenge of the juror Alsup. It appears from the bill of exceptions that said Alsup was competent to serve as a juror in said cause; and, furthermore, the defendant did not exhaust his peremptory challenges in the organization of the jury, and said Alsup did not serve on said jury, but was challenged by the

¹Respecting misconduct of counsel in argument as a ground for granting a new trial, see *Railway Co. v. Cooper*, (Tex.) 8 S. W. Rep. 68, and note; *Railway Co. v. Metzgar*, (Neb.) 88 N. W. Rep. 27; *Jackson v. Harby*, (Tex.) 8 S. W. Rep. 71; *Railroad Co. v. Perkins*, (Ill.) 17 N. E. Rep. 1.

defendant, and the challenge was not counted against him; the court, in effect, allowing said challenge as one for cause.

2. There was no error in admitting the testimony of John Pate, nor in refusing to exclude it from the jury. It was proof of circumstances relevant to the issue; and, however remote it may be, was not for that reason inadmissible.

3. With regard to the bills of exception to the remarks of counsel for the prosecution in their arguments to the jury, we are of the opinion that no reversible error is shown. It may be conceded that the remarks objected to were not strictly proper and legitimate. They were, however, promptly condemned by the court in the hearing of the jury, and, under the circumstances, could not have prejudiced the defendant, or in any manner have affected his rights injuriously.

4. There is no doubt in our minds as to the sufficiency of the evidence to warrant and sustain the conviction. While the evidence is circumstantial, it is of that cogent and conclusive character which produces moral certainty, and excludes every hypothesis except that of the defendant's guilt. The deceased was clearly identified by age, size, clothing, and other circumstances. The defendant was identified, by both positive and circumstantial evidence, as the person who was last seen in company with the deceased, in the immediate vicinity of where the dead body of the deceased was discovered; and the dead body furnished indubitable evidence that death had resulted from the violent act of another. There is but one particular in which the evidence falls short of that certainty demanded by the law, and that is as to the venue of the offense. There is no direct testimony that the murder was committed in Milam county, or that the place where the dead body was found was in Milam county. It is not required, however, that venue should be established by direct testimony, nor that it should be proved beyond a reasonable doubt. It may be proved by circumstantial evidence, as any other fact; and, if the evidence be reasonably sufficient to satisfy the jury that the offense was committed in the county of the prosecution, this court will not disturb the conviction. *Deggs v. State*, 7 Tex. App. 359; *Achterberg v. State*, 8 Tex. App. 463; *Allison v. State*, 14 Tex. App. 402; *Nance v. State*, 17 Tex. App. 385. In this case the evidence shows that the defendant and the deceased were traveling together, walking from Hearne, in Robertson county, towards Gause and Rockdale, in Milam county. They were walking on a railroad track. They had crossed the Brazos river at the railroad bridge, and were seen together, near where the dead body of the deceased was found, at a point on the railroad right of way at least one and a half miles west of the Brazos river. These facts alone would certainly not establish the venue of the offense in Milam county. But the courts take judicial notice of the boundaries and limits of counties, and of their relation or contiguity to each other. *State v. Jordan*, 12 Tex. 205; 1 Greenl. Ev. § 6, p. 10. This judicial notice establishes that Robertson and Milam counties adjoin each other; the Brazos river being the common boundary line between them, Robertson county being located east and Milam county west of said river. It follows, therefore, that a point on a line extending from Hearne, in Robertson county, westward one mile and a half west of the Brazos river, would be in Milam county; said line, as shown by a plat of the locality in evidence, being a straight one from Hearne to the point where the murder was committed. Considering together the facts proved, and the facts which are matters of judicial knowledge, there is no room for doubting that the murder was committed in Milam county. The *locus in quo* could not possibly be in any other than Milam county.

We find no error in the conviction, and the judgment is affirmed.

FOSTER v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

1. ASSAULT AND BATTERY—CRIMINAL PROSECUTION—AGGRAVATED AND SIMPLE ASSAULT.

Under an indictment for an aggravated assault, defendant may be convicted of a simple assault.

2. CRIMINAL LAW—ARRAIGNMENT AND PLEA—FORMER JEOPARDY—SECOND TRIAL IN SAME CASE.

Where a defendant has been tried and found guilty of a misdemeanor, and the record does not show whether judgment was entered on such verdict or the verdict set aside, a second conviction in the same case will be reversed on appeal.

3. SAME—FORM OF PLEA.

Although a plea of former jeopardy and former conviction omits to set out the indictment and judgment referred to, and would therefore be fatally defective if both trials had been in different courts, such defect will not bar the defense of jeopardy and former conviction when both trials were in the same court, since the court takes judicial cognizance of previous proceedings in the case.¹

Appeal from district court, Haskell county; C. J. CHAPMAN, Judge.

Indictment for an aggravated assault and battery. Defendant was found guilty of simple assault, and appealed.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was indicted for an aggravated assault and battery; the circumstance alleged for aggravation being that he was an adult male, and the party assaulted a child. Two trials were had in the county court. On the first, the appellant was, by the verdict of the jury, found guilty of simple assault, and fined \$25. Whether or not a judgment was entered upon this verdict is not shown; but the record shows that, when the case was called a second time for trial, defendant pleaded specially former jeopardy and former conviction. This second trial was had before the court, a jury being waived, and incorporated in the judgment are set forth the conclusions of fact and law found by the judge; and the judgment again found defendant guilty of simple assault, and imposed again a fine of \$25. As to the special plea of former jeopardy and conviction, the court, in its conclusions, finds that "the first verdict acquitted defendant of aggravated assault, but not of simple assault, and that defendant was required [on the second trial, we presume] to plead to simple assault." The special plea is inartistically drawn, and substantially defective in failing to set out the indictment and judgment; and these defects would have been fatal had the trial been had in a different forum from that in which the former conviction was had. *Grisham v. State*, 19 Tex. App. 504; *Shubert v. State*, 21 Tex. App. 551, 2 S. W. Rep. 883. The two trials, however, being in the same tribunal, and in the same case, it seems that really a special plea of former conviction was not required to be pleaded, because the court would take judicial cognizance of all previous proceedings which had been taken in the case, (*Robinson's Case*, 21 Tex. App. 160,) and, ascertaining that defendant had already once been tried and convicted, would abate a further prosecution because of such prior conviction.

In this case it is clear that defendant had been previously tried, and that a verdict of simple assault had been rendered against him. Whether judgment on the verdict was ever rendered, or whether said verdict was set aside without judgment, does not appear. Now, if judgment had been rendered, and was not subsequently set aside on motion of defendant, or for good and sufficient cause, it is evident that the second trial, though for the lesser offense theretofore found, would be unwarranted and void; the former conviction being a bar to the second trial for any offense under the indictment. Code

¹ Concerning what will support a plea of former conviction or jeopardy, see *State v. Blaut*, (Ark.) 2 S. W. Rep. 190; *Robinson v. State*, (Tex.) 4 S. W. Rep. 904, and note; *People v. White*, (Mich.) 37 N. W. Rep. 34; *People v. Curtis*, (Cal.) 17 Pac. Rep. 941.

Crim. Proc. art. 525. If the former judgment or verdict were set aside or the judgment was arrested at the instance of the defendant, then, indeed, such former conviction would not avail the defendant, and he would be legally liable to a second trial for simple assault,—the lesser offense previously found by the verdict of the jury. *Robinson's Case, supra*; Code Crim. Proc. art. 724. But if the court, of its own motion, after the verdict had been returned, discharged the jury, set aside the verdict, and refused to render the judgment, then the defendant's plea of former jeopardy would be proper and available, though the case was a misdemeanor. Const. Bill of Rights, § 14; *Brink v. State*, 18 Tex. App. 344. Just how the matter stands with reference to either of the above propositions, we are unable to determine from the record before us. In such a state of uncertainty we have deemed it but right to reverse, and remand the case for another trial.

Before doing so, however, it may be well to notice a question made by appellant's counsel, and which seems to be the main point relied upon for reversal. It is insisted that, when an assault and battery is committed by an adult male upon a child, the offense is *per se*, under our statute, an aggravated assault; and that the accused, so charged and proved guilty, cannot be legally found guilty and punished for a simple assault. Pen. Code, art. 496, subd. 5. "The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery," (Pen. Code, art. 484;) and, unless accompanied by one or more of the statutory circumstances of aggravation, is a simple assault and battery. Such simple assault and battery is necessarily included in every aggravated assault and battery; the former is but a lesser degree of the latter when the latter is charged. Pen. Code, art. 494. That a lesser degree is found than that charged by indictment or information, or than that proved, has never been held ground either for a new trial or reversal. A defendant has no right to complain under such circumstances. Code Crim. Proc. art. 724.

For the errors we have previously pointed out the judgment will be reversed, and the cause remanded.

BUCHANAN v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

LARCENY—EVIDENCE—SUFFICIENCY—ACCOMPLICES.

On a trial for stealing cattle, the evidence to corroborate the testimony of an accomplice was that defendant was hide and cattle inspector of the county; that he stated that he had inspected the cattle, and that they were all right; that he wrote a bill of sale of the cattle from M., the accomplice, to a third party, signing M.'s name to the same, he being present and assenting; that he received part of the purchase money on the sale of the cattle, which he explained by proving that M. was indebted to him. It was not shown that defendant knew the owner of the brand on the cattle when he reported them all right; nor was it shown that M. had no cattle, was dishonest, of bad reputation, or unlikely to be honestly in possession of the cattle. *Held*, that the testimony of the accomplice was not sufficiently corroborated to warrant a conviction.¹

Appeal from district court, Tom Green county; J. C. RANDOLPH, Judge.

The defendant, H. D. Buchanan, was convicted of the larceny of two head of cattle and sentenced to two years' imprisonment. From the judgment he brings this appeal.

¹ Concerning the necessity of corroborating the testimony of an accomplice, in order to sustain a conviction, and the extent of such corroboration, see *People v. Elliott*, (N. Y.) 12 N. E. Rep. 602, and note; *People v. Kunz*, (Cal.) 14 Pac. Rep. 886; *Patterson v. Com.*, (Ky.) 5 S. W. Rep. 887; *People v. Clough*, (Cal.) 15 Pac. Rep. 5; *State v. Dana*, (Vt.) 10 Atl. Rep. 727; *Dodson v. State*, (Tex.) 8 S. W. Rep. 548; *Boyd v. State*, Id. 853; *Wisdom v. People*, (Colo.) 17 Pac. Rep. 519. As to who is an accomplice within the rule, see *Smith v. State*, (Tex.) 5 S. W. Rep. 219, and note.

Mays & Wright, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant and one Sam Moore were jointly indicted for the theft of two cattle, the property of E. Burke. Appellant was alone put upon trial, and Sam Moore, his co-defendant, was allowed to turn state's evidence, and testified against appellant on the trial. If his testimony is to be credited, and if it is sufficiently corroborated by other evidence, there can be no question but that the case against appellant was fully made out. As to whether he was sufficiently corroborated is the only material question upon this appeal. If there is any evidence corroborating the accomplice at all, and tending to connect the defendant with the theft, it is, in our opinion, quite meager and unsatisfactory. It amounts to about this: That the defendant was hide and cattle inspector of the county; that he told Voss that he had inspected the cattle, and that they were all right; that he wrote the bill of sale for the animals from Sam Moore to Woodie, the butcher, and witnessed it, (Sam Moore being present;) and that he received part of the money paid on the purchase of the animals. As to the money which he received, he accounted for that fact by proving that it was in payment of a debt due him from Moore. As to his writing the bill of sale, and signing Moore's name to it, that amounts to nothing; Moore being present, and assenting to, if not requesting, it. It is true that he was hide and cattle inspector, and had inspected the animals, and said they were all right. This he might and could have done without being a party to or connected with the theft. He may not have known the mark and brand of E. Burke. It is not shown that he did know them and was thereby put upon notice that they had once been the property of Burke. It is not shown that Sam Moore owned no cattle, or that he was not a party who might honestly have had possession of and owned cattle that formerly belonged to his neighbor; and that the defendant, from Sam Moore's character and circumstances, was put upon inquiry as to the honesty of his (Sam Moore's) possession of cattle. If Sam Moore was an honest man of good reputation, and one likely to own cattle honestly, appellant might honestly and innocently have inspected his cattle and reported them "all right." We say that the evidence corroborative of Sam Moore's testimony, tending to connect the defendant with the theft of the animals, is too meager and unsatisfactory, in the absence of proof of other circumstances, which might, if they existed, have been made, and which would have been more cogent, at least, if not conclusive, of his guilt or innocence. Because the evidence corroborating the accomplice testimony is, in our opinion, inconclusive and insufficient, the judgment is reversed, and the cause remanded.

MCCARTY v. STATE.

(Court of Appeals of Texas. June 9, 1888.)

CRIMINAL LAW—APPEAL—ENTRY OF PLEA ON RECORD.

Where, on appeal, the record fails to show that, at the trial, any plea was made by or entered for the defendant, the judgment will be reversed.

Appeal from Hill county court; A. W. PARKAM, Judge.

The defendant, E. E. McCarty, was convicted of aggravated assault and battery, and fined \$10. From the judgment he brings this appeal.

McKinnon & Carlton, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. In this case the assistant attorney general confesses error because the record fails to show that, at the trial, any plea was made by or entered for the defendant. The error is well taken, and the judgment is reversed, and the cause remanded.

GUYNES v. STATE.

(Court of Appeals of Texas. June 9, 1888.)

BURGLARY—INDICTMENT—VARIANCE.

Upon an indictment alleging burglary in the night-time, there can be no conviction where the offense was committed in the day-time.

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

Indictment for burglary. Defendant was convicted, and judgment of confinement in the penitentiary three years, from which he appealed.

T. S. Henderson and J. M. Ralston, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This is a conviction for burglary, the indictment charging a burglary in the night-time. In his charge the judge instructed the jury that they might convict if the evidence showed that defendant committed the burglary either in the day-time or the night-time. Defendant excepted to this instruction, and reserved his exception by bill. It was error to give such instruction, as, under the indictment, the conviction could only be had for a burglary committed in the night-time. *Brato v. State*, 20 Tex. App. 188; *Mace v. State*, 9 Tex. App. 110. The judgment is reversed, and the cause remanded.

TEAGUE v. STATE.

(Court of Appeals of Texas. June 9, 1888.)

HEALTH—SELLING DISEASED MEAT—INDICTMENT.

Under Pen. Code Tex. art. 392, making it unlawful knowingly to slaughter for food any diseased animal, or to sell the flesh of any animal slaughtered when diseased, it is essential that the defendant should know, at the time of the sale, that the meat was diseased, before he can be convicted of such offense.

Appeal from Brown county court; R. P. CONNER, Judge.

Defendant was indicted for selling diseased meat. The evidence showed that defendant sold the meat, and that it was diseased, but wholly failed to prove that defendant knew it to be diseased. Pen. Code, Tex. art. 392, makes it unlawful knowingly to slaughter for food any diseased animal, or sell the flesh of any animal slaughtered when diseased.

Scott & Jenkins, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This is a conviction, under article 392 of the Penal Code, for selling the flesh of a diseased hog. Conceding that the hog was diseased, the evidence failed to show that defendant, at the time he sold the flesh of it, knew the fact; and, unless he sold the flesh knowing it was diseased, he committed no offense. Because the evidence does not support the conviction, the judgment is reversed, and the cause remanded.

FERNANDEZ v. STATE.

(Court of Appeals of Texas. June 6, 1888.)

1. LARCENY—WHAT CONSTITUTES—POSSESSION OF STOLEN PROPERTY—INSTRUCTIONS.

Where defendant, indicted for theft, explains his possession of the stolen property by claiming that he borrowed it from one who had stolen it, the charge of the court is insufficient if it fails to instruct the jury that if the property was stolen by a third person, from whom defendant, knowing the facts, obtained it by consent of the thief, they must acquit defendant under the indictment.

2. EVIDENCE—DOCUMENTS—LAWS OF FOREIGN STATE.

A book purporting to be a reprint of the Penal Code of the state of Coahuila, Mexico, when duly proven to be such by a competent witness, is admissible in evidence to prove the laws of such state, under Rev. St. Tex. art. 2250, which provides

that the printed statute books of any foreign government, purporting to have been printed under the authority thereof, shall be received as evidence of the acts and resolutions therein contained.

Appeal from district court, Kinney county; W. KELSO, Judge.
Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was indicted, under article 798 of the Penal Code, for the theft of one horse, in the state of Coahuila, republic of Mexico, and afterwards bringing the said stolen horse into Kinney county, Tex. It appears that two horses belonging to the same owner were taken at the same time and place; one being a dun and one a black horse. The court, however, in the charge to the jury, properly limited the jury, in its finding of guilt, to the one, (the dun,) and approximately restricted the purposes and extent to which they would consider the evidence relating to the theft of the black horse.

In the prosecution of this case for the theft of property stolen in a foreign country, it became necessary to show that the act committed was not only theft in this state, but that it was also theft in the state of Coahuila, republic of Mexico, the country from which the property was taken, and brought into this state. Pen. Code, art. 799; *Carmisales v. State*, 11 Tex. App. 474. In such cases the law of the foreign country is an element of the offense, and an issuable fact to be alleged and proved. *State v. Morales*, 21 Tex. 298. Article 2250 of the Revised Statutes provides how laws shall be proved, and is applicable in criminal cases. Code Crim. Proc. art. 726; *Cummins v. State*, 12 Tex. App. 121. It is therein provided that "the printed statute-books of * * * any foreign government, purporting to have been printed under the authority thereof, shall be received as evidence of the acts and resolutions therein contained." For the purpose of proving the laws of Coahuila upon the subject, the prosecution placed as a witness, upon the stand, one Mitchell, who was the vice-consul of the United States at Piedras Negras, Mexico, who was acquainted with and able to read and write the Spanish language, and had had some experience as a practitioner in the courts of Mexico, though not a lawyer. This witness was handed a book, and was asked what it purported to be, and he said that the title-page, translated, reads as follows: "Penal Code for the Federal District and Territory of Lower California, of Crimes against the Federation. Adopted in the State of Coahuila, according to the Decree No. 204. Reprint, Saltillo, 1876. State Printing Office, under the charge of Miguel M. Pepe." The witness further stated that the book contained the decree No. 204 by the legislature of Coahuila, adopting the book as the Penal Code of said state, and other amendments to the same, in some instances; and that the "book purported to be the Penal Code of the state of Coahuila, republic of Mexico, and published by the authority of said state." The witness was also permitted, over the objection of the defendant, to read and translate certain articles contained in said book, relating to theft of animals and its punishment, showing that theft of horses was a punishable crime in that country. Several objections were urged to the competency, sufficiency, and admissibility of this evidence. In *Ellis v. Wiley*, 17 Tex. 194, it was held that "where a code or statutes of another state have been published by authority, and purport to have been so published, a reprint of such book is admissible in evidence, without other evidence of its sanction by the government of such state." We are of opinion that the evidence was properly admitted. *Cummins v. State*, 12 Tex. App. 121; *Cowell v. State*, 16 Tex. App. 57.

Several questions, it occurs to us, present themselves on this record which are necessary to be determined in order to arrive at an intelligent and satisfactory conclusion as to the validity of this conviction. These questions are: (1) Is there any other circumstance or inculpatory fact established against defendant than that of recent possession, and was not such possession explained? (2) Does not the evidence, if it establishes any crime at all against the de-

defendant, show him to be a receiver of stolen property knowing the same to have been stolen? In which event he could not be convicted, under this indictment, for theft. (3) Can defendant, under this prosecution, be convicted as a principal offender, provided the evidence shows that to be his *status* with reference to the offense charged? Let us consider these questions with reference to the salient features of the evidence. It is shown by the testimony that the horses were stolen in Piedras Negras, on December 2, 1887. They were next seen by the witness Davis, at his place on the Nueces river, on or about December 2d, in possession of one Leonidos Huerto and defendant, and they were claimed by Huerto. Huerto sold one of the horses to Davis, and defendant got the dun horse from Huerto, to ride to Brackett to get medicine. He got the medicine from Dr. Patrick about December 15th. On December 16th, he was at the house of Salinas with the horse, and told Salinas it was stolen, but did not state by whom stolen. Salinas told one Ruiz that defendant had possession of a stolen horse, and Ruiz went and got the horse without the defendant's knowledge, and on the 17th he turned it over to Deputy-Sheriff Rose. On the 18th, defendant, finding Rose in possession of the horse, claimed him, but said afterwards that he had borrowed the horse from Leonidos Huerto. These appear to be the principal facts developed by the evidence. It seems clear to us from these facts that the defendant's guilt depends mainly upon the fact of his recent possession, and a possession which defendant explained, whether the explanation made by him was reasonable, satisfactory, and probably true or not. He said he knew the horse was stolen, but he did not say he had stolen it. On the contrary, he stated that he had borrowed it from Huerto. The court's charge was insufficient, in that it wholly failed to instruct the jury upon the law with reference to this phase and theory of the case. *Boyd's Case*, 24 Tex. App. 570, 6 S. W. Rep. 853. Again, if the horses were stolen by Huerto, and, after they were so stolen, the defendant, knowing the facts, obtained and held possession of the dun horse, from and by authority of Huerto, he would not be guilty of the theft, though he might, under a proper indictment, be convicted for receiving and concealing the property, (*Willis' Case*, 24 Tex. App. 584, 6 S. W. Rep. 856;) and the jury should have been instructed that, if they found such to be the case, they would acquit him under this indictment. These omissions in the charge render it necessary that the judgment should be reversed.

There is another question made in the record which is novel in character, and, so far as we are advised, is one of first impression. We have already seen that, under our statute, (Pen. Code, art. 799,) in this case it was essential to the validity of a conviction that proof be made that the act committed would have been theft in Coahuila. Now, under our statutes, the defendant would have been a principal offender if he was present when the offense was actually committed, and, knowing the unlawful intent, aided by acts and encouraged by words the party engaged in the unlawful act, etc. Pen. Code, arts. 74-76. The question whether it devolved upon the state to show a similar provision of law in Coahuila, in case the facts established that defendant occupied such a relation to Huerto, the person who actually perpetrated the crime. We do not believe the state would be required to show such a statute in the foreign country. We are inclined to think that whenever the state proved that, under the laws of the foreign country, the crime committed was theft, and that defendant was present, and a party to it, which latter might be proved by direct or circumstantial evidence, that that would be sufficient, unless the defendant himself could show, by express provisions of such foreign law, he would not be liable because not the actual taker. Without deciding the question at this time, we suggest that upon another trial the state adduce such proof as may be had from the laws of Mexico upon the subject.

For errors of omission in the charge of the court above pointed out, the judgment is reversed, and the cause remanded.

CORDWAY v. STATE.

(Court of Appeals of Texas. March 7, 1888.)

1. PERJURY—WHAT IS—JURISDICTION OF COURT WHERE COMMITTED.

Where one accused of two murders has fled, and, having been extradited for one of them, is indicted and, without objection, tried for the other before a court which has jurisdiction of the subject-matter, false testimony therein is ground for a charge of perjury.

2. SAME—EVIDENCE—FORMER STATEMENTS TO SHOW GUILT OF ACCUSED.

On a trial of defendant for perjury, in testifying upon a murder trial that the deceased was armed when shot, his testimony at the inquest, which is not corroborative of that adduced at the trial, and his statement the day after the murder that deceased was unarmed, are admissible to show the falsity of his testimony, upon which the perjury is assigned.

3. NEW TRIAL—WHEN GRANTED—REFUSAL OF CONTINUANCE.

In Texas, on trial for perjury, where a continuance because of absence of two witnesses, who would corroborate defendant, has been properly refused for want of diligence, a new trial should still be granted if the evidence adduced on the trial shows that the absent testimony would be material, and is probably true.

4. APPEAL—REVIEW—OBJECTION NOT RAISED BELOW—GENERAL EXCEPTIONS.

A general exception to a charge, not specifically pointing out an error therein, will not be considered on appeal.

Appeal from district court, Wilson county; GEORGE MCCORMICK, Judge.

Trial of John Cordway, charged with perjury. Judgment was for conviction, and defendant appeals. The perjury assigned against the appellant was that, on the trial of one Coy for the murder of one Jackson, he, as a witness for the defense, falsely testified that, when shot and killed by Coy, the said Jackson had a pistol in his hands. The penalty assessed against the appellant was a term of five years in the penitentiary. It was inconsistently proved that, upon the trial of Coy for the murder of Jackson, the defendant, as a witness for Coy, testified that, when Coy shot and killed Jackson, the said Jackson, with a pistol in his hands, was struggling to shoot the said Coy. Defendant's statement, when sworn as a witness, upon the inquest over Jackson's body, was read in evidence by the state. It reads as follows: "I do not know how the dispute came up. I came up just after it began. I think Monroe Toodles and Thomas Lopez were the ones disputing. Then Coy spoke in favor of Lopez. Deceased then asked him if he took it up. He said he did. Deceased then remarked: 'If you do, I will fix you. I have a gun for you,'—and started towards it. Coy then went after him, and as he went he pulled out his pistol and caught deceased. I saw his pistol in his hand, and went up and caught hold of it. Just as I caught the pistol it fired, and killed deceased. [Signed] JOHN CORDWAY." Stevenson testified that immediately after signing the above statement defendant told him, in answer to a question, that deceased was not armed when Coy shot him. Gouger testified that he heard defendant make that statement to Stevenson. Hubbard testified that on the day after the killing of Jackson defendant told him that Jackson was unarmed when shot. Toodles, testifying for the state, detailed the circumstances of the killing of Jackson by Coy, and testified positively and emphatically that Jackson was totally unarmed when shot. Bolds testified that he saw the struggle; saw a pistol in Coy's hand, and saw Coy shoot and kill Jackson, but saw no pistol in Jackson's hand. One witness for the defense testified positively and emphatically that Jackson did have a drawn pistol in his hand when shot by Coy, and that he was endeavoring to shoot Coy when shot, and that before he fell Jackson dropped the pistol; that a large number of people were present at the time, and that the shooting occurred where weeds were high and plentiful. Another witness for the defense testified that he saw both Jackson and Coy, just before Coy fired the fatal shot, throw their hands behind them as if to draw pistols. He afterwards saw a pistol in Coy's hand, but saw none in Jackson's hand. A large number of witnesses testified to the good reputa-

tion of defendant for truth and veracity, and that the reputation of the state's witness, Toodles, for truth was infamous. The opinion, on rehearing, states the substance of the absent testimony, as set out in the motion for continuance.

B. F. Ballard and Fly, Davidson & Hankison, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. 1. All the witnesses named in the application for continuance, except two, were present, and testified on the trial. As to the two absent witnesses, the application fails to show sufficient diligence to obtain their testimony. There was therefore no error in refusing to grant the application.

2. Defendant's testimony taken before the jury of inquest, and also his statements to the witness Hubbard, were admissible as tending to show the falsity of the statements upon which the perjury is assigned. They were circumstances pertinent to the issue on trial, and throwing light upon it, and, in our opinion, strongly corroborative of the other testimony of the state. As to the parol testimony of the defendant's statements made before the jury of inquest, it did not contradict or vary said statements as reduced to writing, and signed and sworn to by the defendant, and could not possibly have injured him.

3. It was not error to reject the proposed testimony of the witness McMullen as to other statements made by the defendant. We know of no rule of evidence under which such statements would be admissible in behalf of the defendant.

4. There is no fundamental error in the charge of the court, and, if it be erroneous in any respect, the error is not of a character that could be regarded as injurious to the defendant's rights. There was a general exception made to the charge of the court; no error therein being specifically pointed out, and such exception cannot be considered. *Williams' Case*, 22 Tex. App. 332, 3 S. W. Rep. 226.

5. A bill of exception was reserved by the defendant to certain remarks made by the district attorney in his closing address to the jury. The remarks complained of were in response to an argument used by the defendant's counsel, and were, we think, justified thereby.

6. A question of importance, and not before adjudicated in this state, or in any other state, that we are aware of, is presented in the defendant's motion for a new trial, and in his motion in arrest of judgment. The facts upon which this question arises are briefly stated as follows: The perjury for which defendant stands convicted was committed on the trial of the case of *State v. Juan Coy*, charged with the murder of one Jackson. After killing Jackson, Coy killed one Elder in Karnes county, and fled into Mexico. He was extradited from Mexico for the murder of Elder, but not for the murder of Jackson. After being extradited for the Elder murder, he was indicted for the Jackson murder, and put upon trial therefor, and upon said trial the alleged perjury by defendant was committed. Said trial resulted in a mistrial. Coy did not interpose, upon said trial, any plea or objection to the jurisdiction of the court, but some time thereafter he sued out a writ of *habeas corpus*, based upon the ground that he had not been extradited for the murder of Jackson, and was therefore illegally restrained of his liberty upon said charge. Upon a hearing of said writ it was adjudged that the district court of Wilson county had no jurisdiction to try him for the murder of Jackson, and he was discharged from restraint under that charge. It is claimed by the defendant under this state of facts that as the district court of Wilson county had no jurisdiction to try Coy for the murder of Jackson, the defendant could not commit legal perjury on said trial. In an able and exhaustive brief by the assistant attorney general this proposition is, we think, successfully and conclusively answered. We shall not enter upon an extended discussion of the question, but merely state our conclusions upon it, which we think are well supported by both rea-

son and authority. Our conclusions are: (1) The district court of Wilson county had jurisdiction of the subject-matter of the prosecution against Coy; that is, the offense of murder. (2) It did not have jurisdiction over his person to try him for said murder, because he had not been extradited for that particular murder. (3) Jurisdiction over the person, unlike jurisdiction over the subject-matter, is a matter with respect to which only the person over whom the jurisdiction is being, or is sought to be, exercised, has, or can have, any concern. It can be denied or objected to by no one else. It may be waived by him, as he may waive any other right, except that of trial by jury in a felony case. (4) If such person submits to the jurisdiction of the court over his person; if he makes no objection to being tried by the court, he waives his privilege, whatever it may be; and as long as he does not assert such privilege, and challenge such jurisdiction, the court may proceed legally to try him, and in such case the proceedings had against him are not void, but, in any event, are merely voidable, and voidable only at the instance of the person entitled to the privilege, and cannot be called in question by any other person. We hold, therefore, that the trial of Coy for the murder of Jackson, upon which trial the alleged perjury was committed, was legal, and not a void proceeding, and that the court in which said trial was had was a court of competent jurisdiction for all the purposes of this case.

7. With respect to the sufficiency of the evidence to sustain the conviction, we are not prepared to say that it does not fill the full measure of the law, though there is some conflict in it, and in some respects it is not as clear and satisfactory as it should, and perhaps could, have been made. The credibility of the witnesses was a matter exclusively for the jury to determine, and, the jury having believed the testimony of the state's witnesses, the guilt of the defendant cannot be questioned. The judgment is affirmed.

ON REHEARING.

WILLSON, J. A reargument of this case upon the motion for rehearing, and a thorough consideration of the grounds of the motion, have convinced us that the conviction should be set aside. As stated in the opinion of affirmance, the application for a continuance was not improperly refused, for the reason that it failed to show legal diligence to obtain the testimony of the two absent witnesses, Cordway and Sandoval. But the question with respect to the testimony of these absent witnesses was again presented for the consideration of the trial court on the defendant's motion for a new trial, and upon this second presentation of the matter it was the duty of the court to grant a new trial, if, in view of the evidence which had been adduced on the trial, it appeared that the absent testimony was material and probably true, notwithstanding a failure to show strict legal diligence to obtain said absent testimony on the trial. *McAdam's Case*, 24 Tex. App. 86, 5 S. W. Rep. 826; *Jackson's Case*, 28 Tex. App. 183, 5 S. W. Rep. 371; *Covey's Case*, 23 Tex. App. 388, 5 S. W. Rep. 283. The evidence adduced on the trial, upon the issue of the falsity of the defendant's statements, as alleged in the indictment, is not only conflicting, but the only positive evidence on the part of the state to establish such falsity was that given by the witness Monroe Toodles, whose general reputation for truth was proved to be bad by several witnesses. By the testimony of two absent witnesses the defendant stated he could prove the truth of the alleged false statements; that is, that the deceased, Jackson, at the time he was shot and killed by Coy, did have a pistol in his hand. In view of the evidence adduced on the trial, and especially of the bad character of the witness Toodles, this absent testimony was certainly material, and was probably true. We are convinced that, because the defendant was deprived of the absent testimony, injustice has probably been done him, and that upon this ground he should have been granted a new trial. We will therefore grant the motion for rehearing, and set aside the conviction, and remand the

cause for another trial. With respect to the other grounds of the motion for rehearing, all which are discussed and determined in the opinion of affirmance, we are still of opinion that our conclusions, as stated in that opinion, are correct. The motion is granted, and the judgment is reversed, and the cause remanded.

GULF, C. & S. F. R. CO. v. SILLIPHANT.

(Supreme Court of Texas. May 4, 1888.)

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE—CONFLICTING EVIDENCE.

In an action against a railroad company for personal injuries, it appeared that plaintiff was ordered to work at a wooden lever on a hand car, with his back towards the direction in which the car was moving; that, on raising the lever, it broke, causing plaintiff to be thrown backwards, and run over. Plaintiff's evidence tended to show that the lever had been fastened in place by a nail or bolt through it; that at the break, which was at the place penetrated by the nail or bolt, the wood was discolored, showing decay, and evidence of a partial old break; and that outside the socket there was no evident defect. Defendant's evidence tended to show that the car was new, and that there was no defect in the handle; that it looked to be good, and had not been regarded as unsafe. *Held*, in this conflict in the testimony a verdict for plaintiff will not be disturbed.

2. SAME—DEFECTIVE APPLIANCES—NEGLIGENCE—INSTRUCTIONS.

In an action for injury sustained by the breaking of a defective handle on a hand car, so that plaintiff was thrown off and run over, a charge, in effect, that the company is bound to use reasonable diligence in keeping its machinery in reasonably safe repair; and, if defendant knew the handle of the car to have become defective, allowing it to remain would be negligence on its part; and if plaintiff knew of the defect, and still undertook to use the handle, and was injured by reason of the defect, there would be contributory negligence on his part; that if the defect was unknown to defendant, it would not be negligent unless it failed to use reasonable diligence to discover it; and, if the defect was unknown to plaintiff, he would not be guilty of contributory negligence; and, if both or neither were negligent, plaintiff could not recover,—is a sufficiently clear statement of the law applicable to the facts.

3. SAME—DEFECTIVE APPLIANCES—OPPORTUNITY TO DISCOVER DEFECTS.

In an action for injuries sustained by plaintiff in being thrown from a moving hand car by the breaking of a defective handle, where it appears that the defect was out of sight, and that plaintiff was a new employe, and it is not shown that he had ever seen the handle before the morning of the accident, a charge that, if the opportunities of plaintiff and of defendant to ascertain the defect were equal, the plaintiff could not recover, is properly refused, as it is not applicable to the facts.

4. SAME—INJURIES TO SERVANT—ACTION FOR—EVIDENCE.

In an action against a railroad for personal injuries, the ability of plaintiff to earn wages being in issue, testimony of a witness, coming from matter elicited in cross-examination by defendant, that "he started his market in East Dallas for the purpose of giving employment to plaintiff, who needed it," is admissible to show that plaintiff's present wages are in part charity.

5. TRIAL—INSTRUCTIONS—MEASURE OF DAMAGES.

In an action for personal injuries, the petition alleged that "the injuries caused by the defendant's negligence induced great suffering, permanent ill health, and physical weakness;" and the charge complained of, relating to the measure of damages, included "physical and mental disability or weakness occasioned by the injuries." *Held*, that the terms in the petition were sufficiently comprehensive to include those used in the charge.

Appeal from district court, Dallas county.

Lemuel Silliphant brought an action against the Gulf, Colorado & Santa Fe Railroad Company for damages for personal injuries caused by breaking of a wooden lever when working a hand car as an employe of defendant. Verdict for plaintiff. Defendant appeals.

Seth Shepard and Ballinger, Mott & Terry, for appellant. *M. L. Dye and H. G. Robertson*, for appellee.

WALKER, J. Silliphant sued and obtained judgment against appellant for damages suffered by him when working on a hand car as an employe of appellee. v. 8s.w.no.8—43

lant. The plaintiff's case is that the direct cause of the injury was the breaking or giving way of the lever, at one end of which he was working, aiding in propelling a hand car from a section-house to the place of labor of the squad of which he was a member. He had worked several months on another railroad, and knew the manner of working a hand car. On morning of his second day's work for defendant, he was ordered to work at the lever in the hand car; his position being indicated by the boss, on outside, with his back towards the direction the car was moving,—a position not unusual with eight or ten men in the car, as at the time. The work required the use of strength upon the lever in its upward and downward motion. After the party had gone some distance, and while the car was in motion, and when plaintiff was rising, the lever gave way, breaking at the socket. From the sudden break in the resistance, the momentum of his body threw him backwards. The car ran upon him; the full pressure of the car upon him causing serious injury to his spine. The broken lever was of pine timber. It broke in the socket through which it passed. It had been fastened in place by a nail or iron bolt through it. At the break, which was at the place penetrated by the nail or bolt, the wood was discolored, showing decay and evidence of a partial old break. Outside the socket there was no evident defect. There was testimony that oak and hickory were the best quality of wood, but that pine was in common use, and had sufficient strength for the purpose of safety. The foreman in charge of the machinery testified that the car was new, and had been in use from middle of August, (the accident was on November 20th;) that he was accustomed to examine the cars, and had done so; and that "there was no defect whatever in the handle of the car." He also said that he had the other piece of the broken lever at home, and would produce it; but he did not. The boss in charge of the car said "the handle looked to be good, and it had not been regarded as unsafe." In this conflict in the testimony, this court will not disturb the verdict. It would seem that, by the use of ordinary care in testing the condition of the lever, its weakness might have been ascertained by the superintendent. If so, the defendant would be chargeable with such knowledge, and consequent liability would follow an injury from the defect. *Railway Co. v. Dunham*, 49 Tex. 181; *Railway Co. v. McNamara*, 59 Tex. 256.

Naturally, a lever made of any kind of wood, with time and use and exposure, will wear out or become unsafe. Experience in using such instruments should indicate something of the probable effects of use, exposure, and time, or a combination of them, upon their strength, and when they would likely become unsafe. A newly-employed hand, as was the plaintiff, would not be likely to know anything of the condition of machinery furnished for his use, as to safety, beyond what was visible to the eye. Here the break was out of sight. In performing the duty of inspection for purpose of keeping proper machinery reasonably safe for the employes, it would devolve upon him to make use of his experience, and to take note of whatever facts he knows or might reasonably know leading to knowledge of the true condition of the machinery; in short, his tests and oversights must be real. Taking the circumstances into view, the superintendent had much more facilities for knowing the strength, or want of it, in the machinery, than the plaintiff, who was not shown to have ever seen the lever before he was put to work it the morning of the accident. It was therefore not error in the court to refuse the charge that, if the opportunities of the plaintiff and of the defendant were equal to ascertain the defect, plaintiff could not recover. It was not applicable to the testimony. The defendants asked the charge "that a person taking employment is presumed to have requisite skill and knowledge for the employment, and to assume the ordinary dangers of the employment." The rule is the employes are presumed to take the natural risks incident to their work, not those arising from the negligence of the employer. *Pierce*, R. R. 371; *Whart. Neg.* § 211.

Complaint is made against the charge as to the declaration of the degree of care required of the defendant in providing suitable machinery, as to latent defects in machinery, as to the burden of proving negligence, etc. The charge, in part, is set out here, and we think it a sufficiently clear statement of the law applicable to the facts: "You are instructed that it is the duty of a railway company to furnish its employes machinery reasonably safe for the purposes for which it is to be used. It is also the duty of a railway company, after having provided such machinery, to use reasonable diligence to see that said machinery is kept in reasonably safe condition. If the railway company fails in either of these respects, and injury is thereby occasioned to one of its employes, then the company is guilty of negligence. A railway company is not bound to furnish absolutely safe machinery, nor to absolutely keep it in safe condition, but simply to use the diligence above prescribed in providing it, and seeing that it is kept in such safe condition. If you find that the handle of said car was made of inferior wood, and such as was unfit and not reasonably safe for the purposes of a handle to said car, or if said handle, although originally reasonably safe and suitable for the purposes of operating said car, had become rotten or out of repair, and if the defendants knew of said defects, then to furnish a car with such a handle would be negligence on the part of the railway company. An employe of a railway company is required to use reasonable care and caution to prevent injury to himself in operating the machinery furnished him by the company; and, if he failed to do this, he would be guilty of negligence. If an employe of a railway company knows that machinery furnished him is defective and unsafe, and if, having such knowledge, he nevertheless undertakes to use it, and, while so using it, an injury is occasioned to him by said defect, then, under such circumstances, he would be guilty of negligence. If said handle was defective and unsafe, and if plaintiff knew of such defective and unsafe condition before the handle broke, or if, in operating said car, plaintiff voluntarily took a position upon said car which was dangerous, and which did contribute to bring about the injuries complained of, then, in either event, plaintiff would be guilty of contributory negligence. If said handle was reasonably safe and suitable when the car was furnished to plaintiff, then defendant was not guilty of negligence in furnishing it. If said handle was defective as to material, rotten, or out of repair, when so furnished, if its defects were unknown to defendant, and if defendant could not by the use of reasonable diligence have discovered its said defects, then, in such case, defendant would not be guilty of negligence in furnishing car with such a handle. If said handle was so defective, and if plaintiff did not know of the defects in it, and if he did not voluntarily take a dangerous position on said car, then he would not be guilty of contributory negligence. If you find, under the above instructions, that plaintiff and defendant were both guilty of negligence which contributed to bring about the accident to plaintiff, then plaintiff cannot recover herein, and you will find for defendant. If you find that neither plaintiff nor defendant were guilty of such negligence, then you will also find for defendant. To find for plaintiff, you must believe from the evidence that defendant was guilty of negligence which caused the injuries to plaintiff; and, in addition, that plaintiff, on his part, was not guilty of any negligence which contributed to bring about the accident to himself."

The testimony of Harris, that "he started his market in East Dallas for purpose of giving employment to plaintiff, who needed it," was not improperly admitted, coming, as it did, from matter elicited in cross-examination by defendant. But, as the ability of plaintiff to earn wages was an issue, that his present wages was in part charity was competent.

As to the measure of damages complained of in the charge. The petition alleges "that the injuries caused by the defendant's negligence induced great suffering, permanent ill health, and physical weakness." The charge com-

plained of includes "physical and mental disability or weakness occasioned by the injuries." We think the terms, "great suffering, permanent ill health, and physical weakness," are sufficiently comprehensive to include the matters specified in the charge.

The verdict is large, and it is claimed to be excessive. The expert medical testimony is contradictory as to the probability of final and complete recovery by plaintiff from the effects of his injuries. That his injuries were serious, his loss of time great, and his physical pain intense and protracted, is not in dispute. The amount is not so great as to show prejudice and misconduct on part of the jury. *Railroad Co. v. Randall*, 50 Tex. 256; *Railway Co. v. O'Donnell*, 58 Tex. 42; *Oil Co. v. Malin*, 60 Tex. 646; *Railway Co. v. Brett*, 61 Tex. 484; *City of Galveston v. Posnatsky*, 62 Tex. 135; *Railway Co. v. Hardin*, Id. 368. The judgment below is affirmed.

GOLDBERG *et al.* v. McCRACKEN *et ux.*

(Supreme Court of Texas. May 25, 1888.)

1. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—WAIVER OF HUSBAND'S CLAIM UPON COMMUNITY PROPERTY.

Where a husband causes a bill of sale from a third person to be made to his wife, and afterwards the goods are taken on execution against the vendor, in an action to recover their value from the sheriff and attaching creditor, it is competent for the husband to testify, in answer to the question whether he intended to make a gift to his wife, that he bought with property belonging to his wife, since, although community gains were included in such property, no one but his creditors could question the waiver of his right thereto.

2. FRAUDULENT CONVEYANCES—RIGHTS OF PURCHASER—EVIDENCE.

Where property sold is afterwards seized under an execution against the vendor, testimony as to his reputation for solvency is pertinent in an action by the purchaser for the recovery of the value of the property to affect the purchaser with knowledge, or want of knowledge, of the vendor's failing circumstances.

3. SAME—INSTRUCTIONS.

Where goods bought by a husband for his wife, with her separate means, were levied on and sold for the debts of the vendor, an instruction in an action to recover their value that plaintiff was entitled to recover if any portion was her property, although erroneous, is cured by instructions given at defendants' request, fully setting out the law regarding sales by failing debtors, and the necessity of proof of the wife's property in the goods.

4. APPEAL—DECISION—CLERICAL ERROR—MODIFICATION OF JUDGMENT.

Where the verdict is for a certain sum, with interest thereon at 8 per cent., and the judgment is for such sum, with interest at 10 per cent., on appeal, the judgment will be reversed, and rendered in the supreme court in accordance with the verdict.

Appeal from district court, Clay county.

The third and fourth assignments of error were as follows: (3) "The error of the court in charging the jury as follows, viz.: 'And if you do not find from the evidence in the case that the goods mentioned in plaintiffs' pleadings, or any portion thereof, were at the time of the seizure and sale of said goods, and that they were seized and sold as alleged, and the separate property of Mrs. Frances McCracken, (if any such seizure and sale,) then you will find for the plaintiffs the market value of said goods at the time and place of said seizure and sale.' The charge was error, because—*First*, it authorized the jury to find for plaintiffs the full value of all the goods seized if they found that the said goods, or any portion thereof, was not the property of plaintiffs at the time of said seizure and sale; *second*, it authorized the jury to find for plaintiffs the full value of all the goods seized if any portion thereof was, at the time of such seizure, the separate property of Mrs. McCracken." (4) "That portion of the court's general charge to the jury in which they were told that, in order that plaintiffs recover, they must show that the goods alleged to have been seized and sold were the separate property of the plaintiff Frances McCracken, was error, and was calculated to mislead and confuse the jury—*First*, because it was contradictory of that part of the charge complained of in third assign-

ment of error; and, *second*, because it did not go further, and inform the jury that, before plaintiffs could recover, they must show that the property seized was, at the time of such seizure, the separate property of Mrs. McCracken."

The charges asked by defendants were as follows: "(1) The increase, during marriage, of cattle belonging to Mrs. Frances J. McCracken at the date of her marriage with John McCracken, would be the community property of plaintiff; and so, also, would be the profits of a mercantile business carried on by the husband, though the goods with which the business was started was the separate property of the wife. You are therefore instructed that if you believe from the evidence that the goods, wares, merchandise, for the value of which plaintiffs sued, was, at the date the same was seized, the community property of McCracken and wife, as hereinabove explained, you will find for defendants; as if you believe that a part of the money which was paid for said goods by plaintiffs was the separate property of Mrs. Frances J. McCracken, and a part thereof was community property of said plaintiffs, before you can find any sum for the plaintiffs, the plaintiffs must prove to your satisfaction clearly what part of such purchase money was the separate property of Mrs. Frances J. McCracken; and, if plaintiffs had failed to do this, you will find for the defendants. (2) The defendants asks the court to charge the jury that if they believe from the evidence that at the time McCracken bought the goods from Grandall, that said Grandall was insolvent or in failing circumstances, and was indebted to defendants, and that said Grandall sold said goods with the fraudulent intent to hinder or delay his creditors in the collection of their debts against him, (Grandall,) and that McCracken knew of such facts, or by the use of ordinary diligence, under the facts in this case, could have discovered the failing circumstances and fraudulent intent of said M. Grandall in making said sale, they will find for defendants; and, in this connection, the jury is instructed that the fact that McCracken himself intended no fraud in said purchase would not protect them, as above instructed, if said McCracken knew, or by the use of ordinary diligence might have known, of such fraudulent intent on the part of said Grandall. (3) The defendant asks the court to instruct the jury that, in finding their verdict in this case, they will not consider the evidence of plaintiff John McCracken, as to what his purposes and intentions were at the time he purchased said goods, alone; but the jury will look to all the facts and circumstances in evidence in this case in determining the question of the true owner of said goods for which plaintiffs sued; that is, as to whether the same was the individual property of Mrs. Frances J. McCracken, or the community property of McCracken and wife, under the instructions heretofore given you in charge in this case."

Hazlewood & Templeton and Carter & Wynne, for appellants. *A. K. Swan*, for appellees.

WALKER, J. This is a suit by Frances J. McCracken, joined with her husband, against A. Goldberg & Co., and G. C. Wright, sheriff, for the value of a stock of merchandise seized by the said sheriff under an attachment sued out by Goldberg & Co. against M. Grandall. Plaintiff claimed that she had bought the goods July 31, 1883, of the said Grandall, and that they were her separate property. Defendants answered, alleging that the goods seized were the property of Grandall, and that they had been conveyed to plaintiff in fraud of the creditors of the defendant in the attachment suit; also that the goods, if not the property of Grandall, were the community property of McCracken and his wife. The testimony showed a bill of sale by one M. Grandall to the plaintiff as her separate property, payment of over \$600 cash, and surrender of a note of Grandall for \$480. It seems that Grandall was in fact insolvent, though in good standing in the neighborhood of his business. McCracken, the husband, who made the purchase for his wife, testified that he did not know Grandall's insolvency, nor any facts showing it.

The first proposition urged as error questions the ruling of the court in permitting the husband to testify as to his intention in taking the bill of sale in the name of his wife. The bill of exceptions does not disclose the answer; but from the statement of facts it appears that, in answer to the question, "Did you intend to make your wife a gift of the property when you took the bill of sale in her name?" he answered: "No; I did not, because it was bought with property I thought to be hers, and was therefore her property." The objection was that it was not competent. Our court has held that such inquiry can properly be made where the husband causes a conveyance to be made to the wife. *Higgins v. Johnson*, 20 Tex. 389; *Biesenbach v. Key*, 63 Tex. 80. It was not error to allow the witness Collins to testify that he knew the reputation of Grandall for solvency to be good in the community in which he lived at the time of his sale to the plaintiff. The inquiry was pertinent upon whether the purchasers, by that means, may have known that he was in failing circumstances. The objection made was because witness was not asked as to the general reputation. In inquiries as to reputation, the inquiry is made in the neighborhood where, from his conduct, he may have made a reputation, good or bad. Complaint follows, in the first and second propositions under the third and fourth assignments of error, the general charge of the court. An examination of the charge shows that it is subject to criticism, and probably would have been cause of reversal but for the fact that charges Nos. 1, 2, and 3, asked by the defendants, were given. These presented to the jury, in clear and vigorous terms, the law of the case as insisted upon by the defendants. The law as to increase of stock and cattle, and the profits of business becoming community property; and the necessity of proof by the plaintiff of her separate estate in the property; the law as to sale by a failing creditor to hinder or delay his creditors; and the effect that knowledge, or the means of knowledge, of such fraudulent intent by the purchaser, would have in avoiding such sale; and the duty of the jury to look to all the testimony to determine the question of ownership of the property,—were all given to the jury, and we do not think the defects in the charge, as given in the general charge, could have misled the jury, or that the verdict was found by the jury in ignorance of the law applicable to the testimony. The fifth assignment of error, and several propositions under it, cannot be considered, for the reason that they apply to charges improperly in the record, and which seem to have been given on a former trial. On motion, that part of the transcript has been stricken out. So, also, the propositions based upon the mistake in the record as to the date of the bill of sale from Grandall to the plaintiffs. The correction is made in the transcript by consent of counsel. This is not a contest between community creditors against the claim by the wife. The husband, save where his creditors have a right to question his generosity to his wife, can waive his right in the community gains, or can give such gains to his wife. In this case, at their marriage, the wife had some stock. From sale of it money was accumulated, and invested in a mercantile enterprise in her name. The goods were sold for \$600 in money, and the note of Grandall for \$480. After an interval of eight months, the husband proposed taking an interest again in the store. The wife refused, but proposed to buy if the entire stock should be bought and taken in her name. This was done; she furnishing the means to buy. The conveyance was made to her separate use and estate; the husband acting for her. There is no complaint but that full value was paid. If the husband takes a conveyance to the separate estate of his wife, it is conclusive against him and all others, save creditors having a right to pursue such property for payment of their debts. The husband testified that he had no knowledge of Grandall being in failing circumstances, nor did he know that he was indebted at all. The jury found a verdict for the plaintiff for \$864, with interest at 8 per cent. from August 8, 1883. Interest was remitted to January 1, 1884. By some oversight, the judgment is for \$864, and 10 per

cent. interest from January 1, 1884. We find no material error in the record save in the judgment as to the rate of interest. This error requires a reversal, and judgment will be here rendered in accordance with the verdict.

INTERNATIONAL & G. N. R. CO. v. ECKFORD.

(Supreme Court of Texas. May 15, 1888.)

1. RAILROAD COMPANIES—CHARTER AND FRANCHISES—LEASE—LIABILITY OF LESSOR.

A railway company cannot, without legislative authority, lease the right to use its road so as to absolve itself from its duties to the public. Following *Railroad Co. v. Morris*, 3 S. W. Rep. 457.¹

2. CARRIERS OF PASSENGERS—INJURIES TO PASSENGERS—NEGLIGENCE—INSTRUCTIONS.

In an action against a railroad company for personal injuries caused by falling through a trestle while alighting from a train in the dark, it is error to take the question of negligence from the jury by instructing them that, if plaintiff alighted without directions to do so by the company's servants, and with knowledge of the locality of the station, such act constituted negligence on his part.

3. SAME—INJURIES TO PASSENGERS—PROVINCE OF JURY.

In such case, an instruction to the jury "that the absence from their posts of duty on the train of the employees of the railroad would not entitle plaintiff to recover unless such absence caused or contributed in a material degree to the accident; and that, if there were nothing in the evidence from which they might conclude that the injury was caused by some act or omission not incident to the every-day usage of the carrier, or indicating fault on the part of the employees, to find for defendant," encroaches upon the province of the jury, whose special duty it is to determine whether the acts and omissions in evidence constitute error, and is properly refused.

4. APPEAL—REVIEW—CONFLICT OF EVIDENCE.

When the testimony is conflicting, it is for the jury to determine the weight of evidence, and their verdict for plaintiff or defendant is final.

Appeal from district court, Bexar county.

The instructions referred to in the opinion are as follows: "(11) If the jury believe from the evidence that the plaintiff was familiar with the railroad station at Cotulla, and knew on which side of the track the same was situated, and was aware of the fact that said train had not reached the depot, and under these circumstances, and in the dark, without any direction from defendant's employees to alight upon the east side of the track, or the side other than that on which the station was located, then this was negligence upon his part, and the verdict should be for the defendant. (12) It is the duty of all employees of a railroad company, intrusted with the management and control of passenger trains, to be at their posts of duty while the train is in motion, and when the passengers are coming on board or departing from said train; but their absence from their posts would not entitle the plaintiff to recover unless such absence caused the accident, or contributed in a material degree thereto; and passengers upon trains must use their senses, and take the responsibility of informing themselves concerning the every-day incidents of railway traveling; and if there is nothing in the evidence from which the jury may conclude that the injury was caused by some act or omission not incident to the constant usage of the carrier, or indicating fault on the part of the employees of the company, they must find the verdict for the defendant."

H. E. Barnard, for appellant. Houston Bros., for appellee.

WALKER, J. The appellee sued for damages for personal injuries alleged to have been sustained near the station of Cotulla, upon the road of the defendant. The defense was general denial, contributory negligence on part of

¹ Concerning the inability of railway corporations, by lease or other voluntary transfer of their franchises and property, to free themselves from the duties imposed by their charters, or from liability for injuries done to person or property, see *Nugent v. Railroad Corp.*, (Me.) 12 Atl. Rep. 797, and note; *Palmer v. Railway Co.*, (Idaho), 16 Pac. Rep. 553, and note; *Harmon v. Railroad Co.*, (S. C.) 5 S. E. Rep. 335, and note; *Acker v. Railway Co.*, (Va.) 5 S. E. Rep. 688.

plaintiff, and lease of defendant's road to the Missouri, Kansas & Texas Railway Company. Judgment was rendered for \$2,900, and the defendant appealed.

The decision in *Railroad Co. v. Morris*, 68 Tex. 59, 3 S. W. Rep. 457, that a railroad company in Texas cannot lease the right to use its road so as to absolve itself from its duties to the public without legislative authority, disposes of all the assignments of error touching the alleged lease by the defendant.

Further complaint by appellant is that the law as to contributory negligence was not fully given, and error by the court in refusing charges applicable to the testimony, and supplying the defects in the charge as given; that the duty of the defendant, as defined by the court, was more onerous than that prescribed by the law; and that the verdict was not supported by the testimony. The circumstances of the injury, as stated in the testimony of the plaintiff, are as follows: "The train reached Cotulla at about 2 o'clock at night. The whistle blew, the conductor came through the car, and a lady asked him what station it was, and he told her 'it was Cotulla.' The brakeman opened the front door of the car, and called 'Cotulla.' The train stopped, and I and several other passengers got up from our seats, and started out of the car. Givens was with me. We went out on the platform. I caught hold of the railing, and stepped off. The night was very dark, and I believed we were at the proper place to get off. When I stepped off I fell through the trestle to the ground below. I sustained an injury to my spine, and a broken leg, by the fall. * * * I got off the train because the whistle blew, the train stopped, and the station was called, and I thought I was at the station. I did not know that the trestle was there. I had been to Cotulla twice before. Was never there during the day-time, and when I was there before the train did not stop at the trestle. I put the satchel down on the platform, and stepped down. I thought I was going to step on the ground, but went through the trestle. No warning of any kind was given me, and there was no light there. The man with the lantern had called 'Cotulla,' and I thought we were at the station,—the proper place to get off." The trestle upon which the train was stopped was 150 to 200 yards from the station at Cotulla. The plaintiff was a passenger, and he was to stop at Cotulla.

The instructions are full, clear, and applicable to the case made by the testimony. The instructions 11 and 12, refusal of which is complained of, are objectionable. They encroach upon the province of the jury. Whether the acts and omissions in evidence constituted negligence, without which the injury had not happened, was to be determined by the jury. "The common knowledge and experience of jurors, their acquaintance with the affairs of life and the motives of men acting under different conditions, are specially called into request in determining such questions." *Pierce*, R. R. 318. The testimony was conflicting to an extent unusual even in this class of cases. The testimony given by the plaintiff is corroborated in all material details. On the other hand, every statement, save his fall and injury, is contradicted by witnesses called for defendant. It was for the jury to determine in this conflict. The verdict would be alike final had they found for defendant. The effect to be given to the calling out of the name of the station when the train was halting was also a fact to be found; the calling itself only a fact to be considered with the other circumstances. Some courts have held it to be "an announcement by the railroad officers that the train is approaching, or has arrived at, the platform, and that the passengers may get out when the train stops at the platform." But on this courts conflict. *Patt. Ry. Acc. Law*, 261. Finding no error in the record the judgment is affirmed.

JONES *et al.* v. COLLINS.

(Supreme Court of Texas. May 25, 1888.)

APPEAL—TIME OF TAKING.

A motion for a new trial filed within five days after judgment rendered, but not acted on within ten days after judgment rendered, is considered overruled on the tenth day, and ten days remain thereafter for filing an appeal-bond.

Appeal from district court, Bexar county.

Oscar Bergstrom, for appellants. John A. & N. O. Green and John A. Green, Jr., for appellees.

WALKER, J. Judgment was rendered in a justice's court, May 1, 1885. Motion for new trial was filed May 2d. It was not acted on within 10 days, and May 15th, at request of the defendant, it was overruled, and he gave notice of appeal. On 21st May he filed appeal-bond. The appeal was dismissed, and from the judgment appeal to this court is prosecuted.

The court of appeals in *Grant v. Fowler*, 3 Wils. App. Cas. pt. 1, has held, "if a motion for new trial had been filed within five days after the rendition of the judgment, but no action has been had thereon within ten days after the rendition of the judgment, such motion would be considered as overruled on the tenth day after the date of the judgment, and party would in such case have ten days thereafter within which to file his appeal-bond." The rule of decisions on this subject ought to be the same in all the courts. The subject being peculiarly within the jurisdiction of the court of appeals, we regard the decisions of that court as authoritative, and we are unwilling to revise them. Following the rule cited, the appeal-bond was filed in time, and the dismissal of the appeal was error, for which the judgment below is reversed.

IRWIN v. STATE.

(Court of Appeals of Texas. June 9, 1888.)

LARCENY—TRIAL—INSTRUCTION—PENALTY.

On an indictment under Pen. Code Tex. art. 736, prescribing, as punishment for the theft of property under the value of \$20, imprisonment in the county jail not exceeding one year, and a fine not exceeding \$500, or such imprisonment without the fine, it is error for the court to charge that, if the jury found defendant guilty, they would assess his punishment at not more than one year's imprisonment in the county jail, and a fine of not more than \$500, since it omitted to charge as to the imprisonment without the fine.

Appeal from Young county court; H. D. WILLIAMS, Judge.

Andrew Irwin was indicted for the larceny of certain property of less value than \$20. There was a conviction, and defendant appeals. Pen. Code Tex. § 736, provides that theft of property under the value of \$20 shall be punished by imprisonment in the county jail not exceeding one year, during which time the prisoner may be put to hard work, and by fine not exceeding \$500, or by such imprisonment without fine.

C. W. Johnson, for appellant. Asst. Atty. Gen. Davidson, for respondent.

WHITE, P. J. Appellant was tried and convicted of theft of property under \$20; the case being a misdemeanor, and prosecuted by information. The punishment assessed by the verdict was imprisonment in the county jail for a period of 30 days and a fine of \$50. As to the penalty, the charge of the court instructed the jury that, if they found defendant guilty, they would "assess his punishment at not more than one year's imprisonment in the county jail, (during which time he may be put to hard labor,) and a fine of not more than \$500." This charge was erroneous, in that it failed to further instruct that the jury might inflict the imprisonment without the fine, (Pen. Code, art.

736,) and the error is radical and fundamental, (*Soria v. State*, 2 Tex. App. 298; *Spears v. State*, 8 Tex. App. 467; *Veal v. State*, id. 475; *Vincent v. State*, 10 Tex. App. 394; *Sanders v. State*, 17 Tex. App. 222.) The judgment is reversed, and the cause remanded.

MARTIN v. STATE.

(Court of Appeals of Texas. June 9, 1888.)

1. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—PROOF OF CONSPIRACY.

In the prosecution of a jail-guard for permitting the escape of a prisoner, evidence of acts and declarations performed and made both before and after the escape, and in the absence of defendant, by a fellow-guard, who was under a separate indictment for the same escape, is not admissible; there being no sufficient proof of a conspiracy between the two to permit the escape.

2. SAME—APPEAL—EXCEPTIONS TO CHARGE AFTER JURY HAS RETIRED.

Exceptions to the charge of the court, which were not taken until the jury had retired from the box, and the grounds of which were not specified until after a verdict had been returned, will not be considered by the appellate court; no fundamental error being found in the charge as given.

3. TRIAL—INSTRUCTIONS—SPECIAL CHARGES.

Special charges requested to be given, are properly refused when substantially embodied in the charge as given to the jury.

Appeal from district court; Wise county; GEORGE A. MCCALL, Judge.

Indictment of a jail-guard for willfully permitting the escape of a prisoner confined in the jail on a charge of murder. Defendant was convicted, and appealed. It appeared that one Freeman, a fellow-guard, was charged, in a separate indictment, for willfully permitting the same escape.

E. C. Smith and *J. H. Burts*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. 1. When a defendant is dissatisfied with a charge of the court, and desires to except thereto, he must state to the court, at the time the charge is given to the jury, that he excepts thereto; but he is not required to specify his exceptions until the jury has retired from the box. But, before a verdict is returned, he must specify his exceptions, in order that the court may correct the charge if, in the opinion of the court, it is erroneous or insufficient. *McCall v. State*, 14 Tex. App. 353; *Phillips v. State*, 19 Tex. App. 158. In this case the bills of exception to the charge of the court were not reserved in the manner required. After the jury had retired from the box, counsel for defendant stated to the court that he desired to except to the charge. Thereupon the court asked the counsel to state the grounds of exception; that the court was ready to supply any omission, or correct any error, which might be in the charge, if pointed out. Counsel did not comply with this request of the court, and did not specify exceptions to the charge until after the return of the verdict. We, therefore, are not called upon to consider the exceptions to the charge, and decline to do so; there being no fundamental error pointed out or perceived by us in the charge.

2. In so far as the special charges requested by defendant, and refused by the court, are correct in principle, and demanded by the evidence, they were substantially and sufficiently embodied in the charge given to the jury, and no error was committed in refusing them.

3. Over the objections of the defendant, the state was permitted to prove the acts and declarations of one Freeman, occurring both before and after the escape of Paschall from the jail, and when defendant was not present. These acts and declarations were in relation to said escape, and tended strongly to prove that Paschall had been willfully permitted to escape from jail by the guards. There can be no question that this testimony was calculated to injure the rights of the defendant; and, if it was improperly admitted, the error is material, and the conviction must be set aside. We are of opinion that said

testimony was inadmissible. There was no sufficient proof of the existence of a conspiracy between Freeman and the defendant to permit Paschall to escape, to warrant the admission in evidence of the acts and declarations of Freeman, performed and made when defendant was not present. It is still clearer that the acts and declarations of Freeman, performed and made after the escape of Paschall, and not in the presence of the defendant, were not admissible evidence against the defendant. Such testimony would not have been legitimate, even if the proof had established a conspiracy between Freeman and the defendant to permit the escape of Paschall. *Phillips v. State*, 6 Tex. App. 383; *Willey v. State*, 22 Tex. App. 408, 3 S. W. Rep. 570; *Cortez's Case*, 24 Tex. App. 511, 6 S. W. Rep. 546.

Because of the error committed in admitting the testimony objected to, proving acts and declarations of Freeman, the judgment is reversed, and the cause remanded.

ARKANSAS RIVER PACKET CO. v. SORRELLS.

(Supreme Court of Arkansas. May 19, 1888.)

1. INJUNCTION—PLEADING—ANSWER—WHEN SUFFICIENTLY SPECIFIC.

A complaint for an injunction alleged that defendants constructed a warehouse and ditch in the middle of a street, and within 10 feet of plaintiff's land, thereby obstructing the street and preventing the free use and occupation of plaintiff's lot, and damaged his property, but did not allege any special damage, or show that the warehouse and ditch were in that part of the street abutting on plaintiff's land. The answer admitted the construction of the warehouse and ditch, but denied that they in any way damaged plaintiff's property. *Held*, that a demurrer to the answer as not stating facts sufficient to constitute a defense should have been overruled, the answer being as specific as the complaint.

2. MUNICIPAL CORPORATIONS—CONTROL OVER STREETS—USING FOR OTHER PURPOSES LAND DEDICATED AS A STREET.

Where the owner of land had dedicated it to the public for a street, the authorities of the city cannot lawfully appropriate it to uses and purposes foreign to those for which it was dedicated.¹

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.

Action by Theodor F. Sorrells against the Arkansas River Packet Company for an injunction. A demurrer to the answer was sustained, and defendant appealed.

N. T. White, for appellant. *T. F. Sorrells*, for appellee.

BATTLE, J. On the 25th of May, 1885, Theodor F. Sorrells filed his complaint in the Jefferson circuit court, alleging, among other things, the following: That in the year 1830 John W. and James T. Pullen purchased from the United States the land on which the city of Pine Bluff is situated, and in the same year sold a part of the same to one Anthony H. Davis; that in the year 1838 Davis sold to James J. Chowning, William H. Pinkard, and Henry S. Dawson, a three-fourths interest in this land; that in the year 1838 the then owners of the land caused the same to be surveyed off into lots and blocks, and in the same year filed in the office of the clerk of Jefferson county a plat and plan of the city of Pine Bluff, designating and naming the various streets and alleys, and dedicating to public use the streets of the city; that long after the filing of the plat of the city plaintiff became the legal owner in fee of lot number 5, in block number 14, and has been in peaceable and adverse possession thereof since his purchase, for a period of 24 years; that said lot is situate at the corner of Barreque and Dardenne streets, fronting 60 feet on Barreque street, running 154 feet north on Dardenne street, near to the Arkansas river; that the defendants, John D. Adams, James H. Reed, John H. Harbin, and Samuel Hiltzheim, composing the Arkansas River Packet

¹See, also, *Railroad Co. v. Heisel*, (Mich.) 11 N. W. Rep. 212; *Railroad Co. v. Nestor*, (Colo.) 15 Pac. Rep. 714.

Company, have, in violation of the rights of plaintiff, erected a warehouse in the middle of Dardenne street, within 10 feet of the lot, thereby almost completely obstructing said street, and dug a deep ditch at the north end and near the center of the street, for the purpose of making a steam-boat landing; that the ditch is so constructed as to reach the river near the north end of said lot, and that the erection and maintenance of the warehouse on said street and the ditch prevent the free use and occupation of the lot, and damage his property; and were made without his knowledge and consent; the complaint then prays that the court make an order restraining and enjoining the defendants from keeping said warehouse any longer in Dardenne street, and the defendants be required to remove the same from said street, and fill up the ditch. To this complaint defendants filed an answer, in which they admit that they have a warehouse on the north end of Dardenne street, north of Barreque street, but deny that the same in any manner interferes with the property of plaintiff, or that by the erection thereof they violated any of his rights, and allege that Dardenne street, north of Barreque street, has been set apart and designated by the city council of Pine Bluff as the city wharf, and that the ditch complained of by plaintiff was dug and is maintained as a passage to and from steam-boats for the convenience of loading and unloading freight and passengers, and that the same was necessary for such purposes. They positively deny that the excavation of the ditch or the maintenance of the warehouse upon Dardenne street has in any manner interfered with or in the slightest degree injured the property of plaintiff, or that the same are a nuisance, or that the value of plaintiff's property has in any way been impaired or injured thereby, but that such improvements have increased its value. They pleaded the ordinance of the city of Pine Bluff establishing the city wharf, and annex to their answer a certified copy of the city ordinance establishing Dardenne street, north of Barreque street, to the low-water mark on the Arkansas river as such wharf. Plaintiff demurred to the answer because the facts therein stated are not sufficient to constitute a defense; and the court sustained the demurrer to so much of it as pleads the ordinance of the city council of Pine Bluff as authority for building the warehouse, and in other respects overruled it; and, the defendants refusing to plead further, the court rendered a decree granting an injunction, and commanding defendants, within 30 days, to move the warehouse from Dardenne street. And defendants appealed.

In *Taylor v. Armstrong*, 24 Ark. 102, this court held that the interest which the public acquired by the dedication of land for a street or other highway is merely an easement or right of passage over the soil, and that the owner, who made the dedication, still retains the fee, together with all rights of property not inconsistent with the public use, and that a subsequent conveyance by such owner of a lot on a street laid off and dedicated by him to the public use, in the absence of a reservation, expressed or implied, to the contrary, vests in his grantee the fee in the street to the center as a part and parcel of the grant, subject to the right of the public to use it for the purposes of a street, and that in the absence of proof the presumption is that the owners of lots on each side own such fee to the center of the street. Mr. Kent, in his Commentaries, says: "Every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the king's subjects,' is a highway, whether it be a carriage way, a horse way, a foot way, or a navigable river. 'It is,' says Lord HOLT, 'the *genus* of all public ways.' The law with respect to public highways and to fresh-water rivers is the same, and the analogy perfect, as concerns the right of soil. The presumption is that the owner of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public. Being owners of the soil, they have a right to all ordinary remedies for the freehold. They may maintain an action of ejectment for encroachments

upon the road, or an assize if disseized of it, or trespass against any person who digs up the soil of it, or cuts down any trees growing on the side of the road, and left there for shade or ornament. The freehold and all profits belong to the owners of the adjoining lands. They may carry water in pipes under the highway, and have every use and remedy that is consistent with the servitude or easement of a way over it, and with police regulations. The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would be contrary to universal practice. And it was said in *Peck v. Smith*, (1 Conn. 103,) that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an express declaration, or something equivalent thereto, to sustain such an inference; and it may be considered as the general rule that a grant of land bounded upon a highway or river carries the fee in the highway or river to the center of it, provided the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent." 3 Kent, Comm. marg. p. 432. It follows, then, that land dedicated by the owner as a street to the use of the public cannot lawfully be used for any other purpose, and that if lots bounded by it have been conveyed by such owner, without reservation of the fee in the street, the right to the use and possession of the one-half of the street adjoining such lots would pass to the person owning the lots, when the right to use the same as a street ceases to exist; and that the authorities of the town or city in which the same is situate cannot lawfully appropriate or direct it to uses and purposes foreign to those for which it was dedicated; nor is it within the power of the legislature to authorize a disposal or diversion of it to uses foreign to the dedication. The legislature cannot authorize its appropriation to private purposes; nor to public purposes, except in the manner private property can be taken for the use of the public under the right of eminent domain. In *re John and Cherry Sts.*, 19 Wend. 659; *Warren v. Mayor*, 22 Iowa, 351; *LeClercq v. Gallipolis*, 7 Ohio, 218; 2 Dill. Mun. Corp. (3d Ed.) §§ 650, 651, and authorities cited. In *Railroad Co. v. Williamson*, 45 Ark. 429, it was held by this court that "under the constitution of 1874, which provides that 'private property shall not be taken, appropriated, or damaged without just compensation,' the owner of premises abutting upon a street in a city or town may recover from a railroad company the damages resulting to his premises by the construction of its road-bed or other structures on its right of way along the street, in such manner as to obstruct access to the premises, though he have no interest in the fee of the street, and no part of his premises be taken, and the road or other structure be skillfully or properly built."

Appellants, if pleadings be true, had no right to obstruct Dardenne street by their warehouse. The ordinance of the city council did not confer that right upon them. If appellee has suffered special and peculiar injury thereby, not suffered in common with the public affected by the obstruction, he has his right of action for damages, or may maintain a suit for injunction against its continuance and for its abatement. *Draper v. Mackey*, 35 Ark. 497; *Pennsylvania v. Bridge Co.*, 18 How. 518; *Railroad Co. v. Ward*, 2 Black, 485; *Bemis v. Upham*, 18 Pick. 169; *Wellbourn v. Davies*, 40 Ark. 83; *Railroad Co. v. Cohen*, 50 Ga. 461. But to maintain a suit in equity for injunction he should aver and prove the specific injury. A general allegation that damages have or will result is not sufficient, but the facts which go to show that such injury has or will occur should be stated. But he only shows that the warehouse was erected in the middle of Dardenne street, within 10 feet of his lot, thereby almost completely obstructing the street, and that the ditch and

warehouse prevent the free use and occupation of his lot, and damage him. In answer appellants deny that the warehouse and ditch in any manner interfere with his property, or have in the slightest degree injured it, but, on the contrary, have increased its value. The complaint does not show that the warehouse and ditch are in that portion of the street abutting appellee's lot, or that he has suffered a special or peculiar injury, which is not denied by the answer. The denials in the answer are as broad and specific in this respect as the allegations in the complaint. The demurrer to the answer should have been overruled.

The decree of the court below is reversed, and this cause is remanded, with leave to both parties to amend their respective pleadings, if they so desire, and for further proceedings.

SIBLEY v. RATLIFF.

(Supreme Court of Arkansas. June 2, 1888.)

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK—MINOR—PARTIES.

Mansf. Dig. Ark. § 5589, provides that, "when any person shall be wounded by a railroad train running in this state, he may sue for damages in his own name; or, if he be a minor, his father, if living, may sue; and, if the father be dead, then the mother may sue; and, if both father and mother be dead, then the guardian of such minor may sue." A minor sued, by next friend, for injuries caused by a railroad train, and the company moved to dismiss the action because not brought by the proper party. The minor having come of age since the suit was brought, the motion was denied, and he was, on his own motion, permitted to prosecute the suit in his own name. *Held* proper, since, under the above statute, two rights of action accrue: one to the minor for the personal injury, and one to the father, mother, or guardian for losses suffered by him or her.

2. SAME—EVIDENCE.

In an action for injury caused by a railroad train, the engineer swore, at one trial, that he was 100 yards from the plaintiff when he first saw him, and at the second trial he swore he was 50 or 60 feet from the plaintiff when he first saw him, and that he saw him just as soon as he could from the nature of the ground. The mail agent on the train swore that he saw plaintiff on the ties several hundred yards ahead of the train. The jury found specially that plaintiff was at least 200 yards from the engine when seen by the engineer. *Held*, that the evidence was sufficient to sustain the verdict.

3. SAME—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

In such a case, it is not error to refuse the following instruction to the jury: "The positive testimony of a witness who said he heard the whistle blow, is entitled to more weight than the negative testimony of a witness who says he did not hear it,"—since it is the province of the jury to pass upon the weight and credibility of the testimony of every witness.

Appeal from the circuit court, Lonoke county; F. T. VAUGHN, Judge.

U. M. & G. B. Ross, for appellant. *John C. & C. W. England*, for appellee.

COCKRILL, C. J. The appellee, Ratliffe, was injured by an engine of the Memphis & Little Rock Railway. He was a minor at the time; and, after obtaining permission of the court which appointed Sibley receiver of the company, brought suit, by his next friend, to recover damages for the injury. There was a trial and verdict for the plaintiff, which the court set aside. Afterwards the defendant moved to dismiss the action because it had not been instituted at the instance of the minor's father, mother, or guardian. Ratliffe, having reached his majority in the mean time, asked and obtained leave to prosecute the action in his own name, and the motion to dismiss was thereupon denied. A second trial resulted in a verdict for the plaintiff for \$1,500. The court refused to disturb it. Judgment was entered accordingly. The defendant took his bill of exceptions and appealed.

1. It is urged that the court erred in refusing to dismiss the action. The statute directing by whom suit may be brought for an injury, not resulting

in death, done to a person by a railroad train in this state, is as follows: "When any person shall be wounded by a railroad train running in this state, he may sue for damages in his own name; or, if he be a minor, his father, if living, may sue; and, if the father be dead, then the mother may sue; and, if both father and mother be dead, then the guardian of such minor may sue for and recover such damages as the court or jury trying the case may assess." Mansf. Dig. § 5539. Statutes substantially like this are in force in many of the states, and the construction placed upon them by the courts is that, in case of an injury to a minor child, two causes of action arise: one in favor of the infant for his personal injuries, and one in favor of the parent for losses suffered by him or her. *Durkee v. Railroad Co.*, 56 Cal. 388. See authorities collected in note to *Iron Co. v. Rupp*, 7 Amer. & Eng. R. Cas. 30; Shear. & R. Neg. § 608. As a right of action accrued to the minor by reason of the injury, it was not error to permit him to prosecute the suit in his own name, after reaching his majority, to recover such damages as he was entitled to. *Smith v. Smithson*, 48 Ark. 261, 3 S. W. Rep. 49.

2. It is argued that the evidence is not sufficient to sustain the verdict, and that the court misdirected the jury, and refused to charge as requested. The plaintiff had started to walk over the defendant's railway track from Madison to Lonoke. On the second day of his journey, he was struck by a passing engine, and permanently injured. The jury were required by the court to find the facts specially in response to the following questions: "(1) What was Ratliffe doing when he was struck by the engine? (2) How far was the engine from Ratliffe when the engineer first saw him?" To the first query they responded as follows: "We, the jury, believe the plaintiff was, at the time he was struck, sitting on the side of the track asleep." And to the second, that "he was at least 200 yards from the engine when seen by the engineer." Upon both propositions the evidence was conflicting. As the jury is the final arbiter or trier of the facts, we pass by the evidence which contradicts the verdict, and look only to that which tends to sustain it. If, out of the conflicting mass, we find enough to justify the verdict, we decline to interfere, in accordance with a long-settled practice, regardless of the preponderance of the evidence. It is not contended that there is no evidence to support the first special finding of the jury. It is said there is none to sustain the second special finding, or the general verdict. The engineer testified that he did not see the plaintiff until he was within 50 or 60 feet of him; that he was lying on the ground near the rail, and so obscured as to render it impossible to see him earlier; that he recognized the object as a man the instant he saw it; and that he put on the brakes, reversed the engine, "stopped as soon as he could, and blew the whistle." Upon cross-examination it was developed that this witness had testified, on the former trial of the cause, that he discovered the plaintiff about 100 yards ahead of the engine; and that, in his deposition which was taken at another time, he placed the distance at 75 yards, and said that he had sounded the alarm to warn the plaintiff of his danger. Bush, who was a United States mail agent on the train, testified that he was standing in the door of the mail car just before the accident, ready to throw the mail-sack off at the next station; and, as he looked ahead, he saw the plaintiff on the track, or ends of the cross-ties, several hundred yards ahead of the train; that he turned to Rowland, who was in the car with him, and told him of the circumstances; and that Rowland went to the car door in time to see the plaintiff about 50 yards in front of the engine. Rowland corroborated the latter part of this statement. It was in proof that the train could have been stopped within a distance of 350 feet; that the whistle was not sounded or the bell rung. It is immaterial whether the jury was accurately correct in fixing the distance at which the engineer discovered the plaintiff on the track at not less than 200 yards. If his perilous position was discovered at a less distance, the collision might have been prevented. When

we look to the engineer's statement that he discovered the plaintiff at the earliest moment it was physically possible to see him from his position in the cab, and to that of Bush that he (Bush) actually saw him several hundred yards ahead, from a less advantageous position, we cannot say there is any inaccuracy in the special finding. From the conflicting statements of the engineer alone, the jury could have drawn the conclusion that he saw the plaintiff 100 yards in front of the engine, and realized the peril of his position at once; and if they further believed the testimony of other witnesses, to the effect that he made no effort to avert the danger or warn the victim, their conclusion was justifiable. We cannot say that the verdict is without evidence to sustain it.

3. The law governing the duty of a railway to a trespasser upon its track has been stated time and again by this court. *Railway Co. v. Monday*, 49 Ark. 257, 4 S. W. Rep. 782; *Railway Co. v. Fairbairn*, 48 Ark. 491, 4 S. W. Rep. 50; *Railway Co. v. Haynes*, 47 Ark. 497, 1 S. W. Rep. 774; *Railway Co. v. Wilkerson*, 46 Ark. 513; *Railway Co. v. Leabetter*, 45 Ark. 249; *Railway Co. v. Pankhurst*, 36 Ark. 371; *Railway Co. v. Freeman*, Id. 41. It is not necessary to do more than cite the previous cases, and state the substance of the court's charge to the jury, to show that the defendant was not prejudiced in this respect. Only a part of the court's charge in this case was excepted to, and our attention is not directed to any part of it as being inconsistent with what we have previously ruled in similar cases. Only errors of omission, or rather of refusal to charge as requested by the defendant, are assigned here. The jury were instructed, in the language asked by the defendant, to the effect that the plaintiff was a trespasser while on the railway track; that he went upon the track at his peril; and that he could not recover unless he showed that he was willfully injured by the company's agents, or unless they, knowing his perilous situation, and that he was not apprised of his peril, recklessly ran the train on him. They were told that the servants of the company had the right to presume that he (plaintiff) would get off the track in time to avoid injury unless there was something unusual in his situation to warn them that he would not; that they were not bound to check the speed of the train unless they discovered that there was; and that an omission to sound the whistle or ring the bell must have been willful and reckless, to warrant a recovery. Other requests in the line of those already given were rejected. We cannot say that was error.

4. The refusal to give the following language in charge to the jury is the final assignment of error: "The positive testimony of a witness who says he heard the whistle blow, is entitled to more weight than the negative testimony of a witness who says that he did not hear it." It is doubtful, from the conflicting statements of the engineer, whether he sounded the whistle before the injury was inflicted. As to whether it was sounded or not, the testimony of other witnesses is conflicting. It was the province of the jury to determine the question of veracity between the witnesses. The rejected request to charge upon this point may be a correct statement of a conclusion of logic when the witnesses who testify negatively and affirmatively are of equal credibility, and have the same opportunities for hearing the signal. But the request falls short of stating the full proposition. *Keith v. State*, 49 Ark. 439, 5 S. W. Rep. 880. It may be doubted whether, if proper in any case to instruct the jury on the weight to be given to evidence, (see *Keith v. State*, *supra*.) it cannot be said to be error to refuse to do so, (*Railroad Co. v. Robinson*, 106 Ill. 142, 19 Amer. & Eng. R. Cas. 396, and note.) It was not error to refuse the request. Affirm.

HERSHY v. THOMPSON.

(Supreme Court of Arkansas. June 2, 1888.)

1. TAXATION—TAX TITLES—COLOR OF TITLE—DESCRIPTION OF LAND.

A tax deed, which describes the land sold as "part of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 15, tp. 8 N., R. 32 W.," is void on its face for indefiniteness and uncertainty of description, and does not constitute such color of title as would enable one claiming under it to recover for taxes paid and improvements made on the land.

2. SAME—RECOVERY OF TAXES PAID.

Under Mans. Dig. Ark. § 5789, providing that a purchaser at a sale of land for taxes, which shall prove invalid on account of any informality in the proceedings of any officer having any duty to perform in relation thereto, shall be entitled to receive from the owner of the land the amount of taxes for which the same was sold, and the amount of taxes subsequently paid by such purchaser thereon, a purchaser at a tax sale, invalid for insufficient description of the land sold, must show what land was sold to him, in order to charge the owner with such taxes; and evidence that the tract sold was the only land claimed by such owner in the legal subdivision of which it was a part is insufficient to show what land was sold.

3. SAME.

Mans. Dig. Ark. §§ 2649-2651, allowing compensation to a purchaser for taxes paid and improvements made on lands sold by collectors or auditors of public accounts for the non-payment of taxes, or purchased from the state by virtue of any act providing for the sale of lands forfeited to the state for non-payment of taxes, or held under a donation deed from the state, does not apply to taxes paid and improvements made on lands sold for delinquent taxes by a county clerk before forfeiture to the state.

Appeal from circuit court, Sebastian county; R. B. RUTHERFORD, Judge.
U. M. & G. B. Rose, for appellant. Sam. W. Williams, for appellee.

BATTLE, J. This was an action of ejectment commenced by Thompson against Hershby in the circuit court of Sebastian county, to recover a certain tract of land in that county, containing five acres. Plaintiff recovered judgment for the land, and the defendant appealed.

Appellee alleges he is the owner and entitled to the possession of the land in controversy, and that appellant is wrongfully in possession. This is denied by appellant. To sustain his claim appellee traces his title back, through Newman Erb, to G. W. Estes, but does not undertake to show that Estes has any title. He alleges, and appellant does not deny, that Erb took actual possession when he purchased. It appears that a tract of land was listed and assessed for taxation for the year 1878 as "part of the south-east quarter of the north-east quarter of section fifteen, in township eight North, and in range thirty-two West," in the name of Erb. No other description of the land was given in the assessment. Appellant alleges, in his answer, that the land so assessed was returned delinquent on account of the non-payment of the taxes for the year 1878, and that he redeemed and purchased it from the county clerk of Sebastian county; and, to identify it as the land in controversy, alleges that it was assessed in the name of Newman Erb, and that the land in controversy was all the land owned or claimed by Erb in the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 15; and averred that he notified Erb that he had purchased. Erb testified that he purchased the land sued for of E. M. Estes on the 8th of November, 1872, and that Estes delivered him the deed under which he (Estes) held and claimed possession; and that when he (Erb) purchased, he went into immediate actual possession of the land, and had it properly inclosed, by having the fence around it repaired, and remained in possession until he sold; and that he paid the taxes on it regularly, except for one year. These allegations of appellant, and the testimony of Erb, are sufficient to sustain the verdict of the jury as to the right to the land, in this court.

But appellant insists he was entitled to judgment for taxes paid, and for improvements made by him on the land. It is true, a part of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, in township 8 N., and in range 32 W., containing five acres, was assessed for taxation for 1878, but no other description was given of it in

the assessment. It was returned delinquent for the taxes of that year, and, not having been redeemed by the owner within the first year after it was returned delinquent, appellant redeemed it within the second year, under an act entitled "An act to provide for the redemption of delinquent lands, and to repeal sections 5185 and 5186 of Gantt's Digest," approved March 14, 1879; and the county clerk of Sebastian county executed and delivered to him a deed therefor, describing it as described in the assessment. It is obvious that he took nothing by his redemption, because the assessment and deed under which he claims are void. But the question recurs, is appellant entitled to anything for taxes paid? In the assessment of lands for taxation the statutes of this state provide that the description of each tract or lot of real property shall be such as to identify it and distinguish it from any other tracts or lots. The object of such description is to inform the owner and all other persons of the tracts and lots assessed, and the amount of taxes levied thereon. From the description given of the tract purchased by appellant for the taxes of 1878 it cannot be ascertained what part of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 15, containing five acres, was assessed. In fact there was no description, and the assessment of this indefinite and unknown part was void. Gantt's Dig. § 5117; Mansf. Dig. § 5677; *Cogburn v. Hunt*, 54 Miss. 675; *Society v. Mayor, etc.*, 3 Mich. 184; *Greene v. Lunt*, 58 Me. 518; *Lessee of Massie's Heirs v. Long*, 2 Ohio, 293; *State v. Elizabeth*, 39 N. J. Law, 689; *Yandell v. Pugh*, 58 Miss. 303. There being no legal assessment of the five acres, there could be no valid sale thereof. But the statutes of this state provide, that upon the sale of any land for taxes, if such sale should prove invalid on account of any informality in the proceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive from the proprietor of such land or lot the amount of taxes for which such land was sold, and the amount of taxes paid thereon by the purchaser subsequent to such sale, and such land shall be bound for the payment thereof. Mansf. Dig. § 5789. One of the requirements necessary to the validity of the sale being a description of the land in the assessment, which of itself shall identify, it follows that the purchaser at a sale void because of a want of a description in the assessment, would be entitled to receive from the proprietor the amount of the taxes for which the land was sold, and the amount paid by him subsequent to the sale, and to a lien on the land for the payment thereof, if "he can show beyond cavil or doubt what land it was that was sold to him, and can show further that said land was at the time delinquent for unpaid taxes," "though in so doing he is forced to resort to other evidence than that afforded by the assessment rolls and the tax deed." Under this construction of the statutes, no wrong can be done the owner. His land cannot legally escape taxation for any year by any neglect or omission; for the statute expressly provides that, in case land subject to taxation shall by mistake or inadvertence be omitted to be entered on the tax-books for any year, it shall be entered on the tax-books of the next succeeding year, and that the taxes of the current year and of each and every preceeding year in which it shall have escaped taxation shall be added. The state is estopped from claiming the taxes thus paid the second time, and the purchaser receives back the taxes which the owner should have paid; and the manifest object and intent of the statute is accomplished; and the owner is forced to discharge the duties imposed upon him in the first instance. Gantt's Dig. §§ 5134, 5214; Mansf. Dig. §§ 5699, 5701, 5789; *Cogburn v. Hunt*, 56 Miss. 718; *Hunt v. Curry*, 37 Ark. 108. In *Bagley v. Castile*, 42 Ark. 77, this court held that a purchaser under the act of March 14, 1879, and his vendee, have a lien upon the land for the burden discharged, both in the purchase and for subsequent taxes, notwithstanding the act under which the sale was made was unconstitutional and void. Appellant offered to identify the land in controversy as the land purchased by him, and on which he paid subsequent taxes, by showing that

it was the only land owned or claimed by Erb in the legal subdivision of which it is a part; but this does not show that the land owned by Erb was the land assessed or sold. If the appellant had shown that every other portion of the legal subdivision was assessed by proper description, it probably would have been sufficient proof that the land in controversy was the land intended to be sold to appellant, and that he had paid taxes on it. The description of the land in the receipts for subsequent taxes paid by appellant is equally defective as that in the assessment for 1878; and the proof offered is not sufficient to identify it as the land in controversy beyond cavil or doubt, or satisfactorily.

It is contended that appellant is entitled to compensation for improvements under the act of January 10, 1857; but that act only applies to taxes paid and improvements made on lands sold by collectors, or auditors of public accounts, for the non-payment of taxes, or purchased from the state by virtue of any act providing for the sale of lands forfeited to the state for the non-payment of taxes, or held under a donation deed from the state. The land sold to appellant, if any, was sold by a county clerk before any forfeiture to the state. Mansf. Dig. §§ 2649, 2651.

"To successfully assert a claim," it is said, "an occupant must ordinarily show not only that he occupied and claimed the land in good faith, but also under color of title, *i. e.*, under some instrument or paper writing presenting the appearance or semblance of title." A deed which contains no designation or description by which the land intended to be conveyed can be identified presents no semblance or appearance of title, and does not constitute color of title. Such deeds themselves put the holder on notice that they have no title. They do not purport to convey anything, and are void. Such is the deed under which appellant claims. No one can be heard to say he has been misled by such a deed. *Humphries v. Huffman*, 33 Ohio St. 395; *Shackleford v. Bailey*, 35 Ill. 387; Sedg. & W. Tr. Title, Land, [2d Ed.] § 767; *Field v. Columbert*, 4 Sawy. 523; *Griswold v. Bragg*, 19 Blatchf. 94, 6 Fed. Rep. 342; *Lunquest v. Ten Eyck*, 40 Iowa, 213; Sedg. & W. Tr. Title, Land, § 697, and cases cited. Judgment affirmed.

KENTUCKY CENT. R. CO. v. ACKLEY.

(Court of Appeals of Kentucky. May 24, 1888.)

1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—RAILROAD COMPANIES.

In an action against a railroad company by an engineer of a passenger train for injuries received in a collision with a freight train, defendant is liable where the accident was caused by the negligence of those in charge of the freight train.

2. DAMAGES—NEGLIGENCE—INSTRUCTIONS.

In an action for personal injuries caused by negligence, where plaintiff, in the hearing of the jury, has disclaimed any recovery for medical expenses or loss of time, an instruction that, if the jury find for plaintiff, they shall assess his damages at such amount as he has sustained, is not erroneous, so far as defendant is concerned, because it fails to point out the *criteria* by which they are to be governed in fixing the compensatory damages; nor does it authorize the jury to find punitive damages.

Appeal from circuit court, Pendleton county.

Action by Isaac Ackley against the Kentucky Central Railroad Company.

Verdict and judgment for plaintiff, and defendant appealed.

L. T. Applegate and *George C. Lockhart*, for appellant. *Cowan & Farris*, *John H. Fryer*, and *J. W. Peck*, for appellee.

LEWIS, J. Appellee brought this action to recover damages for personal injuries resulting from a collision of a passenger train of cars, upon which he was acting as engineer, with a freight train; both being, at the time, operated upon appellant's road. The collision, which it is alleged in the petition was caused by the willful negligence of appellant and its servants, oc-

curred a short distance south of the end of the side track at Cataba station, but at a curve in the road where those in charge of the respective trains could not perceive the danger in time to prevent it. It appears from the evidence the passenger train was, at the time, going from Covington south, and was due at Cataba, 9:10 P. M., and at Falmouth 9:18 P. M. There is a slight difference in the testimony of the engineer and the local agent at Falmouth in regard to the precise time the freight train left that station, bound north; but we think it is satisfactorily shown it did not leave soon enough, going the allowable rate of speed, to arrive at Cataba, and get upon the side track 10 minutes, the time prescribed by the rules of the company, or any length of time, before the passenger train was due there; and as the latter train was as near on time as is generally practicable, and was entitled to the track, it is evident the collision was caused by those in charge of the freight train, which was four or five hours behind time, leaving Falmouth when a collision would be probable, if not inevitable. We therefore think there was evidence tending to show, if not clearly showing, that the injury to appellee was caused by the willful neglect of not only the engineer but conductor of the freight train, who had the power to direct its movements, and ordered or improperly permitted the departure from Falmouth; and the lower court did not err in overruling the motion of the defendant for a peremptory instruction to the jury, if the maxim *respondet superior* be applicable to a case like this; and that it should be thus applied has been settled by this court in *Railroad Co. v. Caven's Adm'r*, 9 Bush, 559. In that case the action was instituted by the personal representative of an engineer whose life was destroyed by reason of a collision of the train he was on with another freight train. The two trains were not, in that case, as in this, moving in an opposite direction, but the one upon which the deceased was acting as engineer was in the rear of and ran into the other, that was at that time, and had been for a half an hour or more, stationary, at the foot of an up-grade, or vainly trying to ascend it. But, notwithstanding the evidence showed the train dispatcher was also negligent, yet the question of the liability of the company for the negligence of the conductor of the train in front, in failing to give any signal or warning by which those on the coming train might have been advised of the danger of a collision, was directly considered, and determined in the affirmative. It was argued in that case that the rule should be applied that, when a number of persons contract to perform service for another, the employes not being superior or subordinate to each other in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other, or occupies such a position in the service, with reference to his co-laborer, as precludes him having any control over his actions, or right to advise even as to the manner in which the service is to be performed; and the court used this language: "If Cavens, the person killed, had been on the same train with Armstrong, the negligent conductor, and in a condition, by reason of his equality with him as an employe, to watch over and provide against his negligence, the reasons, then, for refusing to make the company liable, would apply; but when on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from responsibility ceases to exist; and in such case those controlling and directing the movement of one train with reference to those upon another train must be regarded as the agents of the company." It is useless to add to what was said in that case, because the rule there adopted is clearly applicable in this, and is reasonable and just.

The next and only other question made in argument for appellant arises on instruction No. 1, given at the instance of appellee, as follows: "If the jury believe from all the evidence that the plaintiff was in the employment of the

defendant as engineer of passenger train No. 6, known as the 'Fast Line,' on said defendant's road, and was so in charge of said train on the evening of the 1st day of December, 1882, and that said train collided with local freight train No. 13, belonging to said defendant, on the said road, near Catamba station, on said road, and thereby said plaintiff received injuries on his head, shoulders, hip, and spine, or either, and that from said injuries he was temporarily or permanently disabled from labor at his business, in whole or in part, and that said injuries were the result of the willful negligence of defendant's employees in control of said freight train No. 13 at said time, they shall find for the plaintiff such damages as he sustained, not exceeding the amount claimed in the petition, unless they shall further believe from the evidence that said plaintiff contributed by his own negligence to bring about said collision and injuries, and but for said plaintiff's negligence he would have escaped the injuries, in which latter case they should find for the defendant." The objections made by counsel to that instruction are that it authorized the jury to give compensatory damages, without being informed by the court of the criterion by which it was their duty to be governed in fixing the amount, and in directing them, in case they believed the injury was the result of willful neglect, to find punitive damages, instead of leaving such finding to their discretion. Compensatory damages for personal injuries, where death does not ensue, as held by this court, is confined to the expense of cure, value of time lost, a fair compensation for the physical and mental suffering, caused by the injury, and for any permanent reduction of the power to earn money. *Railroad Co. v. Case's Adm'r*, 9 Bush, 728; *Turnpike Co. v. Maupin*, 79 Ky. 101. Neither the expense of cure, value of time lost, nor mental and physical suffering, are referred to in the instruction as elements of damages sustained by the plaintiff, and to be assessed by the jury; but the language used by the court restricted their inquiry to the extent of his disability to labor at his business,—that is, reduction of his power to earn money. It appears that, during the examination of the plaintiff as a witness, he was asked if the defendant did not pay his physician's bills, and also pay for his lost time; whereupon the attorneys for the plaintiff announced he made no claim for expenses on account of medical attention or loss of time. We must therefore presume the lower court, as was its duty, purposely omitted to mention in the instruction either of those two elements of damages; and that the jury, having heard the disclaimer, did not, in the absence of an instruction to that effect, take them into consideration in assessing the amount. As the jury had the right, and it was their duty, to consider the mental and physical suffering of the plaintiff caused by the injury, the failure of the court to instruct them to do so was certainly not prejudicial to the defendant. We do not think the jury could have regarded themselves authorized by the instruction to find punitive damages. The language is, "They shall find for the plaintiff such damages as he sustained," which is entirely distinct from the idea of exemplary or punitive damages, that might have been given to or found for, but could not in any sense have been sustained by, him. There is some contrariety in the testimony as to the character and extent of the injury done to the plaintiff. But there was evidence before the jury conducing to show his sufferings were great, and the injury of a serious and permanent nature; and we are not, therefore, authorized to say the verdict was the result of passion or prejudice, or that the amount of damages fixed is so excessive, compared with like cases heretofore passed on by this court, as to justify a reversal. Judgment affirmed.

COMMONWEALTH v. PATTERSON.

(Court of Appeals of Kentucky. May 24, 1888.)

1. CRIMINAL LAW—JURISDICTION OF TRIAL COURT—WHEN APPEARS BY BILL OF EXCEPTIONS.

A bill of exceptions, signed by the judge, reciting that "the foregoing bill of exceptions having been tendered and examined by the court, and corrected, is now approved and signed and ordered to be made part of the record herein," which shows that there was evidence that the larceny was committed in S., which was the county seat of the trial county, shows that the crime was committed in the county, the court and jury having the right to take judicial cognizance of public cities within their jurisdiction; and under Civil Code Ky. § 887, subsec. 2, providing that "if the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as a part of the record, but not spread at large upon the order book. If not approved he shall correct it, or suggest the correction to be made, and sign it,"—cannot be contradicted by a written statement of the judge following the bill that there was no evidence that the larceny was committed within the jurisdiction, such statement being unauthorized and unofficial.

2. SAME—JURISDICTION—RECALLING WITNESS AFTER TESTIMONY IS CLOSED.

Under Crim. Code Ky. § 290, providing that "if, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this state, the court shall stop the trial, discharge the jury, and take the proceedings in the case directed in sections 166, 167," where there is evidence that defendant is guilty of a crime, it is error to refuse to allow the commonwealth's attorney to recall a witness to show that the crime was committed within the jurisdiction though he had announced himself through with his evidence.

Appeal from circuit court, Washington county.

P. W. Hardin, for the Commonwealth.

BENNETT, J. The appellee having been indicted in the Washington circuit court for grand larceny, he was put upon his trial, and upon the announcement of the appellant that it was through with its evidence, the circuit court, upon the motion of the appellee's attorneys, instructed the jury to find for the appellee. The bill of exceptions shows that Vanceave testified that the watch which the appellee is charged with having stolen was taken from his house in Springfield. The bill of exceptions also shows that another witness testified that Vanceave lived in Springfield, Washington county. The bill of exceptions concludes as follows: "The foregoing bill of exceptions, having been tendered and examined by the court, and corrected, is now approved and signed and ordered to be made part of the record herein. WM. E. RUSSELL, Judge 18th Ky. District." Following the bill of exceptions and the official signature of the presiding judge is a written statement signed by the said judge to the effect that there was no evidence before the jury showing that the appellee committed the crime with which he was charged in Washington county, and that for that reason he gave the jury a peremptory instruction to find for the appellee. Subsection 3 of section 837 of the Civil Code provides as follows: "If the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as a part of the record, but not spread at large upon the order book. If not approved, he shall correct it or suggest the correction to be made, and sign it." The remaining portion of the section provides how either party objecting to the correctness of the bill of exceptions as signed by the judge may proceed. The bill of exceptions shows that the judge corrected it, and then approved and signed it. If the bill of exceptions fully and correctly set forth the evidence, it was the duty of the judge to sign it. If it did not correctly set forth the evidence, it was his duty to correct it so as to make it conform to the truth, and then sign it. This he did, and, having done so, the bill of exceptions became an official paper, and the only official paper that we can consider. His subsequent written statement was unauthorized and unofficial. Therefore we cannot consider any statement made in it. But if the written statement were considered, it does not contradict that part of the

bill of exceptions that represents Vancleave as testifying that the watch was stolen from his house in Springfield, from which statement the jury had the right to presume that reference was made to Springfield, the county seat of Washington county. The court and jury have the right to take cognizance of public cities and towns within their jurisdiction without proof *aliunde* of the particular county in which they are situated. They are presumed to have knowledge of that fact. For instance, the court and jury are presumed to know that Springfield is the county seat of Washington county, and that it is situated in that county. That presumption is judicial, and no proof *aliunde* is required of the fact. The burden, therefore, was on the appellee to show that the offense was committed in another jurisdiction. After the commonwealth's attorney announced himself through with his evidence, the question was made that the venue was not proved. He then offered to recall the witness Vancleave, for the purpose of proving that the crime was committed in Washington county; but the court would not allow him to do so, and instructed the jury to find for the appellee. This evidence was not offered as tending to show that the appellee was guilty of crime, but it was offered merely for the purpose of establishing the jurisdiction of the court. Section 290 of the Criminal Code provides: "If, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this state, the court shall stop the trial, discharge the jury, and take the proceedings in the case directed in sections 166 and 167." The appellee was charged with the crime of grand larceny, and there was proof tending to show that he was guilty of that crime; and it was the duty of the court to allow the evidence for the purpose of determining the jurisdictional question in order that the court, if it had not jurisdiction, might transfer the case to any other court in the state having jurisdiction. As the appellee has been acquitted, the case cannot be reversed. The clerk of this court is therefore directed to certify this opinion to the court below.

HUNTER *et al.* v. RYAN.

(Court of Appeals of Kentucky. June 9, 1888.)

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—INTEREST SOLD.

The equity of redemption to premises sold at an execution and tax sale having been sold by the execution debtor, the execution purchaser offered to sell his interest in the land to the redemption purchaser at the price bid at the execution sale, which offer was accepted, more than the bid paid, and a receipt therefor given, which recited only a sale of the execution purchase, and not of the tax-sale interest, and the execution and tax-sale purchaser afterwards procured a tax deed, and brought an action for possession. *Held*, that the action should be dismissed, as plaintiff sold all his interest in the land, irrespective of the receipt given by him.

Appeal from circuit court, Logan county.

Action by Charles H. Ryan against James L. Hunter and others to recover possession of land under a tax-title deed. From a decree in favor of complainant, defendants appeal.

James A. Mitchell, for appellants. *Thomas H. Hines*, for appellee.

PRYOR, C. J. A careful examination of this record results in the conclusion that the chancellor below must have overlooked the fact that the appellee had been paid all and more than the amount bid by him for the land in controversy at the execution and tax sale. The facts, as presented by this record, show that one Brown owned the land in controversy, of the value of \$2,500; that he was involved in debt, and his land sold under an execution, and for the payment of certain taxes due the state and county. The land was sold in February, 1877, and purchased by the appellee, Ryan; the entire amount of his bid being \$805. The land was sold, on the same day, to satisfy all three of the claims, and the money paid by Ryan to the sheriff, who applied it—

First, to the payment of taxes, \$14.20; *second*, to the payment of a *capias*, \$4.52; leaving a balance of \$286.28, that was credited on the execution, making in all \$305. After this sale, a man by the name of Ferguson purchased the equity of redemption under an execution sale; the land having sold for less than two-thirds of its value to Ryan. This purchase was for the owner, Brown; and, Brown failing to pay, Ferguson gave to him \$1,000, and took the land. The transactions with Ferguson were all subsequent to Ryan's purchase. Ferguson, having purchased from Brown, says that Ryan offered to sell him his interest in the land at the price he (Ryan) paid for it; that he gave Ryan his note for \$330, which was \$25 in excess of Ryan's bid and the amount he had paid, and subsequently paid the note off. The payment Ryan admits, but says that he intended to assign him his interest only in the execution bid; meaning, to use Ryan's language, to convey that. The receipt executed to Ferguson reads: "Recd. of John J. Ferguson the sum of three hundred and thirty dollars, in full of an execution of *Reinhart, Ballard & Co. vs. D. Brown*; the said Ryan having bought the property of the said D. Brown, sold under this execution, No. 437. This payment is made in lieu of said purchase under said execution. Dated June 19, 1877. [Signed] C. H. RYAN." In three months after Ryan had bid the \$305 for the land, he received from Ferguson \$330, who had paid Brown, the original owner, \$1,000, and was trying to perfect his title. Ryan now says that nothing was said about the tax sale made on the same day, and that Ferguson knew the taxes were unpaid; and, acting on this most singular version of the transaction, obtained from the sheriff a deed, called a tax deed, and brought this action against the children of Mrs. Hunter, to whom Ferguson had sold, to recover the land on this tax title. This unconscionable transaction has been approved by the judgment below; and Ryan, for the failure of Ferguson or Brown to pay \$14.25, has recovered of the children of Mrs. Hunter this land. The sale of the land and the title is all regular; but the transaction with Ferguson is conclusive as to the rights of these parties, and leaves the claim of the appellee unsupported by any rule of law, equity, or justice. Here the purchaser at the tax sale had secured more than he bid for the land; and if nothing had been said at the time, but the act of payment by Ferguson admitted, it would have entitled appellants to demand the right to redeem. With Ferguson's statements in the record, that are rational and consistent with this ordinary business transaction, this claim of Ryan cannot be sustained upon the mere verbiage of a receipt, that the entire transaction fully explains. This judgment is reversed, with directions to dismiss the petition.

CALVERT v. ALEXANDER *et al.*

(Court of Appeals of Kentucky. May 3, 1888.)

1. EXECUTORS AND ADMINISTRATORS—SALES UNDER ORDER OF COURT—PRICE AS EVIDENCE OF FRAUD.

Where, upon exception to the commissioner's report of judicial sale of decedent's land for distribution among the heirs, the heir excepting offers \$2,000, without guaranty or security for the land, which sold for \$1,715, the amount brought at the sale is not so inadequate as to raise the least presumption of fraud, and the sale, having been duly advertised and publicly and fairly made, will not be disturbed.

2. SAME—DESCRIPTION OF LAND IN REPORT.

Upon judicial sale by the commissioner of decedent's land for distribution among the heirs, it is not indispensable that the report shall contain a precise and full description by metes and bounds of the land sold.

Appeal from circuit court, Allen county.

Upon petition of the heirs at law of Fletcher Gatewood, deceased, sale was ordered of a tract of land belonging to decedent for the purpose of distribution of the proceeds among the heirs. The land was sold to J. C. Calvert, and

upon exception of N. C. Alexander to the commissioner's report of the sale, the sale was set aside, and Calvert appeals.

W. L. Porter, for appellant.

LEWIS, J. The exceptions to the report of the commissioner were filed by appellee, N. C. Alexander, one of the heirs at law of Fletcher Gatewood, who died the owner of the land sold, and were based upon three grounds: *First*. Because no description of the land was given in the report. *Second*. The land was not sufficiently described in the publication of the notice of sale, nor in the judgment of the court directing the sale. *Third*. The land did not sell for its value, and in support of that objection an advanced bid for the land was offered by the party excepting. The tract of land sold was fully described by metes and bounds in the petition for the sale and distribution of the proceeds among the heirs, and also in the judgment directing the sale. It has never been held by this court indispensable, nor is there reason for requiring a precise and full description by metes and bounds of the land to be set out by the commissioner either in the advertisement or in the report of sale by him, although in this case he did actually amend his report so as to thus describe it. The land was sold for \$1,715, and there was no evidence offered on the trial it did not sell for its fair value, or anything in the record conducing to show it would at another sale bring a greater sum, except the advanced bid of \$2,000, by the party excepting to the report, which is unaccompanied by any security or guaranty. So far as the record appears to us the sale was duly advertised and publicly and fairly made by the commissioner, and, as the price at which the land was sold does not appear so grossly inadequate as to raise the least presumption of fraud, we see no reason for sustaining the exceptions. It is stated by the party excepting that at the time of the sale her husband was sick and unable to attend to business, and has since died; but it does not appear he would have bid for the land, or it would have brought more than it did if he had been well and present. When judicial sales are duly and legally made, they should not be disturbed for inadequacy of price unless it is so great as to raise a presumption of fraud, or unless caused by the casualty or misfortune of a party interested in the sale. An adherence to this rule is necessary to insure fair prices at judicial sales, in which the parties are directly interested, and a departure from it would generally have the opposite effect.

The judgment is reversed, and cause remanded, with directions to overrule the exceptions and confirm the report.

CLEMONS v. HOLTHEIDE.

(*Court of Appeals of Kentucky*. May 19, 1888.)

EQUITY—REFORMATION OF DEED—MISTAKE.

When, in settlement of a claim of a married woman against an estate, a sale, directed by the court, is made to her of land belonging to the estate, but by mistake, and without her consent, the commissioner's deed is made to and in the name of her husband, who has paid no part of the consideration, she being inexperienced in business, and until his death unaware of the mistake, the deed will be corrected.¹

Appeal from Louisville chancery court.

Suit by Blanche M. Clemons Holtheide against Maggie Judge Clemons to correct a deed made by mistake to and in the name of plaintiff's husband, J. J. Clemons, deceased, instead of to herself. The defendant was the only child of the husband. Decree was for the plaintiff, and defendant appeals.

¹As to the mistakes against which equity will relieve, and the proof necessary to obtain the reformation of a written instrument, see *Little v. Webster*, 1 N. Y. Supp. 815; *Goff v. Jones*, (Tex.) 8 S. W. Rep. 525.

John C. Walker, for appellant. *Marc. Mundy*, for appellee.

LEWIS, J. As appears from the petition in this case, the allegations of which are sustained by the proof, the plaintiff (appellee) was the granddaughter and ward of M. Kean at the time of his death; and, in an action for the settlement and distribution of his estate, it was ascertained and adjudged he was indebted to her in the sum of about \$11,000. That, to satisfy that and other demands against his estate, certain real estate in the city of Louisville was adjudged to be sold; and at said sale J. J. Clemons, the husband of the plaintiff, bid for and became the purchaser of four lots described in the petition and judgment in this action, the purchase price of which was paid by entering credit therefor upon the amount found due by her guardian to the plaintiff. But the plaintiff states that, through negligence, carelessness, or mistake, her husband received the commissioner's deed for said lots, of which she was not aware until since his death, which occurred suddenly, and while he was away from home. It is clearly shown by the evidence in this case that the deceased husband of the plaintiff paid no part of the purchase price of the lots in question, but the whole of it was paid by reducing, to that extent, the amount of her judgment against the estate of her late guardian, which was done by order of court; the judgment being, at the time, existing and unsatisfied. It also appears that the plaintiff was, at the time, just about 21 years of age, and had no experience in business; and the management of her business was intrusted to her husband, and she believed the title of the lots purchased by him at the sale would be and had been conveyed to her; otherwise she would not have consented to have them paid for with her means. J. J. Clemons left, at his death, one child, Maggie Judge Clemons, the defendant, an infant; also child of the plaintiff. We think the deed was made by the commissioner to J. J. Clemons through mistake, and without the knowledge or consent of the plaintiff; and, as has been heretofore held by this court, relief against fraud or mistake may be afforded as well in the procurement and execution of deeds under judgment of court as in a private transaction. And the circumstances under which the deed in question was executed make this a case deserving the interposition of the chancellor. We are therefore of the opinion the judgment correcting the mistake, and directing the title of the lot conveyed, in exchange, by Judge, as well as the other three, to be vested in the plaintiff, is proper, and must be affirmed.

ATKINSON *et ux.* v. GOWDY'S ADM'R.

(Court of Appeals of Kentucky. June 5, 1888.)

MORTGAGE—FORECLOSURE—HOMESTEAD—HUSBAND AND WIFE.

Though, on foreclosure of a mortgage executed by the husband without joining his wife, the homestead is sold subject to her homestead and dower rights, the sale passes the interest of neither, under Gen. St. Ky. c. 38, art. 13, § 13, which provides that no mortgage or other release of the homestead exemption shall be valid, unless subscribed by both husband and wife, and acknowledged and recorded in the same manner as conveyances of real estate.

Appeal from circuit court, Taylor county.

R. N. Atkinson, having a wife and infant children, mortgaged to A. F. Gowdy a tract of land which he owned, and upon which he lived with his family, his wife not uniting in the mortgage. A. F. Gowdy's administrator brought this suit against Atkinson and wife to foreclose the mortgage and sell the land. Defendants claimed a homestead therein,—it being of less value than \$1,000; but a sale, subject to the wife's homestead and dower rights, was decreed; and, the defendants' exceptions to the report of sale having been overruled and the sale confirmed, they appeal.

Thos. N. Hines and *J. R. Robinson*, for appellants. *G. W. Craddock* and *R. E. Puryear*, for appellee.

LEWIS, J. The judgment rendered in this case is, in substance, that the plaintiff, in virtue of the mortgage executed by the husband alone, the wife not uniting, has a lien on the land for the payment of the debt sued on, and the right to have so much of it as may be necessary sold, subject to the homestead interest of Elizabeth, the wife, and R. N. Atkinson, the husband and debtor; the land being of less value than \$1,000. It is not clear from the transcript before us whether it was intended by the lower court to adjudge that both of them, or only the wife, is entitled to the homestead exemption; for, while the sale is directed to be made subject to the interest of both of them, the homestead is directed to be allotted to her only. Under that judgment, the commissioner, as he reported, sold the land, subject to the dower and homestead interest of Elizabeth Atkinson, for the sum of \$200, the tract having been appraised at \$687.50,—the plaintiff, who is the personal representative of the mortgagee, now dead, becoming the purchaser; and the exceptions filed to the report of sale by Atkinson and wife were, at a subsequent term of court, overruled, and the sale confirmed. Section 13, art. 13, c. 38, Gen. St., provides that “no mortgage, release, or waiver of such exemption, [homestead,] shall be valid, unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate.” And it has been often held by this court that a mortgage in which the wife does not join, does not pass the homestead right of either of them. *Thorn v. Darlington*, 6 Bush, 448; *Wing v. Hayden*, 10 Bush, 276; *Tong v. Elfort*, 80 Ky. 152. The purport of the judgment in this case is that the effect of the mortgage was to divest the husband of his homestead right; and the commissioner, so construing it, sold the land subject only to the dower and homestead right of the wife. And consequently, if that judgment stands, the purchaser, upon the death of the wife, would own and be entitled to the possession of the entire tract, although the husband might be still living, and a *bona fide* housekeeper with a family. A mortgage executed by the husband alone does not operate to deprive either him or his wife of the homestead exemption right in the land mortgaged, nor deprive the husband of the power to sell and pass a complete title to the purchaser of such land of the value of not exceeding \$1,000, and invest the proceeds in another homestead. We think the court erred in subjecting any part of the land, or interest in it, to sale, to satisfy the mortgage debt; and, as the purchaser at the commissioner's sale acquired nothing, the sale ought to have been set aside, and the action, so far as it seeks a sale, dismissed without prejudice. Judgment reversed for further proceedings consistent with this opinion.

COMMONWEALTH v. MASONIC TEMPLE CO.

(Court of Appeals of Kentucky. June 9, 1888.)

TAXATION—EXEMPTION—CORPORATIONS.

Act Ky. Feb. 2, 1860, incorporating the Masonic Temple Company, and empowering it to purchase the temple and corporate rights of the Masonic Fraternity of Louisville, whose successor it was to be in case of such purchase, does not entitle the purchasing corporation to the exemption of said lot from taxation granted the Masonic Fraternity of Louisville by act Ky. March 10, 1856, as immunity from taxation is a personal privilege, not running with the property exempted, and does not, in the absence of express provisions to that effect, pass with the sale of corporate rights.

Appeal from Louisville chancery court.

Helm & Bruce, for appellant. *Wm. Lindsay and Goodloe & Roberts*, for appellee.

LEWIS, J. The auditor's agent having, as provided by statute, filed in the Jefferson county court information that appellee, the Masonic Temple Com-

pany, on the 10th day of January of each of the years 1862 to 1883, inclusive, owned property taxable under the laws of the state, and failed to give in a list thereof, which consisted of a lot of land bounded by Jefferson, Fourth, and Green streets, in the city of Louisville, and improvements thereon, and the county court, having found the information true, assessed the value at \$85,000, and the aggregate taxes due at \$8,593.50, and placed the same in the hands of the sheriff for collection, this action was brought to enjoin any levy on or sale of the property of the corporation to pay the taxes so assessed. As appears from his opinion, made part of the record, the ground upon which the judgment of the chancellor was rendered perpetuating the injunction—and an affirmation of that judgment is contended for in argument—is that the lot in question has by statute been exempt from taxation. By an act of the legislature, approved February 27, 1849, certain persons therein named, in behalf of the officers and members of their respective Masonic institutions in the city of Louisville, and such others as might thereafter be created and apply for participation in the benefits of the act, were created a corporation, under the name of "The Masonic Fraternity of the City of Louisville." The corporation was empowered to own and dispose of, at pleasure, real and personal property, not exceeding \$250,000 in value, and its business was to be placed under the control of one member of each of the institutions composing it, to be styled "The Masonic Board of Finance." It seems that some time after its organization the corporation purchased the lot of land described, and commenced the erection of a Masonic temple or hall upon it, which was not, however, completed, when an amendment was passed January 9, 1854. By that act it was provided that for the purpose of benevolence and charity, and the completion of their temple, the Masonic Fraternity of Louisville might issue bonds, and purchase ground upon which to erect an asylum for indigent Masons, their wives and orphans. It was also provided that those who had or should take stock in the Masonic temple might constitute a savings institution with corporate powers and privileges; but that dividends upon the stock therein in excess of 10 per cent. should be given in aid of the buildings and charities contemplated by the act. Further provision was made for organizing the Masonic Savings Institution by an act passed March 9, 1854, in which the excess of dividends were required to be paid to the stockholders in the Masonic temple. The act under which the exemption from taxation is claimed is entitled "An act for the benefit of the Masonic Fraternity of Louisville," was approved March 10, 1856, and is as follows: "That the lot of ground, * * * with the improvements thereon, belonging to the Masonic Fraternity of Louisville, be * * * exempt from taxation for state, county, and municipal purposes: provided, however, that this exemption is made with a view to enable said fraternity, as soon as a sufficient fund shall have been accumulated, to establish and maintain a school for the education of poor and orphan children, at the expense of said fraternity; and the legislature reserves the power to repeal or amend this act."

Appellee did not then exist, but was organized as a corporation under an act approved February 2, 1860, the first section of which is as follows: "That it shall be lawful to reorganize the corporation of the Masonic Fraternity of Louisville, as herein provided, in order to raise the necessary funds to pay the debts not secured by mortgage or deed of trust, and punctual payment of interest on its debts." Certain persons named in the act were appointed commissioners to open books of subscription and raise stock, and a list of subscribers of stock having, as provided, been filed in the county court, they then became a corporation under the style mentioned. And March 31, 1860, a tripartite deed was executed between the Masonic Fraternity of Louisville, of the first, Isaac Cromie, trustee, of the second, and the Masonic Temple Company, of the third part. By the terms of that deed the absolute title to the lot in question, together with all claims owing to the Masonic Fraternity of Louisville, was

conveyed to the Masonic Temple Company for the recited consideration of one dollar paid, and the covenant of the latter company to pay the debts incurred in erecting the temple, to save Cromie harmless from personal liability by reason of the deed of trust made to and accepted by him for the benefit of the creditors of the first-named company, and to release the Masonic institutions before mentioned from payment of their resources and revenues, as required by regulations between them and the board of finance.

It is not necessary to decide the question of the validity of the act of March 10, 1856, exempting from taxation the lot upon which the Masonic temple was erected; but we will simply inquire whether that exemption has inured to appellee, claiming to be the successor, and entitled to the franchises, of the former corporation. Sections 8 and 16 of the act of 1860 are principally relied on in support of appellee's claim to the exemption of the property from taxation. Section 8 provides that "the president and directors shall have the power and authority to purchase the Masonic temple and the corporate rights of the existing corporation, subject to the mortgages on the same, or rent out the rooms in said temple, and any of its franchises, and apply the rents and profits to the payment of interest on the mortgage debts and on the principal stock, until the mortgage debts shall be discharged, and the rents and profits shall be sufficient not only to pay the preferred stockholders not exceeding 10 per cent. per annum interest, and all the stockholders the same dividend; after which there shall be no preferred stock." Section 16 is as follows: "That when this corporation is organized and becomes the purchaser of the Masonic temple, it shall be the successor of the corporation, the Masonic Fraternity of Louisville." Immunity from taxation is from its nature a personal privilege, which can be granted by the legislature only in consideration of public service to be rendered by the beneficiary, or to religious bodies, charitable institutions, or schools. It is not an estate or interest running with the particular property exempted, nor can it be transferred by sale or succession without statutory authority, and, to entitle a purchaser or successor to the benefit of it, the intention of the legislature to continue the privilege must be clear and express; for relinquishment of the taxing power of a state is never to be presumed. Such has been the ruling of the supreme court of the United States and of this court, and any other would be against public policy and common justice, as well as subversive of the sovereign authority of the state. *Morgan v. Louisiana*, 98 U. S. 221; *Wilson v. Gaines*, 108 U. S. 417; *Railroad Co. v. Palmes*, 109 U. S. 224, 3 Sup. Ct. Rep. 193; *Bradley v. McAtee*, 7 Bush, 667; *Railroad Co. v. Com.*, 9 Bush, 439. It therefore follows that the corporate rights which appellee was by section 8 empowered to purchase from the Masonic Fraternity of Louisville must be regarded such rights or privileges merely as were essential to the existence of that corporation, or accomplishment of the object of its creation, and not as including immunity from taxation, which is a privilege the legislature may grant to one company, and not intend nor have the power to grant to another. It, however, makes no difference what meaning may be given to the words, for by the terms of the deed appellee acquired title to the property, and to nothing else except the claims mentioned. Nor do we think the exceptional privilege claimed by appellee can be justified by section 16 without giving to the word "successor" therein used a meaning forbidden by the rule of construction just mentioned. It is a fair and legitimate inference that the legislature intended to give to appellee, as a corporation, the right and privilege to purchase, own, and control the Masonic Temple building; but the intention to exempt it from taxation after being thus acquired is not expressed, nor can it be reasonably inferred from the language used. On the contrary, looking at the provisions of the act of 1860 alone, without reference to the subsequent conduct of appellee, it is evident the purpose of those who procured the passage of it, and the organization under it, was the purchase of the property as an investment for

their own benefit; and obviously in order to make it as profitable to themselves as possible, by getting the property at less than its actual cost, without regard to the interest of the institutions composing the Masonic Fraternity of Louisville, it was provided in the act that stockholders in that company could become such in the one about to be formed only by surrendering two shares for one, and paying \$10 besides, and that all the shares in the old might be purchased up by stockholders in the new company. Power was conferred to pay off the debts incurred in erecting the building by issuing and disposing of preferred stock by sale or exchange, and all was made personal estate and assignable. Power was also given to organize the savings institution provided for in the act of 1854, or to rent the right to organize the same to others, and finally so much of the charter of the Masonic Fraternity of Louisville and the amendments thereto as conflicted was repealed. We perceive nothing in the charter of appellee distinguishing it from those ordinarily granted to corporations organized for purely business purposes. It is true, there is a provision that the Grand Lodge of Kentucky may become a stockholder, and another that at least one-half the directors shall be affiliated Masons. But neither, it seems to us, constitutes a reason for the exemption claimed. There is neither by the act of 1860, nor by the deed under which it acquired title to the property, any obligation imposed upon appellee to establish and maintain a school for the education of poor and orphan children, which was the inducement and condition of the exemption granted by the act of 1856, but it is, and has been from the beginning, free to appropriate the surplus rents and profits to the sole use of its stockholders. It exacts rents from the Masonic bodies that occupy rooms in the building, a portion of which is used as a theater, and other portions for stores; and although, during the 28 years that have elapsed since it was organized and become the owner of the property, large profits have accrued, and been divided among the stockholders, no step has been taken nor intention shown to comply with the conditions upon which the privilege was granted to the former company that it now claims the benefit of. In our opinion, appellee occupied in this case the same position that would any other corporation having money invested in real property for the exclusive use and benefit of its stockholders. The judgment is reversed, and cause remanded, with directions to dissolve the injunction and dismiss the petition.

ROUQUETTE v. RYAN *et al.*

(Court of Appeals of Kentucky. June 12, 1888.)

PARTNERSHIP—PURCHASE OF FIRM PROPERTY BY PARTNER AT FORECLOSURE SALE.

Plaintiff, defendant, and two others, being each the owner of an undivided one-fourth interest in a tract of land, formed a partnership for mining purposes, putting in the land as capital stock, and agreeing to contribute a specific sum as working capital. Plaintiff and the two others executed mortgages on their interest to secure their individual debts, for which neither defendant nor the firm was liable, under which the land was sold, and bought by defendant, who sold it again at a large profit. *Held*, in an action to recover a share of such profit, that, the sale being for the individual debts of the partners, defendant's purchase did not inure to the benefit of the firm, and that he was not liable to plaintiff for such profit.

Appeal from circuit court, Muhlenberg county.

Weir, Weir & Walker and *W. N. & J. J. Sweeney*, for appellants. *Andrew J. Kellar* and *Wilbur F. Browder*, for appellees.

BENNETT, J. Under a judgment rendered in the Muhlenberg circuit court in the case of *M. P. Reno v. E. D. Payne, etc.*, for the sale of the property described in the pleadings in this case as the "Mud River Coal Mines," consisting of about 2,600 acres of land, said land was, on the 15th day of July, 1878, sold by the court's commissioner, and the appellee J. B. Ryan purchased it at the price of \$7,350. He executed bond for the purchase price, with A. B.

Boswell and J. W. Jewell as his sureties thereon. There was a verbal agreement, at the time of said purchase, that Ryan, Jewell, and Boswell were to be partners in said purchase, in proportion of one-half to Ryan, and one-fourth each to Jewell and Boswell, and each was to pay the purchase money in proportion to his interest in the land. By reason of some litigation that sprang up about the time of the sale, the sale was not confirmed until 1880, when the sale was confirmed, and a deed made to Ryan. The deed was made to Ryan without requiring the payment of the purchase money in full. By a deed bearing date the 10th of December, 1880, the appellee Ryan conveyed to the appellant, Rouquette, Jewell, and Boswell, one-fourth each of said land; the appellant agreeing to pay for his one-fourth interest the sum of ten thousand dollars. Four thousand eight hundred and fifty-six dollars and seventy-seven cents was paid in discharging balance of the purchase money that Ryan yet owed on the land; and five thousand one hundred and forty-four dollars and twenty-three cents was paid in a short time thereafter. On the following day, the 11th of December, 1880, the appellant, appellee, Jewell, and Boswell, entered into a written contract of copartnership under the firm name of the Mud River Coal Company, by the terms of which each member contributed his fourth interest in the property as an equal part of the capital stock paid in. Also, Jewell being indebted to C. & G. Green & Co., of New Orleans, in the sum of \$7,500, for whom the appellant was the agent, and had in charge the collection of this debt, he, on the 11th day of December, 1880, induced Ryan, Jewell, and Boswell to join with him in executing a mortgage to C. & G. Green & Co. on the entire tract of land, to secure said firm in the payment of said debt. On the 6th of March, 1882, the appellant executed to C. & G. Green & Co. a mortgage on his one-fourth interest in said land, to secure them in a debt of \$4,900, bearing interest from the 11th day of December, 1880. The Jewell note for \$7,500 and the Rouquette note for \$4,900 having fallen due, C. & G. Green & Co. instituted proceedings in the Muhlenberg circuit court for the purpose of subjecting said land to the payment of these debts. At the decretal sale, the appellee Ryan purchased the interest of Jewell and Boswell in said land, they being jointly bound as principals for said debt, at a price sufficient to discharge said debt, interest, and cost; he also purchased the appellant's interest in said land at a price sufficient to pay his debt, interest, and cost; whereby he became the owner of the entire tract of land. After this purchase, he formed a partnership with some parties in Nashville, Tenn., by the terms of which they were to and did pay off the purchase price of said interests, etc. The sale was confirmed, and the entire property is now owned and controlled by the new firm. These Nashville parties agreed to give the appellee Ryan \$25,000 for three-fourths interest in said land. After the new partnership was formed, the appellant instituted this action in equity against the appellee Ryan, and the other members of the new firm, in which he alleges that his purchase was not upon the consideration expressed in the deed, to-wit, that he gave \$10,000 for one-fourth interest in the land; that on the 10th day of December, 1880, the day of the date of the deed, he took from Ryan, Jewell, and Boswell the following writing: "GREENVILLE, 10th December. *Louis P. Rouquette, New Orleans*—DEAR SIR: In consideration of your having advanced the sum of ten thousand dollars for the purpose of enlarging the Mud River Coal Company business, we, the undersigned, agree to pay you five hundred dollars per annum interest on same for three years from date, being together fifteen hundred dollars, which sum we reserve to ourselves the right to liquidate at any and all times before their maturity, as specified herein; said maturity being 10th-13th December, 1883. We remain yours respectfully, J. W. JEWELL. J. B. RYAN. A. B. BOSWELL." The appellant alleges that the foregoing writing expresses the true consideration of his purchase, and that said sum of \$10,000 was never applied by Ryan, etc., to the enlarging of said mines; that Ryan was personally bound to pay off the

mortgage debt of \$7,500; that he failed to do so, suffered said property to be sold, and pass into his own and other hands; that Ryan's purchase redounded to the benefit of the old firm, etc. He claims that he is entitled to the \$1,500 mentioned in said writing; also that, by reason of the failure of Ryan to expend said \$10,000 in enlarging said mines, he has been damaged, etc., and that he is entitled to recover said sum, together with interest thereon, less \$2,500, the real value of his one-fourth interest; that he is entitled to recover his proportion of the \$25,000 that Ryan receiver for three-fourths of said land. The circuit court rendered judgment for the appellant for said \$1,500 and interest thereon, and one-fourth of the interest on the \$5,144.23. The appellant, claiming that he is entitled to more than he recovered judgment for, has appealed to this court. The appellee Ryan has taken a cross-appeal. The appellee Ryan contends that the \$10,000 paid by the appellant was a payment for the one-fourth of the land sold to him, and not as an advancement to be used in enlarging the mines, and that the writing sued on was not executed with the understanding that the money was to be received and used as an advancement for the purpose of enlarging the mines, but it was understood and agreed that said writing was not to be enforced, etc.

The facts established by the record are that the contract for the sale of one-fourth of the property to the appellant was made about the 7th or 8th of December, and the deed was actually made on the 10th of the same month. Judge Eaves, who drew up the deed, swears that all the parties came to his office in the town of Greenville, and requested him to draw up the deed. He says he drew the deed in exact conformity with instructions. The deed expresses that the appellant was to pay \$10,000 as the price of the land. He says that he, at the instance of the appellant, ascertained the amount of the original purchase money that Ryan owed on the land, and at the instance of the appellant inserted said sum in the deed as the cash payment; that, on the next day, he, at the instance of the appellant and the others, drew up the articles of copartnership, in which \$8,000—\$2,000 each—was agreed on as a working capital; that on the same day he drew up the mortgage to C. & G. Green & Co. to secure the payment of the \$7,500. He says that not a word was said to the effect that the money that the appellee was to pay was to be used for the purpose of enlarging the mines, but that the deed expresses precisely what the parties agreed on. Judge Eaves' evidence is fully sustained by that of Ryan, Jewell, and Boswell. Also it is well established that the verbal agreement, made in the country just a few days before, did not embrace any agreement or understanding that said purchase money was to be used for the purpose of enlarging the mines. On the contrary, the same was agreed on as the price of the land. Also the fact that \$8,000 was agreed on as the working capital, each member putting in his share, is a strong circumstance against the contention of the appellant. Also the fact that \$4,856.77 of the \$10,000 was, by the direction of the appellant, applied to the payment of the purchase money then due on the land by Ryan, put it out of the power, as the appellant knew, of Ryan, Jewell, and Boswell, to apply the same to the enlargement of the mines. He was also bound to know that they had not the means with which to supply the place of the money for such a purpose. Also it is clearly established that said writing does not bear its true date. The proof clearly shows that it was written and signed at South Carrollton on the 14th or 15th of December, after the deed, articles of partnership, and mortgage had been written and signed. It also appears, by a decided preponderance of evidence, that said writing was suddenly sprung upon the appellees Jewell and Boswell; that they protested against signing it, for the reason that it was not in accordance with the agreement; that they were then assured that it was not to have any effect upon the agreement already made; and that its only effect was to show a rebate of \$1,500, which would never be insisted on; and with that understanding they signed it. Some time after this, as we are informed by the

record, the appellant told several persons that he had bought one-fourth interest in the mines at the price of \$10,000, and had paid for it. He told this to one of the firm of C. & G. Green & Co. after his return to New Orleans. Had it been true, as now contended by him, that he advanced \$10,000 to Ryan, Jewell, and Boswell, it would have been much easier to reconcile his conduct consistently with his duty to them. There are other facts that materially aid in the solution of this case. They are that the appellant came to Kentucky, as the agent of C. & G. Green & Co., for the purpose of securing a debt of \$7,500 that Jewell owed said firm. His power was plenary. On the 10th of December, the day the deed was executed to him, he telegraphed to said firm to send him a draft for \$4,900, to be advanced to Jewell for the purpose of being used in the stone business. The firm, supposing that this sum was to be advanced in the interest of securing the \$7,500, sent the draft; but this draft was used by the appellant for the purpose of paying the first installment on the land that he purchased from Ryan. The appellant then induced the execution of the mortgage to said firm for the purpose of securing the payment of the \$7,500 that Jewell owed it. There was yet \$4,900 unaccounted for, so he induced Jewell to execute to the firm his note for the \$4,900, upon the assurance that the note would be returned to him as soon as he (the appellant) arrived at New Orleans. By and by the firm was apprised of the appellant's conduct. They then returned to Jewell his note, and took a mortgage on the appellant's interest in the land to secure the payment of said sum. It may be inferred that the appellant's object in obtaining said writing from Ryan, Jewell, and Boswell was to aid him in some way in explaining his conduct to said firm. Be this, however, as it may, the facts are clearly against the appellant's theory of the case.

In the case of C. & G. Green & Co. against the appellant, the circuit court decreed a sale of his one-fourth interest in said land for the purpose of satisfying his mortgage debt to said firm. This was right. In the case of said firm against the appellee Ryan, etc., the circuit court decreed that, inasmuch as Jewell and Boswell were principals in said debt, their interest in said land should be first offered for sale. We see no objection to this. As the appellant's, Jewell's, and Boswell's respective interests in said land were offered for sale to satisfy the debts that they owed as principals, the appellees' purchase of the same did not inure to the benefit of said firm.

The judgment of the circuit court is affirmed on the original and reversed on the cross-appeal, and the case is remanded, with directions to dismiss the appellant's action.

McILVAIN v. PORTER *et al.*

(Court of Appeals of Kentucky. April 7, 1888.)

DEED—EFFECT—AFTER-ACQUIRED TITLE.

Where a life-tenant conveys in fee, covenanting for good title, and thereafter inherits the fee, such after-acquired title inures to the grantee, and does not pass to the heirs of such life-tenant.

On petition for rehearing. For former opinion, see 7 S. W. Rep. 309.

W. J. Hendrick and W. G. Dearing, for appellant. J. P. McCartney, for appellees.

LEWIS, J. The opinion heretofore rendered in this case is extended for the purpose of indicating the quantity of land for which appellees should have judgment, about which counsel suggest there may be some question. Deducting from the original tract of 160 acres, 47 acres, one-fifth of which belongs to appellant, there remain 113 acres, one-fifth of which, being 22 and 3-5 acres, belonged to Orville Leforge, and one-half thereof, being 11 and 3-10 acres, passed at his death to his mother, Eliza Jane Leforge, now dead, and

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is claimed by inheritance by appellees, her four surviving children. But as she bound herself for a good title to the 47 and 16 acre tracts, which appellees seek to recover, there should be deducted from those two tracts, and adjudged to belong to appellant, 11 and 3-10 acres, in addition to the one-fifth of the 47 acres to which appellant is entitled in virtue of Orville Leforge's conveyance to him.

LOUISVILLE & N. R. Co. v. MITCHELL.

(Court of Appeals of Kentucky. June 7, 1888.)

1. NEGLIGENCE—PLEADING—GENERAL ALLEGATION.

Where one is injured by the negligence of a railroad company, an allegation of negligence, without averring its degree, is sufficient to entitle him to recover for any degree of culpable negligence that may be established by the evidence.¹

2. SAME—GROSS NEGLIGENCE—QUESTION FOR JURY.

When there is some competent evidence authorized by the pleadings that the injury complained of resulted from gross negligence, and the existence of such negligence is necessary to a recovery, the question whether the injury was so caused is properly submitted to the jury.

3. SAME—INSTRUCTIONS.

When the court by its instructions properly defines what would constitute gross and ordinary negligence on the part of a conductor, interrogatories as to whether the injury complained of resulted from the gross negligence of said conductor are not improperly misleading or suggestive, the jury having also been instructed as to the burden of proof.

4. SAME.

Where, in an action for damages for injuries occasioned by negligence of defendant, the jury are instructed that in case they answer certain interrogatories in a certain way, they will then find "what sum will reasonably compensate plaintiff for the injuries sustained because of such negligence,—the bodily and mental suffering (if any) resulting directly from such injuries; and the impairment of capacity (if any) to labor and enjoy life resulting also from such injury,"—evidence that plaintiff had a family is thereby withdrawn from the consideration of the jury, and its improper admission is no ground for reversal of judgment.

5. SAME—EVIDENCE.

Where a conductor controlling a train orders a new movement before his brakeman has a reasonable time to get from between the cars after making a coupling, it is gross negligence.

6. APPEAL—REVIEW—SPECIAL VERDICT.

The special findings of a jury, like a general verdict, cannot be disturbed upon appeal upon the ground that they are against the weight of the evidence, unless the error is flagrant.

7. DAMAGES—PERSONAL INJURIES.

The verdict of a jury awarding to a brakeman \$10,000 damages for the loss of a foot, not being so glaringly excessive as to appear to have resulted from passion or prejudice, will not be disturbed.²

Appeal from court of common pleas, Jefferson county.

Action by Robert S. Mitchell, appellee, against the Louisville & Nashville Railroad Company, appellant, for injuries received while in the employ of defendant in the capacity of brakeman.

¹See Railroad Co. v. Lee, (Tex.) 7 S. W. Rep. 857, and note; Railroad Co. v. Jones, (Ala.) 3 South. Rep. 902; Railroad Co. v. Fudge, (Kan.) 18 Pac. Rep. —.

²As to excessive damages in actions for injuries to the person, see Railway Co. v. Ware, (Ky.) 1 S. W. Rep. 493, and note; Railroad Co. v. Hewitt, (Tex.) 8 S. W. Rep. 705; Railroad Co. v. Thompson, (Miss.) 1 South. Rep. 840; Triese v. City, (Minn.) 32 N. W. Rep. 857; Schroth v. City, (Wis.) Id. 621; Fitzgerald v. Dobson, (Me.) 7 Atl. Rep. 704; Knapp v. Railroad Co., (Iowa,) 32 N. W. Rep. 18; Railway Co. v. Davidson, (Tex.) 4 S. W. Rep. 636; Railroad Co. v. Stacker, (Tenn.) 6 S. W. Rep. 737; Abbot v. Tolliver, (Wis.) 36 N. W. Rep. 623; Hurt v. Railway Co., (Mo.) 7 S. W. Rep. 1; Maher v. Railroad Co., (La.) 3 South. Rep. 462; Railroad Co. v. Wood, (Ind.) 14 N. E. Rep. 572; Bridge v. City of Oshkosh, (Wis.) 37 N. W. Rep. 409.

Wm. Lindsay and Barnett, Noble & Barnett, for appellant. Brown, Humphrey & Davis, for appellee.

HOLT, J. The appellee, Robert S. Mitchell, while in the employ of the appellant as brakeman, and when engaged in the hazardous work of coupling some freight cars, in the presence of and under the direction of the conductor, was caught by the wheel of one of them, and his ankle and foot so crushed that it had to be amputated. His theory as to the manner of the injury is, that after making the coupling, and before he had time to get from between the cars, there was a new movement of the train, under the direction of the conductor, by which he was knocked down and injured. The company, upon the other hand, claim that there was no new movement of the train; that it backed slowly and properly to the car that was to be coupled to it; that the appellee went between them, and made the coupling, and then, instead of coming out at once, walked between the two cars for three or four steps, as they continued to go backwards some six or eight feet from the force of the movement that was necessary to make the coupling, and in this way was caught and injured. The company now object to the judgment of \$10,000 that was rendered upon the special verdict, upon several grounds. The petition after setting forth the manner and extent of the injury, avers that "the said action of said defendant's conductor in charge of said train, and the action of defendant in regard to said operating of said train, was negligent and careless, and the defendant was guilty of negligence, and the said injury to the plaintiff occurred by reason of the negligence and want of reasonable care on the part of defendant, and without any fault of the plaintiff." The degree of the imputed negligence is not stated, at least in express language. Waiving the question whether this may not be done, and whether it is not done in this instance by the statement of the manner of the injury, we are of the opinion that the use of the generic word "negligence" in the pleading in an action of this character is sufficient without averring its degree. This is not an action under the statute for a killing by "willful" neglect. If it were, it would have been necessary, inasmuch as the statute creates and defines the injury, to allege that the negligence was willful; but it is one at common law, for negligence. In such a case, the degree, whether willful, gross, or ordinary, need not be stated. It is a matter of proof, and not of averment. It is said in Chitty that a general averment of negligence authorizes proof of gross negligence. 2 Chit. Pl. 358, note e. In Abb. Tr. Ev. 588: "Gross negligence may be proven under a general averment of negligence." Another writer uses this language: "The declaration must aver the negligence or default of the company; but it need not describe the kind of negligence, or particular acts which constitute the default, or the names or positions of the servants by whose fault the injury was inflicted." Pierce, R. R. 393. Newman, in his work on Pleading and Practice, page 415, says, in substance, that where a statute creates and defines an injury by neglect, its particular degree must be averred in the language of the statute, or in equivalent words; but that in other cases the general allegation of negligence will be sufficient, as it "in general includes gross as well as ordinary negligence." Many cases might be cited in support of these text writers. Among them are *Nolton v. Railroad Corp.*, 15 N. Y. 444, and *Turnpike Co. v. Maupin*, 79 Ky. 101. The last-named case was for an injury sustained by reason of a defect in a bridge of the company, and the court, in its opinion, says: "The allegation of negligence is sufficient to entitle the plaintiff to recover in an action like this for any degree of culpable negligence that may be established by the evidence." Why should not the general allegation of negligence authorize proof of gross negligence, where its existence is necessary to a recovery, equally with evidence of slight or ordinary neglect in a case where it is sufficient? Each are but subdivisions of it, and equally embraced by the term. There is some evidence

that the injury to the appellee resulted from gross neglect. The pleading authorized its admission, and, as its existence was necessary to a recovery, the question was properly submitted to the jury whether the injury was thus caused.

The company contends that the interrogatories submitted to the jury were suggestive, and calculated to induce responses favorable to the appellee; that the court improperly refused to let them say whether the injury resulted from an accident which could not have been guarded against by the exercise of ordinary prudence upon the part of the train-men; that it failed to inform them that the burden rested upon the appellee not only to show the company's neglect, but his own freedom from any negligence; that some of the material findings are unsupported by the evidence; and that the damages awarded are excessive, resulting, in part, at least, from the improper admission of evidence that the appellee had a family. The jury, in answer to the interrogatories, found that the appellee, when coupling the cars, was acting under the orders of the conductor; that when the coupling was made there was a momentary check of the train, but that it was in motion when the appellee was hurt, and that the conductor by signal caused the train to move on before the appellee had reasonable time to get from between the cars; that the gross negligence of the conductor in controlling the train caused the injury, and that he failed to use such caution as an ordinarily prudent person would have used under like circumstances; that the exercise of ordinary care by the appellee would not have avoided the injury; and that \$10,000 in damages would reasonably compensate him for the mental and bodily suffering, and the impairment of his capacity to labor and enjoy life, arising from it. It is insisted for the company that the findings that there was a new movement of the train, that the injury resulted from gross negligence upon the part of the conductor, and that the exercise of ordinary care by the appellee would not have averted it, are altogether unsustained by the evidence. Whether this is so, and whether the verdict is so excessive as to warrant the intervention of an appellate tribunal, are the main questions to be considered. The special findings of a jury, like a general verdict, cannot be disturbed upon the ground that they are against the weight of the evidence, unless they are flagrantly so. The appellee testified, in substance, that by the direction of the conductor, and in his presence, he went between the cars to make the coupling; that after doing so, and before he had time to get out, he was injured by a new movement of the train. If this be true, the conductor was certainly chargeable with gross negligence. He was immediately present; he was controlling the train; he knew the appellee had gone between the cars by his orders to make the coupling, and that a new movement of the train would imperil his life. Under such circumstances it was his duty to see that it did not take place. Certainly, the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence. The conductor would not, for fear of injury to his own person, have permitted a new movement of the train if he had occupied the appellee's position. To permit it under the circumstances was an absence of all care. It is true that several other witnesses testify that there was no new movement of the train, but that merely the motion of the train necessary to make the coupling carried it backward a few feet. In fact, we are inclined to think that some of the findings are against the weight of the evidence, as it appears to us in the record; but they are the conclusions of 12 men who heard and saw the witnesses, and we cannot say that they are flagrantly so, especially in view of the fact that they have been approved by the trial judge, before whom the witnesses also testified. The evidence fails to show that the negligence, which must be imputed to the company, was accompanied by any act of willfulness. The jury, however found it to be gross, and this authorizes the finding of exemplary damages. *Railroad Co. v. McCoy*, 81 Ky. 403. The jury were, however, re-

stricted by the court to those which are compensatory only; and of this the company cannot, of course, complain. The amount allowed seems large. It is so. The fact, however, that it appears high to us, does not authorize a reversal. We are not acting as a jury; and it is only when it is glaringly excessive, and appears at first blush to have resulted from passion or prejudice, that we can interfere. The power should be sparingly exercised, and only in extreme cases. This is the policy of the law, and reasonably and necessarily so. It is difficult, indeed impossible, to measure with mathematical certainty the extent of some of the elements of compensatory damages. The law has confided the duty to the opinion of a jury as the best means of arriving at their extent, even approximately; and every verdict should be regarded *prima facie* as the result of the exercise of an honest judgment upon their part. Any other rule would soon burden this court with numberless appeals upon this ground. The evidence shows that the appellee has suffered beyond estimate. For weeks his life hung in the balance. He is a cripple for life; doomed to hobble about during the balance of his days; disabled from earning a living, at least at his accustomed employment, if not altogether; and in large measure deprived of the enjoyment of life. In estimating the damages for all this, different minds may well arrive at different results; and in view of the well-established rule upon this subject, the verdict of the jury cannot be disturbed upon the ground that it is excessive.

The interrogatories objected to are in form as follows: (4) "Did or not the conductor, (Sterling,) while the plaintiff was coupling the cars, and before he had reasonable time to complete the same and come from between the cars, cause, by order or signal, the train to start in motion, and thereby catch the plaintiff between the cars, and cause the injury to the latter?" *Answer*. "We of the jury say that the conductor did by signal cause the train to move on before the plaintiff had reasonable time to come from between the cars." (5) "Was or not the injury to the plaintiff caused by the negligence or want of care on the part of the conductor (Sterling) in controlling or directing the movements of the train at the time?" *A*. "We of the jury say, yes, it was." (5½) "If they answer question 5 in the affirmative, then they will say whether such neglect on the part of the conductor was gross neglect or ordinary negligence." *A*. "We of the jury say it was gross negligence." (5½) "Did or not the conductor, (Sterling,) at the time of plaintiff's injury, fail to use that kind of care and caution which an ordinarily prudent and skillful person engaged in like business would have observed under similar circumstances?" *A*. "We of the jury say, he did fail." (6) "Could or not the plaintiff, by the use of ordinary care and prudence on his part at the time, have avoided said injury?" *A*. "We of the jury say, he could not." (7) "If the jury answer question No. 4 in the negative, question 5 in the affirmative, question 6 in the negative, and say in answer to question No. 5½ that said conductor was guilty of gross negligence, then they will consider and say in answer to this question what sum in damages within that claimed will reasonably compensate plaintiff for the injuries sustained by him because of said negligence,—the bodily and mental suffering (if any) resulting directly from said injuries, and the impairment of capacity (if any) to labor and enjoy life resulting also from said injury. If, however, said questions 4, 5, and 6 are not answered as herein set forth, then this, the 7th question, need not be answered." *A*. "We, the jury, find for the plaintiff in the sum of ten thousand dollars." It is urged that they pointed out to the jury how to find a verdict that would sustain a judgment for the appellee. It may be equally said that they informed the jury how to find so as to authorize one for the company. As to the last interrogatory, it may be said that it would be difficult, if not impossible, to frame a hypothetical question so that a jury of ordinary intelligence would not know how to find to authorize a judgment for the one party or the other. Certainly it would be impossible to submit interrogatories of such a form that

the attorneys could not point out to the jury how they desired them to answer them to authorize a judgment for their client. If such a thing were possible the jury would be unable to act intelligently. We must presume that they hunt for the right, and not the wrong; and in our opinion the interrogatories are not open to the objection that they are improperly leading and suggestive. The court, by its instructions, properly defined what would constitute gross and ordinary negligence upon the part of the conductor, and what would be ordinary care upon the part of the appellee; and the interrogatories must be read in the light of these instructions. The jury were not only required to find specially whether the appellee had been guilty of any negligence, but were informed that the burden of proof rested upon him, and that he must make out his case by the weight of the testimony. It was not a question of accident under the pleadings, but whether the company had been guilty of gross neglect, or the appellee of such negligence that but for it the injury would not have happened. This was the issue; and it was proper to shape the interrogatories with a view to its determination, and not of some question not presented.

In the case of *Railroad Co. v. Mahony*, 7 Bush, 238, evidence that the injured party had a family was held to be competent. That was an action, however, under the statute for a killing by willful neglect. In actions for injuries for neglect, not based upon such a statute, and where compensatory damages only are allowable, the authorities are to some extent conflicting as to the competency of such evidence. In the case of *Winters v. Railroad Co.*, 39 Mo. 468, it was decided that it was competent to prove that the injured party had a family, not as a fact in itself authorizing damages, but as showing his condition and situation in life by way of estimating the damages done to him. Upon the other hand, this was denied in the case of *Railway Co. v. Powers*, 74 Ill. 341, upon the ground that it would tend to unduly enhance the damages, and beyond compensation; that the only question is, how much has the plaintiff been damaged? and, if such evidence be admissible, then it would be equally proper to show that the wife was blind, or the daughter an invalid. It was held by the supreme court of the United States, in the case of *Pennsylvania Co. v. Roy*, 102 U. S. 451, that evidence as to the poverty of the injured party, or whether he had a family, was inadmissible where he was entitled to compensatory damages only. This left the question open, so far as that court is concerned, in a case where an injury results from gross neglect, unaccompanied by willfulness or acts of aggravation. In the case now in hand the petition avers that the appellee has a family. It is specially pleaded. It is held in *Latng v. Colder*, 8 Pa. St. 479, that matters not naturally attendant upon the act, but proper by way of special damages, as that the injured party is the head of a family, may be proven, if specially pleaded. Mr. Rorer, in his work on Railroads, (volume 2, p. 1099,) appears, by the citation of authority, to support this view. It is not, however, necessary in this case to decide whether such evidence is competent in a case where an injury results from gross neglect, which authorizes exemplary damages, but which is unaccompanied by any act of willfulness or oppression, or whether it is admissible in support of such matter when specially pleaded, because in this case the jury were by the seventh interrogatory expressly restricted in estimating the damages to such sum as would "reasonably compensate plaintiff for the injuries sustained by him because of such negligence,—the bodily and mental suffering (if any) resulting directly from such injuries, and the impairment of capacity (if any) to labor and enjoy life resulting also from said injury." This question enumerated the elements for the calculation of the damages, thereby withdrawing from the consideration of the jury the evidence as to the family as effectually as if it had been done by express instruction. *Railroad Co. v. Shiple*, 31 Md. 368. It was not a general verdict; but the finding as to damage was upon a special question that pointed out to the

jury what they should consider in fixing it. We cannot presume that they did not follow it; and if an erroneous step or instruction in a case be corrected by a subsequent instruction or otherwise, no ground for reversal exists. Judgment affirmed.

ADAMS v. COWLES.

(*Supreme Court of Missouri. June 4, 1888.*)

1. FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—SERVICE OF NOTICE BY PUBLICATION—REV. ST. MO. § 3494.

An action by a judgment creditor to set aside a conveyance as fraudulent as to creditors is within Rev. St. Mo. § 3494, allowing service of notice by publication "in all actions, at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, etc., to or against real estate."

2. SAME—ACTIONS TO SET ASIDE—SERVICE OF NOTICE BY PUBLICATION—SUFFICIENCY.

A notice by publication in an action by a judgment creditor to set aside a conveyance as fraudulent as to creditors, which, after describing the land, notifies defendant that the object of the suit is to obtain a decree of title to it, is not bad for failure to state "briefly the object and general nature of the petition," as required by Rev. St. Mo. § 3494.

3. COURTS OF GENERAL JURISDICTION—PRESUMPTION IN FAVOR OF.

In an action to set aside a conveyance fraudulent as to creditors, notice was served on defendant by publication, under Rev. St. Mo. § 3494, providing that if plaintiff shall allege in his petition, or file an affidavit stating, that part or all the defendants are non-residents of the state, the court, or clerk in vacation, shall make an order of publication. The decree setting aside the conveyance recited that defendants had been duly notified by publication. The order of publication was good on its face, carrying the inference that an affidavit of non-residence had been filed. Held that, the court being one of general jurisdiction, whose judgments were presumptively regular, such decree was not void for want of jurisdiction, where defendants had acquiesced therein for some 15 years, though no affidavit of non-residence was to be found among the papers of the cause, and the petition contained no allegation of non-residence.

Appeal from circuit court, Bates county; JAMES B. GANTT, Judge.

Ejectment brought by Robert Adams against Manning S. Cowles. Judgment for defendant. Plaintiff appeals. The statute referred to in the opinion is Rev. St. Mo. § 3494.

Adams & Bowles, for appellant.

The circuit court of Bates county is a court of general jurisdiction, and its decree cannot be attacked collaterally by a stranger under any circumstances. The decree recited and found its jurisdiction over the parties to it and of the subject-matter of the action, and such finding is conclusive in this case. *Dunham v. Wilfong*, 69 Mo. 355; *Kane v. McCown*, 55 Mo. 200, 201; *Hardin v. McCansse*, 53 Mo. 255; *Tutt v. Boyer*, 51 Mo. 425; *Johnson v. Beazley*, 65 Mo. 262-265; *Brown v. Insurance Co.*, 86 Mo. 51; *State v. Donegan*, 83 Mo. 374; *Yates v. Johnson*, 87 Mo. 213; *Exendine v. Morris*, 76 Mo. 416; *State v. Evans*, 83 Mo. 319, and cases cited; *Crews v. Mooney*, 74 Mo. 26; *Wellshear v. Kelley*, 69 Mo. 343; *Brawley v. Ranney*, 67 Mo. 280; *Johnson v. Gage*, 57 Mo. 160; *Sloan v. Mitchell*, 84 Mo. 546; *Brown v. Walker*, 85 Mo. 262; *Yeoman v. Younger*, 83 Mo. 428; *Spaulding v. Baldwin*, 31 Ind. 376; *Evans v. Ashby*, 22 Ind. 15; *Hahn v. Kelly*, 84 Cal. 391; *Prince v. Griffin*, 16 Iowa, 552; *Grignon's Lessee v. Astor*, 2 How. 319; *Coax v. Thomas*, 9 Grat. 323; *Potter v. Bank*, 28 N. Y. 656; *Kelsey v. Wyley*, 10 Ga. 371; *Smith v. Pomeroy*, 2 Dill. 414-420; *Voorhees v. Bank*, 10 Pet. 449; *Harvey v. Tyler*, 2 Wall. 343-345; *Withers v. Patterson*, 27 Tex. 499; *Maxwell v. Stewart*, 22 Wall. 77; *Galpin v. Page*, 18 Wall. 364. The court erred in admitting, against the objection of appellant, what was assumed to be the original writ of summons, petition, order of publication, and proof of publication in the case of *Ferris v. William C. and William A. Glenn*. The court, by its decree, having found "that the said defendants had been duly notified of

the commencement of this action, and of the general nature and object of the same," that fact was like any other fact found by the court; and such papers were incompetent to establish any different fact. *Kane v. McCoun*, 55 Mo. 181; *Dunham v. Wilfong*, 69 Mo. 355; *Crow v. Meyersieck*, 88 Mo. 411; *Robertson v. Winchester*, 1 Pickle, 183, 1 S. W. Rep. 781; *Stanly v. Crippin*, 1 Head, 115, 116; *Mitchell v. McKinny*, 6 Heisk. 83; *Allen v. Gilliland*, 3 Lea, 532, 533; *Claybrook v. Wade*, 7 Cold. 556, 557; *Kilcrease v. Blythe*, 6 Humph. 389, 390; *Hopper v. Fisher*, 2 Head, 253, 254; *Walker v. Cottrell*, 6 Baxt. 274; *Foot v. Stevens*, 17 Wend. 486, 487; *Paine v. Moreland*, 15 Ohio, 435; *Nash v. Church*, 10 Wis. 312; *Gemmell v. Rice*, 13 Minn. 400, (Gil. 371); *Hahn v. Kelly*, 34 Cal. 391; *Quincey v. Baker*, 37 Cal. 465; *McCauley v. Fulton*, 44 Cal. 355; *Reilly v. Lancaster*, 39 Cal. 354; *Yaple v. Titus*, 41 Pa. St. 202; *Shawhan v. Loffer*, 24 Iowa, 226, 227; *Finneran v. Leonard*, 7 Allen, 54.

A. *Comingo*, for respondent.

Jurisdiction consists of the right, as well as the power, to hear and determine a cause. There are conditions and requirements precedent and indispensable to the rightful exercise of the power. It can only be brought into exercise by a substantial compliance with the precedent conditions, or by the appearance of the parties without such compliance. *Shelton v. Newton*, 3 Ohio St. 494; *Grignon's Lessee v. Astor*, 2 How. 319, 338; *U. S. v. Arredondo*, 6 Pet. 691, 709; *Pennoyer v. Neff*, 95 U. S. 714, 727; *Gray v. Bowles*, 74 Mo. 419, 423. In the case of *Ferris v. Glenn* and *Glenn* the circuit court of Bates county did not acquire, and it could not by an order of publication obtain, jurisdiction over the defendants, for the purposes of that action. It was not an action for the recovery of the land, nor "to enforce a right, claim, or demand to or against it." It was a personal action for relief against an alleged fraud. Gen. St. 1865, p. 655, § 13; Rev. St. 1879, § 3493,—authorize service, by publication of notice, in actions brought to enforce rights, claims, or demands to or against land, but not for the purpose set out in the *Ferris* petition. Even if it be held that the subject-matter of the action in *Ferris v. Glenn* and *Glenn* was one over which the circuit court might acquire jurisdiction of the defendants by constructive service, (publication of notice,) the court failed to acquire jurisdiction—*First*, because the order of publication was not authorized by an averment in the petition, nor by an affidavit filed in the cause, showing that the defendants were non-residents of the state; *second*, because the order of publication fails to state the object and general nature of the petition. Had it been alleged in the petition, or stated in an affidavit filed therewith, that the defendants were non-residents, the order of publication would still have been fatally defective, in that it simply states that the object and general nature of the suit was "to obtain a decree of title," etc. *Boylard v. Boyland*, 18 Ill. 552; *Brownfield v. Dyer*, 7 Bush, 505; *Fountaine v. Houston*, 86 Ind. 205; *Rankin v. Adams*, 18 Wis. 292; *Slocum v. Slocum*, 17 Wis. 150; *Shields v. Miller*, 9 Kan. 390, 398; *Mickel v. Hicks*, 19 Kan. 578; *Bradley v. Jamison*, 46 Iowa, 68; *Tunis v. Withrow*, 10 Iowa, 305; *Mayfield v. Bennett*, 48 Iowa, 194; *Galpin v. Page*, 18 Wall. 351; *Bobb v. Woodward*, 42 Mo. 483; *Drake v. Hale*, 38 Mo. 346, 348; *Cloud v. Pierce City*, 86 Mo. 366, and citations; *Schell v. Leland*, 45 Mo. 293. Although a judgment or decree may be regular on its face, and may recite the existence of all the jurisdictional facts, yet if, from an examination of the record, it appear that such recitals, or any of them, are untrue, such judgment will be void. The whole record may be brought before the court, in every case, to test the validity of the judgment. *Cloud v. Pierce City*, 86 Mo. 366, 369, and citations; *Gilkeson v. Knight*, 71 Mo. 403, 406; *Brown v. Woody*, 64 Mo. 547, 550; *Bobb v. Woodward*, 42 Mo. 482, 489; *Howard v. Thornton*, 50 Mo. 291; *Thompson v. Whitman*, 18 Wall. 457, 468; *Ferguson v. Crawford*, 70 N. Y. 253; *Tunis v. Withrow*, 10 Iowa, 305, 307; *Bradley v. Jamison*,

46 Iowa, 68; *Shields v. Miller*, 9 Kan. 390, 397; *Manley v. Headley*, 10 Kan. 88, 93; *Boylard v. Boyland*, 18 Ill. 551; *Morey v. Morey*, 27 Minn. 265, 6 N. W. Rep. 783.

BLACK, J. This was an action of ejectment for the undivided one-half of 320 acres of land in Bates county. Both parties claim title through William A. Glenn, who conveyed the land to William C. Glenn in June, 1869, and he conveyed to Hartwell in 1881, from whom defendant claims sundry deeds. Judgments were recovered against William A. Glenn in August, 1869, under which the property was sold to Dwight Ferris. The deeds from the sheriff to him are dated March 10 and 11, 1870. Ferris conveyed to Dunston Adams in 1875, and Dunston Adams conveyed to plaintiff. Before Ferris conveyed to Adams, he procured a decree in a suit against William A. and William C. Glenn, setting aside the deed from William A. to William C. Glenn on the ground that it was made to hinder, delay, and defraud the creditors of William A. Glenn. The validity of that decree is the only real controversy in this case. The defendant claims that the decree is a nullity for want of jurisdiction over the defendants, and so the trial court held. The petition in the case of *Ferris against Glenn and Glenn* was filed in the circuit court of Bates county on the 12th October, 1870. A summons was issued for the defendants at the same time, but there is no return on it whatever. At the same time the clerk made an order of publication, the material portions of which are as follows: "Now, at this day comes Dwight Ferris, plaintiff in the above-entitled cause, before the undersigned, clerk of the circuit court of Bates county, in vacation, and files his petition, stating, among other things, that the above-named defendants, William A. Glenn and William C. Glenn, are non-residents of the state of Missouri. It is therefore ordered by the clerk aforesaid, in vacation, that publication be made, notifying them that an action has been commenced against them by petition and affidavit in the circuit court of Bates county, and state of Missouri, the object and general nature of which is to obtain a decree of title to the following described real estate, to-wit." The property is then described, and the defendants are notified to appear at the March term, 1871. At that term the plaintiff made proof of publication; and at the September term, 1871, the plaintiff took a decree by default. The record in that case was put in evidence in this one, but no affidavit of non-residence of the defendants appears among the files.

1. The statute allows the service of notice by publication "in all actions, at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, etc., to or against real estate." If the deed to William C. Glenn was fraudulent, then it was void as to Ferris, and that fact could be shown in ejectment. But Ferris had the further right to have the fraudulent deed canceled and in effect erased from the public records, and to do this while the evidence was at hand. The relief asked is the establishment of a right to real property, and comes within the statute allowing the service of notice by publication.

2. Nor is the notice published bad for a failure to state "briefly the object and general nature of the petition." These are the words of the statute, which requires the land to be described only in partition suits. Here the land is described, and the defendants are notified that the object of the suit is to obtain a decree of title to it. Accurately speaking, the relief asked was the removal of a cloud from the plaintiff's title; but the notice given would be quite as well understood as if it had named the relief with more accuracy. The statute does not contemplate that the notice shall detail the facts as they are stated in the petition. Since the notice describes the land and states the object of the suit, it is sufficient, and especially so when attacked collaterally.

3. The contention that the decree is void for want of an affidavit, or statement in the petition, that the defendants were non-residents, presents a dif-

ferent question. The statute provides that if the plaintiff, or other person for him, shall allege in his petition, or file an affidavit stating, that part or all of the defendants are non-residents of the state, the court, or clerk in vacation, shall make an order of publication. The circuit court is a court of general jurisdiction, a court which proceeds according to the course of the common law, and, being such, the rule obtains in respect of the proceeding therein, that nothing shall be intended to be out of its jurisdiction but that which specially appears to be so. The general rule also prevails in this state that the question of jurisdiction must be tried by the whole record. When it appears from the whole record that the court had no jurisdiction, either over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding. *Brown v. Woody*, 64 Mo. 548; *Howard v. Thornton*, 50 Mo. 291. In this case the decree recites that the defendants had been duly notified by publication, and this recital is relied upon by this plaintiff as showing conclusively that an affidavit of non-residence was filed. This recital and the proof made at the previous term are conclusive that the order of publication was duly published in the designated newspaper; but if we are to look to the whole record, then it is not conclusive that the order actually made was good and sufficient, nor that an affidavit for publication was filed. As said in the recent case of *Millner v. Shipley*, 7 S. W. Rep. 175, if there is any conflict between the recitals in the judgment as to the terms of the order, and the order itself, the latter must control, for a recital of the order must yield to the order itself. So in the case of *Cloud v. Pierce City*, 86 Mo. 357, there was a recital that defendant had been duly served with process; but, when the service was produced, it proved to be worthless, and we held the judgment to be void,—a nullity. The same principle is clearly stated in *Crow v. Meyersieck*, 88 Mo. 415, cited by plaintiff in this case. It is there in substance said that the notice was a part of the record; that it showed the infirmity on its face, and, when offered in evidence, contradicted the general recital of "due notice," and thus a want of notice appeared from the whole record. The order of publication in this case is good on its face, and the question is whether the record shows the want of an affidavit. The order of publication states that plaintiff "files his petition, stating, among other things," that defendants are non-residents. This, taken by itself, gives some support to the theory that the order was made, not on an affidavit, but on the petition, and there is no allegation of non-residence in the petition. But another portion of the same order says the defendants are notified "that an action has been commenced by petition and affidavit." Taking the order as a whole, it leaves the inference that an affidavit had been filed. It certainly does not show that the order was made by the clerk without an affidavit, but leads to the contrary conclusion. There is nothing on the face of the record produced which specifically contradicts the general recital of due service, within the principle of the cases before cited. The remaining question is whether the failure to find an affidavit among the papers will overthrow the decree with its general recital of service by publication. The additional parol evidence is as follows: Mr. Jenkins testified that he had been clerk of the court since January, 1879; that the papers produced were on file during his term of office; that, to the best of his belief, there were not any other papers filed in said cause; that the papers produced were found in an envelope among the files of his office. Mr. Brugler testified that he made an examination of the papers in the case in 1880; that he found them in their proper place in the clerk's office; that the papers produced were the only ones he found. The plaintiff says that after he learned that Brugler, the witness, and Hartman claimed title to the land, he made inquiry for the papers; that the deputy-clerk made search, and could not find them; that he first saw them at the term of the court at which this cause was tried; that he then got them from Mr. Brugler. Mr. Freeman, speaking of the presumption in favor of the judgments of courts which have jurisdiction

over the subject-matter, proceeds to say in respect of the jurisdiction over the person against whom the judgment is obtained: "Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, has acted correctly, and with due authority, and its judgments will be as valid as though every fact necessary to jurisdiction affirmatively appeared. The decisions to this effect are very numerous. If a statute required a certain affidavit to be filed prior to the rendition of judgment, it will be presumed, in the absence of any statement or showing upon the subject, that such affidavit was filed." *Freem. Judgm.* § 124. It is true that in *Howard v. Thornton, supra*, it was said that "if the whole record, taken together, does not show that the court had jurisdiction over the defendant, then the judgment would be a nullity;" but the real question in that case was whether a judgment could be impeached without producing the whole record. This doctrine, as it is stated in *Freeman on Judgments*, is approved in *Huxley v. Harrold*, 62 Mo. 516, and is assumed as a correct exposition of the law in the entire discussion in the case of *Cloud v. Pierce City, supra*. Where an official act is shown to have been done in a manner substantially regular, formal requisites for the validity of the act are constantly presumed. *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. Rep. 93. There is nothing in this case to overcome the presumption that the court had jurisdiction over the defendants in the equity suit. The parol evidence as to what papers were on file does not reach a period of about 10 years, beginning with the time when the suit was commenced. During that 10 years plaintiff and his grantor paid all the taxes on the land, and paid delinquent taxes existing prior to 1870. The land was in the actual possession of the plaintiff's tenant in 1877. The deed from William C. Glenn, who was the father of William A. Glenn, was not made until about 10 years after the date of the decree, in 1881. This long acquiescence in the decree is wholly unexplained. Judgments of courts of general jurisdiction ought not to be overthrown and declared void in collateral proceedings on such a state of facts as exists in this case. The judgment is therefore reversed, and the cause remanded.

All concur.

CITY OF ST. LOUIS v. FREIVOGEL.

(Supreme Court of Missouri. June 4, 1888.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—IMPOSITION OF LICENSE TAXES.

Rev. Ord. St. Louis 1887, § 889, provides that no one shall keep a meat-shop in St. Louis without first having obtained a license therefor, and one doing business as a meat-shop keeper shall pay an annual license of \$50, is not invalid, as made without power on the part of the municipal authorities to tax keepers of meat-shops; such power being conferred by the charter of St. Louis, which provides that the mayor and assembly shall have power to license and tax grocers, merchants, and retailers, and all other business, trades, avocations, or professions.

2. SAME—ORDINANCES—VALIDITY—DISCRIMINATION.

Where one ordinance provides that a meat-shop keeper's license shall entitle him to sell meat, fish, fowl, vegetables, and fruit, and another ordinance provides that "the inner portion of all market-houses shall be set apart for butchers' stalls, and that any stall outside of any market-house may be used for the sale of vegetables, fruit," etc., "or other article except fresh meat," the former ordinance does not discriminate, in that meat-shop keepers inside the market-houses are not allowed to sell vegetables and fruits, since the prohibition so to do is contained in the latter ordinance.

3. SAME.

Rev. Ord. St. Louis 1887, § 889, providing that no one shall keep a meat-shop in St. Louis without having first obtained a license therefor; that such person shall pay an annual license tax of \$50; that all meat-shop keepers who have paid their license may deliver meat in a wagon or otherwise, without taking out an additional license therefor; that all persons offering for sale salt or fresh meat, fish, sausage,

etc., shall be considered meat-shop keepers, except that grocers who sell ham, shoulders, dried beef, bacon, etc., shall not be included,—does not discriminate in favor of grocers, since such articles are a part of a grocer's stock.

Appeal from St. Louis criminal court; E. A. NOONAN, Judge.

Christian Freivogel was tried, under the ordinance of St. Louis, for keeping a meat-shop without a license. There was a conviction, and defendant appeals.

Steber & Clark, for appellant. *Leverett Bell*, for respondent.

NORTON, C. J. An ordinance of the city of St. Louis contains the following section: Sec. 889. "No person, persons, or copartnership of persons shall open or keep a meat-shop in the city of St. Louis, without having first obtained from the collector a license therefor; and any person, persons, or copartnership of persons, doing business as a meat-shop keeper or keepers, shall pay an annual license of fifty dollars, in advance, which license shall authorize and empower such person, persons, or copartnership of persons to sell, in their shops, all kinds of fresh and salt meats, fresh and salt fish, sausage and sausage meat, whether made by them or not; and also all kinds of fowl and game, in their proper seasons, that is not prohibited being sold or offered for sale by any ordinance of this city or law of this state; all kinds of vegetables and fruit, in large or small quantities,—for one year from the date of such license. And it is hereby provided that the owners of meat-shops who have paid their license may be permitted to deliver meat in a wagon or otherwise, without taking out an additional license therefor. It is hereby provided that if any person, persons, or copartnership of persons shall exhibit for sale, or offer for sale, any of the above-enumerated articles, vegetables and fruit excepted, in any market, stall, place, or shop in this city, whether sold or not, such person, persons, or copartnership of persons shall be considered to be meat-shop keepers, as herein defined, and shall be adjudged to be such in the full meaning of this section: and provided, further, that nothing in this section shall be so construed as to include grocers who sell ham, shoulders, dried beef, bacon, salt fish, and smoked sausage." It appears from the record that defendant sold meat in the Union market in St. Louis, having rented a stall in said market for the purpose of selling meat thereat. He was arrested for conducting said business without first having taken out a license as required by the above ordinance, was convicted in the police court, and fined \$50; and, on his appeal to the court of criminal correction, was again convicted and fined, from which he has appealed to this court. And the first point made by counsel on the appeal is that while, under the charter of the city, the municipal assembly had the power to license and regulate meat-shops, it had no power to tax them. The second made is that if the assembly was empowered by the charter to tax meat-shop keepers, that the tax imposed is invalid, because of discrimination, and because it is not uniform.

As to the points made under the first ground of objection, viz., that the charter conferred no power to impose such a tax, it may be said that they are identical with those made in the cases of *City of St. Louis v. Spiegel*, 75 Mo. 145, 90 Mo. 587, and 2 S. W. Rep. 839. The ordinance, the validity of which was challenged in the cases above cited as to the question whether the power to tax was given by the charter, is, in its essential features bearing on that question, like the one in the present case. Spiegel was convicted for selling meat, as a meat-shop keeper, without taking out a license, and on appeal to the St. Louis court of appeals the judgment was affirmed, (8 Mo. App. 478;) the court in its opinion holding that the charter of the city gives the power to license and tax meat-shops. And on that branch of the case it is said: "The charter gives the power to the municipal authorities (article 3, § 6) 'to assess, levy, and collect, for general and special purposes, on real and personal property, and licenses; * * * to establish market places, and

meat-shops, and license, regulate, sell, lease, abolish, or otherwise dispose of the same; * * * to license, tax, and regulate grocers, merchants, retailers, * * * and all other business, trades, avocations, or professions whatsoever; * * * to license, tax, regulate, or suppress all occupations, professions, and trades not enumerated, of whatever name or character.' These provisions give the right to license meat-shops as plainly as can be given. It is said, in so many words in the charter, that the 'mayor and assembly shall have power, within the city, to license meat-shops.' The right to tax them is also plainly given, since the city has the power to license and tax grocers, merchants, and retailers, and all trades and avocations whatsoever. If the keepers of meat-shops are not *ejusdem generis* with 'grocers, merchants, and retailers,' then the meaning of these three words must be restrained altogether to grocers; that being the only kind of retail merchants especially named under this subdivision of the fifth section. The business of a meat-shop man, as prescribed in the ordinance, is to retail meat, game, and vegetables. He is certainly a retailer, and his retail business is certainly akin to that of a grocer. We have no doubt that the charter, by a fair construction of the language used, gives the power to license and tax those keeping meat-shops." While it was held, in the case above quoted from, that the power to tax meat-shops was given by the charter, it was further held that the license tax, when imposed, need not be uniform in the city. On said cause being appealed to this court, the judgment of the St. Louis court of appeals was reversed on the sole ground that the license tax, when imposed, must be uniform, under section 3, art. 10, of the constitution, which provides that "taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax;" and that inasmuch as the tax imposed was not uniform, in this: that it imposed a license tax of \$100 on meat-shop keepers in one part of the city, and \$25 on meat-shop keepers in another part of the city,—the ordinance imposing it was held to be invalid. The ordinance was amended, in conformity with the ruling of this court, so as to make the tax uniform throughout the city, and Spiegel was again arrested for selling meat without license as a meat-shop keeper, and, being convicted and fined by the court of criminal correction, he appealed to the St. Louis court of appeals, which affirmed the judgment of the court of criminal correction. He thereupon appealed to this court, and the judgment of the St. Louis court of appeals was reversed, on the ground that as the ordinance provided that the owners of meat-shops in the new city limits could sell both at their shops and from wagons, while the owners of meat-shops in the old city limits could only sell at their shops, this discrimination rendered the ordinance invalid. *City of St. Louis v. Spiegel*, 90 Mo. 587, 2 S. W. Rep. 839. No doubt is expressed, in either of these cases, by this court, as to the power, under the charter, to impose the tax; and that question, we think, was properly disposed of by the St. Louis court of appeals in the opinion in 8 Mo. App., *supra*, and from which we have quoted herein. The ordinance now appears before us for the third time, with the discriminating provision fatal to its validity, under our ruling in *City of St. Louis v. Spiegel*, *supra*, stricken out.

Considering the question of the power to tax meat-shop keepers, under the charter, as having been settled by the adjudications hereinbefore referred to, the only remaining question left for determination is as to whether the ordinance makes such discrimination as to render it invalid; and on this branch of the case it is insisted by counsel that it discriminates in favor of grocers; that it undertakes to classify butchers as meat-shop keepers; that it also discriminates in allowing a meat-shop keeper to deliver meat from an unlicensed wagon, without giving this privilege to one who sells meat at a stall in a market-house; and also discriminates by permitting a meat-shop keeper to sell vegetables and fruit, and refusing the privilege to one who is selling meat in a market-house. As the articles mentioned in the ordinance as being sold

by grocers may be understood as making up, in part, a grocer's stock, which he may sell under a grocer's or merchant's license, the provision of the ordinance exempting him from taking out license as a meat-shop keeper, in order to sell what he may properly sell under a grocer's or merchant's license, cannot be said to be a discrimination in his favor. As to the second point, it may be said that there is nothing in the ordinance from which an inference can be drawn that it classifies, or attempts to classify, butchers as meat-shop keepers. As to the third point, it is a sufficient answer to say that there is nothing in the ordinance which forbids a person who sells meat in a market-house from delivering his meat in a wagon, without taking out an additional license therefor. The exemption applies as well to one who sells meat inside the market as to one who sells it outside. As to the last point of objection made, it is claimed by counsel for the city that the denial of the right to sell vegetables and fruit in a stall in a market-house is not by virtue of the ordinance in question, but by virtue of the following ordinances, viz.: "All the inner portion of all market-houses shall be, and are hereby, set apart for butchers' stalls; but, when not needed for this purpose, may be used, under the direction of the comptroller, for the sale of fresh, smoked, or salted meats, bacon, ham, sausages, dressed fowls, and all other kinds of provisions or goods, except fish." "Any stand or stall outside of any market-house may be used or employed for the sale of poultry, game, vegetables, fruits, coffee, or other articles, except fresh meat." It would therefore seem that the interdiction of the sale of vegetables and fruits in the market comes from the ordinance above quoted, and not from the ordinance in question. The ordinance in this case defines a meat-shop keeper to be any person who shall offer for sale in any market, stall, place, or shop in the city, whether sold or not, any kind of fresh and salt meat, fresh and salt fish, sausage and sausage meat, whether made by him or not, and also all kinds of fowls and game, in their proper seasons, that is not prohibited being sold, or offered for sale, by any law of the state, or any ordinance of the city, in large or small quantities. Such a person, when he obtains his license, is authorized to sell, for one year, any or all of the above-named articles, and, in addition thereto, vegetables and fruits. This authority is given to all meat-shop keepers who procure license. A meat-shop keeper who sells his meat at a stall in the market is not forbidden, by anything contained in the ordinance in question, from selling vegetables and fruits; and, if forbidden to do so, it is by virtue of other and distinct ordinances of the city above referred to. The ordinance does not require that meat-shops shall be located inside a market, and it is optional with the meat-shop keeper to sell his meat inside or outside the market-house; and, if he choose to sell inside a market, he voluntarily subjects himself to the rules and regulations governing market-houses; and, if a discrimination is thus created, it is not by virtue of the ordinance in question. The judgment is hereby affirmed.

All concurring.

ARNOLD v. HAWKINS, Collector.

(Supreme Court of Missouri. June 4, 1888.)

CONSTITUTIONAL LAW—TAXATION—LIMIT OF COUNTY TAX.

Const. Mo. 1875, art. 10, § 11, provides, in regard to taxation: "For county purposes, the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed 50 cents on the \$100 valuation. * * * Said restriction shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." *Held*, that a county falling within such provision, having levied a tax of 50 cents on the \$100 to meet the ordinary current expenses of the county, and 40 cents on the \$100 to pay debts created prior to November 30, 1875, when said constitutional provision took effect, cannot also collect a road tax of 5 cents on the \$100, or a judgment tax of 40 cents on the \$100, to pay judgments founded wholly upon warrants issued to pay current county expenses since November 30, 1875.

Appeal from circuit court, Ozark county; J. F. HALE, Judge.

Action by John T. Arnold, to enjoin W. R. Hawkins, collector of Ozark county, from collecting certain taxes. The injunction was refused, and plaintiff appeals.

W. J. Orr, for appellant. J. I. Davis, for respondents.

BLACK, J. The plaintiff, who is a tax-payer in Ozark county, brought this suit against the collector of the revenues of that county to enjoin the collection of certain taxes levied for the year 1886. The case was submitted to the circuit court on agreed facts, under section 3700, Rev. St., and, so far as essential to an understanding of the only question raised on this appeal, the facts are as follows:

(2) That the following taxes appear on said books for the year 1886, as extended against the property of plaintiff:

20 cents	on the \$100 valuation	for state revenue tax.
20	" " "	" state interest tax.
50	" " "	" county revenue tax.
40	" " "	" county special tax.
40	" " "	" county judgment tax.
5	" " "	" county road tax.

(3) Plaintiff has fully paid all of said taxes except the said county judgment and county road taxes, which last-named taxes amount to the sum of \$6.34 county judgment, and 82 cents county road tax, and which sums the plaintiff refuses to pay, subject to the determination of the legality of the same.

(4) It is further agreed that said county revenue tax, amounting to 50 cents on the \$100 valuation, is levied, collected, and used to meet all the ordinary current expenses of the county, as is provided for in section 6818, Rev. St. 1879, and the whole thereof is required for that purpose.

(5) That the said 40 cents on the \$100 valuation, called "County Special Tax," is levied, collected, and apportioned to pay debts created prior to November 30, 1875, or renewal bonds in lieu thereof, or the interest thereon, and cannot legally be used for any other purpose.

(6) That the said 40 cents judgment tax is levied, and is to be collected and used to pay judgments now existing against said county, which said judgments are founded wholly upon warrants issued since November 30, 1875, and which said warrants were drawn to pay current expenses of the county, made and created since last-named date. The circuit court enjoined the collection of the 5 cents county road tax, but refused to enjoin the collection of the tax designated as "40 cents on the \$100 valuation for county judgment tax," and this last ruling presents the only question now before us for consideration.

As the plaintiff has paid all the taxes except those which he claims are illegal, he may have relief by injunction as to such as are illegal and levied in excess of constitutional limitation. *Overall v. Ruenzi*, 67 Mo. 203; *Ewing v. Board*, 72 Mo. 436. Section 11, art. 10, Const. 1875, among other things, provides: "For county purposes, the annual rate on property in counties having six million dollars or less, shall not in the aggregate exceed fifty cents on the hundred dollars valuation. * * * Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." This constitutional provision took effect on the 30th November, 1875, and it and the other like limitations upon the rate of taxation require no legislative aid to give them vitality; they are self-enforcing, as has been repeatedly ruled. This is true, though the proviso therein contained, providing for an increased rate of taxation for designated purposes, does require legislative aid. *Board v. Patten*, 62 Mo. 449; *State v. Railway Co.*, 74 Mo. 163; *State v. Van Every*, 75 Mo. 530. In this case it appears from the agreed facts that the county has levied, and plaintiff has

paid, a tax of 50 cents on the \$100 valuation for county purposes. The tax of 40 cents on the \$100 appears to have been levied to pay warrants issued since November 30, 1875, to pay current county expenses made and created since that date. It therefore cannot be a tax to pay indebtedness existing at the date of the adoption of the present constitution; and, being levied to pay warrants for county current expenses, it cannot be a tax to pay for erecting public buildings. Indeed, it cannot be a tax for any purpose for which a tax in excess of the 50 cents on the \$100 valuation can be levied. It is therefore clearly within the constitutional prohibition, and is an illegal tax, the collection of which should be enjoined. What remedy the judgment creditors may have presents a question not before us on this appeal. It is enough to know that plaintiff has paid all the taxes that can be levied on his property for county purposes for the year in question. It is not his duty to see how it shall be appropriated or applied. The judgment is reversed, with directions to the circuit court to enter up a decree enjoining the collection of the 40 cents on the \$100 valuation now in question, as well as the five-cent tax.

All concur.

STATE v. LICHLITER.

(*Supreme Court of Missouri.* June 4, 1888.)

1. FALSE PRETENSES—BY LETTER—VENUE.

Upon trial for obtaining goods by false pretenses by means of a letter giving a false statement of the financial standing of defendant's firm, it appeared that the letter was written and mailed, with an order for goods, in Jasper county, to a firm in St. Louis; and that they, relying upon the statement, filled the order, and delivered the goods to a railroad company in St. Louis, consigned to defendant's firm, in Jasper county. *Held*, that the crime was committed in St. Louis county.

2. SAME—EVIDENCE.

In the trial for obtaining goods by false pretenses, evidence of defendant's conduct in the disposition of the goods is admissible as bearing upon the question of his intent in obtaining them.

3. SAME—INSTRUCTIONS.

In a trial for obtaining goods by false pretenses by means of a false statement of the financial standing of defendant's firm, it appeared that the statement was written by a third person from figures furnished by the firm, but that defendant was not present when the statement was written. Defendant requested an instruction that unless the jury believed beyond a reasonable doubt that the defendant "did make," and was "present, counseling, aiding, and abetting the making of such statement," the verdict must be not guilty, which the court gave, with the modification that it was not necessary that defendant should have been present when the writing was done; but if the statement was written as the result of a common understanding and fraudulent conspiracy on the part of defendant, and the one writing the statement, though not written in the presence of the defendant, it was the statement of defendant. *Held*, that the modification was properly given, as explaining what was meant by the terms "present, counseling, aiding, and abetting."

4. CRIMINAL LAW—MOTION TO QUASH—WHEN AVAILABLE.

It is too late, after a mistrial upon an indictment for obtaining goods by false pretenses, for defendant to ask leave to withdraw his plea, and file a motion to quash, especially if the indictment is sufficient in law.

5. SAME—MOTION FOR NEW TRIAL—SHOWING.

Where the affidavits accompanying a motion for a new trial fail to disclose any diligence on the part of defendant to discover the evidence he proposed to offer upon a second trial, and did not allege that the evidence first came to his knowledge after the trial, or that, before the trial, he had no knowledge of it, the motion is properly denied.¹

Appeal from St. Louis criminal court; HENRY D. LAUGHLIN, Judge.

Norman B. Lichliter was indicted for obtaining goods in the city of St. Louis under false pretenses, was convicted, appealed to the St. Louis court of appeals, from which the case was transferred to the supreme court.

¹ As to when a new trial will be granted on the ground of newly-discovered evidence, see *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758, and note; *State v. Woodward*, (Mo.) 8 S. W. Rep. 220; *Grady v. People*, (Ill.) 16 N. E. Rep. 654; *Bean v. People*, (Ill.) 16 N. E. Rep. 656; *Fogarty v. State*, (Ga.) 5 S. E. Rep. 782.

Taylor & Pollard, for appellant. *B. G. Boone*, Atty. Gen., *A. C. Clover*, and *C. O. Bishop*, for the State.

NORTON, C. J. Defendant and William H. Fallis were jointly indicted in the criminal court of the city of St. Louis, at its July term, 1881, and charged with obtaining goods in the city of St. Louis under false pretenses. At the May term, 1882, of said court, a trial was had, resulting in the conviction of defendants. Fallis obtained a new trial, and Lichliter, after making an unsuccessful motion for new trial, appealed to the St. Louis court of appeals, from which court the cause has been transferred to this court. It appears from the record that on the 5th of December, 1881, defendants were arraigned, pleaded not guilty, and were put upon trial, which resulting in a mistrial, the cause was continued, and specially set for trial on the 20th February, 1882, at which time defendants appeared, and filed a motion for a special venire of citizens from the county, and the same day asked leave to withdraw the plea of not guilty, and to file a motion to quash. The court refused to allow this, for the reason that said application was made too late. This action of the court was excepted to at the time, and is assigned for error here.

It is said in case of *State v. Rector*, 11 Mo. 28, "that the power to quash indictments is a discretionary one in all cases. * * * The sufficiency of an indictment is properly tested by a demurrer or motion in arrest. Indictments for lesser offenses, below the grade of felony, the court may, in its discretion, quash when the indictment is plainly defective; but in indictments for felonies the defendant should, in general, be left to his demurrer or a motion in arrest." See, also, *State v. Bohannon*, 21 Mo. 491; *State v. Conrad*, Id. 271. In view of the ruling made in the cases above cited, we are not prepared to say that the court committed reversible error in refusing the request of defendant to withdraw the plea of not guilty, and file a motion to quash; and this is especially so if the indictment preferred is sufficient in law, as we think the indictment in this case is. It is based upon section 1335, Rev. St. It lays the venue of the offense at the city of St. Louis, state of Missouri. It distinctly alleges the false pretense upon which the defendants obtained the goods, negatives the truth of the pretense, and avers that the owners of the goods, relying upon its truth, parted with their property, particularly describing it, and stating its value. It is in conformity with the precedents laid down in 1 Whart. Prec. bk. 4, c. 6.

It is also insisted that the judgment should be reversed on the ground that the evidence shows that the offense, if committed at all, was committed in Jasper county. The record is very voluminous; and, as no objection has been interposed to the abstract of the evidence furnished by respondent, we shall adopt it as being correct; and so much of it as is material to the question is as follows: In the fall of 1880 the traveling salesman of the firm of Samuel Cupples & Co., of St. Louis, met defendants in the town of Joplin, Jasper county. He was informed by them that they were about to form a business partnership in Joplin, and desired to purchase a car-load of wooden and willow ware from said Cupples & Co. on a credit of 60 days. The salesman told them that, in order to obtain credit, it would be necessary for them to furnish his firm with a statement of their financial condition. Such a statement, setting forth their assets and liabilities, was made, in writing, in the name of Fallis & Lichliter, which was signed by E. A. Fallis, and mailed from Joplin, and received by Cupples & Co. in the city of St. Louis. A written order for the goods specified in the indictment was also received from Fallis & Lichliter for the goods specified in the indictment. Cupples & Co. being satisfied with said statement, which represented the assets of the firm to be largely in excess of their liabilities, and relying upon its truth, filled the order, and delivered the goods to the St. Louis & San Francisco Railway Company, at their depot in the city of St. Louis, on the 27th October, 1880, ad-

dressed and consigned to Fallis & Lichliter at Joplin; the said railway company, by a bill of lading acknowledging the receipt of the goods from said Cupples & Co., agreeing to deliver the same to Fallis & Lichliter at Joplin, which was done a few days thereafter. Cupples & Co. drew a draft on Fallis & Lichliter for the amount of the bill at 60 days from the date of delivery, which was accepted. Before the maturity of the draft, in December following, Fallis & Lichliter made an assignment, paying but a few cents on the dollar of their indebtedness. Martin Fallis, a brother of one of the defendants, among other things, testified that, just prior to the purchase of the goods from Cupples & Co., defendant Fallis requested witness to make a written statement of the financial condition of the firm, to be sent to St. Louis; that he made a true statement of their assets and liabilities, and submitted it to defendants, who told him that they must make a better showing or quit the business, as such a statement would not buy goods; that under directions of defendants, and from figures furnished by them, and upon their assurance that no harm should come to him from the act, he made the statement for Cupples & Co., and signed the firm name, and also the name of E. O. Fallis, his wife, thereto, by their direction and in their presence; that this statement was wholly false, known to be so by defendants, was intended to deceive, and made for the purpose of obtaining goods and credit from Cupples & Co.; and that he sealed it up, and mailed it to Cupples & Co. at St. Louis; that the goods ordered in connection with the statement were received at Joplin from the railway company, and went into the general stock of the firm of Fallis & Lichliter. The evidence tends further to show that, after the receipt of these goods, and for a period of about six weeks before the assignment, large quantities of goods were taken from the store, and deposited at other places, in other sections of the state and in Kansas, and that considerable sums of money collected by defendants were retained by them, so that but little was left for creditors when the assignment was made. The falsity of the statement, the purchase and receipt of the goods on the strength of it from Cupples & Co., is virtually conceded; but a large amount of evidence was introduced to establish the fact that defendants were mere employes of the firm of Fallis & Lichliter, and that they had nothing to do with making said statement or obtaining the goods. It is contended by counsel that, under the facts disclosed by the evidence, the criminal court of the city of St. Louis had no jurisdiction of the case, but that defendants should have been indicted and prosecuted in Jasper county; and, in support of this contention, has cited the case of *State v. Shaeffer*, 89 Mo. 271, 1 S. W. Rep. 293. The indictment in that case was founded on section 1561, Rev. St.; and it is there held that, as the money obtained by the fraudulent representation was paid to Shaeffer's agent in New York, the offense, if any, was committed in New York, for which a prosecution in Missouri could not be maintained. That case, so far from sustaining the contention made, overthrows it; for in it the case of *Norris v. State*, 25 Ohio St. 217, which is analogous and on all fours with the case in hand, is approvingly cited and quoted from. There the defendant was a resident of Clark county, and by fraudulent representations as to his solvency, contained in a letter sent by him to the Akron Sewer-Pipe Company, located in Summit county, induced said company to ship him by rail to Clark county a lot of sewer-pipe. He was indicted in Clark, where he received the pipe, sent by railroad by the sewer-pipe company; but the supreme court held that the crime was committed in Summit county, remarking "that the weight of authority is clearly that the railroad company was the agent of defendant for receiving the goods at Akron, and carrying them to Springfield, and the delivery to it by the sewer-pipe company was, in legal contemplation, a delivery of the goods to defendant at Akron."

It is also insisted that the court erred in receiving evidence as to the conduct of defendants after receiving the goods, in disposing of them, and appro-

priating to themselves the proceeds of sales, up to the time of the assignment. This evidence, we think, was admissible, as bearing upon the question of defendants' intent in obtaining the goods. In the case of *State v. Dennis*, 80 Mo. 589, Dennis obtained by false pretenses 24 mules in Randolph county, which were shipped to St. Louis, and evidence was received showing that he got the money for which they were sold in St. Louis, and ran off with it, as tending to show his intent in obtaining the mules was to cheat and defraud. The objection made to the reception of expert testimony as to what the books of the firm of Fallis & Lichliter showed the financial condition of the firm to be, will not be considered here, for the reason that the record does not show that any exception was saved to the action of the court in overruling it.

The following instruction was not given as asked, but was modified by the court, and then given, and this action is also complained of as error: "The court instructs the jury that although they may believe from the evidence that the defendants, or either, did make false entries in the account-books, or issue fraudulent notes, or that they did dispose of, appropriate, conceal, or make way with, by themselves or others, of assets or moneys of the firm of Fallis & Lichliter, still, unless the jury further believe from the evidence, beyond a reasonable doubt, that the defendants did make, and were present, counseling, aiding, and abetting the making of, the statement to Samuel Cupples & Co., introduced in evidence, and thereby did procure the property mentioned in the indictment, with intent to defraud Samuel Cupples & Co. out of the purchase price thereof, the jury will return a verdict of not guilty." This instruction the court gave, with the following modification: "But by the terms 'were present, counseling, aiding, and abetting the making of the statement,' is not meant that they were all actually present at the very time when said statement was reduced to writing, but that the statement was the result of a common understanding and fraudulent conspiracy on the part of said Mart P. Fallis and the defendants, primarily or at the time entered into by them. In other words, the making of said statement consisted of something more than the mere writing of it. And hence, if they advised, counseled, or abetted Mart P. Fallis, or invited him to make it, before he actually reduced it to writing, and also so feloniously, designedly, with an intent to cheat and defraud Cupples & Co., and with knowledge that it was false, they made it as much as he, in contemplation of law." The addition to or modification of the instruction is simply explanatory of the terms "present, counseling, aiding, and abetting," which are used in the instruction, and does not in any manner change the principle announced in the instruction as asked. While the modification may be subject to verbal criticism, its meaning is plain enough, and we cannot see how it was calculated to mislead the jury. The instructions given by the court of its own motion, in connection with those given for defendants,—all asked by them being given, the last one of which was given with the modification above noted,—presented the whole case fairly to the jury. The affidavits accompanying the motion for a new trial fail to disclose any diligence whatever on the part of defendants to discover the evidence which it is proposed to offer in the event of a new trial being granted. They do not allege that the evidence first came to their knowledge after the trial; nor do they aver that, before the trial, they had no knowledge of it. Finding no error in the record, the judgment is affirmed.

All concur.

STATE v. RIDER.

(Supreme Court of Missouri. June 4, 1888.)

1. HOMICIDE—EVIDENCE—OBTAINING WEAPON BY ROBBERY.

Upon trial for murder, evidence that defendant, within half an hour of the time of the homicide, and within a short distance from the place thereof, aimed his gun at a third person, and compelled him to give defendant his pistol, is admissible as tend-

ing to show deliberation and premeditation on the part of defendant in arming himself for the encounter with deceased, and as a connecting part of the entire transaction.

2. **SAME—RELEVANCY.**

Where defendant, on trial for murder, contended that deceased assaulted him, evidence that deceased told a witness that he had had sexual intercourse with defendant's wife did not tend to prove that such assault was made, and was properly refused.

3. **SAME—RES GESTÆ.**

The declarations of defendant on trial for murder, made to a witness a few minutes after the homicide, and after defendant had gone two or three hundred yards from the scene thereof, are not part of the *res gestæ*, and are not admissible in evidence.¹

4. **SAME—INSTRUCTIONS—SELF-DEFENSE.**

In a trial for murder, an instruction that if defendant, arming himself, went in search of deceased, with the intention of killing him, and, finding him, did willfully, deliberately, premeditatedly, and of his malice aforethought so kill him, and at the time deceased was not threatening or attempting to assault defendant, then there is no self-defense, and the jury should convict, is not erroneous.

5. **SAME.**

In a trial for murder, an instruction that previous threats alone, unaccompanied by any hostile demonstration at the time of the homicide, would not justify the killing, and which contains nothing that could be fairly construed to intimate that such threats might not be considered for any other legitimate purpose, is not erroneous.²

6. **SAME—DEGREES OF HOMICIDE.**

Where the evidence shows that defendant either deliberately shot deceased for revenge, or shot him in self-defense, there is no error in not giving the jury instructions defining any lower grade of homicide than murder in the first degree.

7. **SAME—REPETITION.**

Requested instructions, fully covered by other instructions given in unobjectionable phraseology, will be refused.

8. **CRIMINAL LAW—CHANGE OF VENUE—DISCRETION OF COURT.**

The action of the trial court on an application for change of venue in a prosecution for murder will be held to be conclusive, in the absence of palpable abuse of judicial discretion prejudicial to defendant.

9. **WITNESS—CREDIBILITY—REPUTATION.**

Where defendant in a criminal case testifies in his own behalf, evidence of his general reputation for truth and veracity, chastity and morality, may be introduced by the state.

Appeal from Saline criminal court; JOHN E. RYLAND, Judge.

Defendant was found guilty of murder in the first degree. The second instruction requested by him was as follows: "The court instructs the jury that if they believe from the evidence that defendant ascertained that his wife had left his home, and he believed that the deceased, R. P. Tallent, had accompanied her, then the defendant had the right to go in search of her, and to carry with him a loaded shot-gun. And the jury are further instructed that the defendant had the right to inquire of deceased, Tallent, as to the whereabouts of defendant's wife, and if the jury believe from the evidence that defendant did make such inquiry of deceased, and that the deceased raised an axe in his hands in an attitude to strike, and in a threatening manner towards the defendant, and that the defendant apprehended, and had reasonable cause to apprehend, that the deceased designed to kill him, or do him some great bodily harm, and that defendant had reasonable cause to believe, and did believe, that there was immediate danger of such design being accomplished, and that the defendant shot the deceased for the purpose of preventing such design from being accomplished, then the verdict must be not guilty."

Boyd & Sebrée and Davis & Wingfield, for appellant. *The Attorney General and A. F. Rector*, for the State.

¹ See note at end of case.

² Threats of personal injuries, or against the life, will not justify the taking of the life of the party making them, when he is doing nothing to put such threats into execution, or to do other wrong. *Gilmore v. People*, (Ill.) 15 N. E. Rep. 738.

BRACE, J. On the 23d day of July, 1883, the defendant and one Rousey P. Tallent were living in the same neighborhood, in the Miami bottom of the Missouri river, in Saline county, about six miles from the town of Miami. Both went to the town of Miami in the morning of that day; Tallent returning home about noon, and Rider, the defendant, about 4 o'clock in the afternoon. During their absence, a woman who is sometimes called Mrs. Moore, and sometimes Mrs. Rider, in the record, who was examined as a witness by the state without objection, but whom Rider claimed to be his wife, and with whom he had been living as such for three years previous, and by whom he had a child, then about two years old, left Rider's house with her child, and went to Tallent's. After Tallent ate his dinner, he rode to the river, procured a skiff, was met at the bank of the river by his wife, this woman, and another neighbor lady, and he took Mrs. Rider in the skiff across the river, leaving her on the other side. About an hour before sundown, he started to recross the river; and returning to his home a little after dark, in a path leading to his house, he was met by the defendant within a few steps of his door, by whom he was shot and killed. Rider, upon returning to his home, found his wife gone, and thereupon commenced making inquiries for her of his neighbors; satisfied himself that she had gone to Tallent's; that Tallent had gone away from home that afternoon; that she had been taken across the river; and that Tallent was the man who had taken her off. The evidence for the state tended to prove that thereafter he armed himself with a double-barreled shotgun; afterwards procured a revolver; and about dusk proceeded towards Tallent's home for the purpose of killing him. The evidence for the defendant tended to prove that after he got the shotgun, at the house of his brother-in-law, Mr. Cockrill, he went in search of his wife, going first to the home of a Mr. Merrill, who lives but a short distance from Tallent's; and he, in his evidence upon the stand, gives the following account of what transpired after he got the gun: "I got me a shotgun there, and came on back; passed Mr. Bristoe's, and went down to Mr. Merrill's; and me and Mr. Merrill went to this path, leading from the river to Mr. Tallent's. When we came to that path, which ran north and south, Mr. Merrill stopped, and I went on in the direction of Mr. Tallent's home, and went to the south part of his house, and looked to see if I could learn anything about where my wife was. I discovered no sign of her there; and I started back north on this path, leading towards the river, that I had come up; and, going down the slough bank, I met Mr. Tallent. I spoke to Mr. Tallent, and asked him if he knew where my wife was, and he made this remark: that 'I have taken her where you won't find her; and, God damn you, we might as well settle this right here.' He started at me with his axe, in a striking posish, and he advanced a few feet, and I fired. I fired one time. * * * Well, after that, I started east towards Mr. Cockrill's house. I met Mr. Merrill; came across him near at his house. I reckon it was some two or three minutes after the shot; * * * some two hundred yards, may be, from Merrill's house; I am not certain of the distance; could not tell you." At the September term, 1885, of the criminal court of Saline county, the defendant was indicted for the homicide, and in November was tried, found guilty of murder in the first degree, and was sentenced to be hanged. He appealed to this court, and at the October term thereof the judgment was reversed, and the cause remanded. 90 Mo. 54, 1 S. W. Rep. 825. At the March term, 1887, of the criminal court, defendant's application for a change of venue on account of the prejudice of the inhabitants of Saline county was overruled; and in January, 1888, he was again tried in that court, and again found guilty of murder in the first degree; and from the judgment and sentence then rendered, after an unsuccessful effort for a new trial and in arrest of judgment, he again appeals to this court, assigning various errors, that will be noticed in their order.

1. On the application for a change of venue the weight of the evidence was

that the defendant could have a fair trial in Saline county; nor is the action of the court in overruling the application urged here as error. On that issue, in cases even where the evidence is conflicting, the action of the trial court will be held to be conclusive unless there has been a palpable abuse of judicial discretion, to the prejudice of the defendant. *State v. Hunt*, 91 Mo. 490, 3 S. W. Rep. 858, and cases cited.

2. It is urged that the court erred in failing to give the jury instructions defining any degree of homicide below murder in the first degree, and in giving instructions 2 and 3 as follows: "(2) The court instructs the jury that if they believe from the evidence that, prior to the killing of Tallent, the defendant, George M. Rider, prepared and armed himself with a gun, and went in search of and sought out Tallent, with the intention of killing him, or shooting him, or doing him great bodily harm, and that he found, overtook, or intercepted Tallent while the said Tallent was on his way home from the Missouri river, in the county of Saline and state of Missouri, and then and there did willfully, deliberately, premeditatedly, and of his malice aforethought, (as these terms are defined in the first instruction for the state,) shoot at and kill Tallent, and, at the time of said shooting, Tallent was not then making any threats of violence against defendant, and was not attempting to assault the defendant, and that defendant had no reasonable cause to apprehend immediate danger to his person from Tallent, then there is no self-defense in this case of which the defendant can avail himself, and the jury should convict. (3) Although the jury may believe from the evidence that, prior to the time he was shot, the deceased had made threats against the defendant, yet this fact alone does not justify, excuse, or palliate the offense of murder, provided the jury shall further believe from the evidence that, at the time deceased was shot, he made no threats against the defendant, and made no attacks or assault upon defendant, and made no demonstration of violence against defendant." The supposititious passion or frenzy which ingenious counsel argue swept through the mind of the defendant upon suddenly beholding before him the man who had inflicted upon him an injury that had wounded his tenderest sensibilities, enhanced by the gross manner in which that man avowed and emphasized it, and which for the moment shook the foundations of right reason in his mind, to the extent of depriving him of that coolness and deliberation essential to a mind capable of committing murder in the first degree, is not to be found in the evidence of either the state or the defendant. His own declarations tended to show that this woman had left him before; that, before he ascertained certainly that she had gone again, he was entertaining the idea that she intended to go; and that he had learned that an arrangement had been made by one of his neighbors for a skiff, which he suspected was to be used for that purpose; and, when he found that she had gone, the evidence of the state tended to prove that he went upon the hunt, not of his wife, but for the man who had taken her off; that he followed the trail systematically and methodically; and when it pointed to Tallent's house, and satisfied him that he was the man, he went coolly about, for the next hour or two before the homicide, making his arrangements to go there; made arrangements with a young man to go to his house and milk the cows; went a distance, to his brother-in-law's, and armed himself with a double-barreled shotgun; taking up his course towards Tallent's house about dark. On the road, he meets this same young man, from whom he procured a revolver. He then proceeds to Merrill's, to the house of the deceased, and to the scene of the homicide. The evidence of the defendant tended to prove that, with like knowledge and calmness of mind, he in like manner prepared himself, and went to that scene, with no other feeling or motive than to find his wife, or learn her whereabouts; and he, who alone of the living saw and knew what transpired when he and the deceased met, in giving the details of the tragedy, does not give the faintest hint that, when he fired the fatal shot, he was actuated by any

other impulse or motive than that of defending himself from the impending danger of an unprovoked and dangerous assault then being made upon him by the deceased with a drawn axe. If that shot was the result of a sudden gust of passion other than that arising from the assault made upon him, it certainly has left no trace upon the cool surface of the defendant's statement. As the case is presented on this record, the defendant either deliberately shot for revenge, or in the necessary defense of his person from impending danger. He was either guilty of murder in the first degree, or he ought to have gone acquit. And we find no error in the failure of the court to instruct on murder in the second degree, or any lower grade of homicide; and none in giving the second instruction, from which has been eliminated the error which was found in a similar instruction when the case was here before. It does not follow, because the evidence may warrant an instruction on justifiable homicide, that there must necessarily be one given on murder in the second degree, or some lower degree of homicide. *State v. Sneed*, 91 Mo. 553, 4 S. W. Rep. 411; *State v. Blunt*, 91 Mo. 503, 4 S. W. Rep. 394; *State v. Collins*, 81 Mo. 652; *State v. Wilson*, 86 Mo. 520; *State v. Kilgore*, 70 Mo. 559. In the third instruction the court did not underlake to lay down the law of self-defense. The law on that subject was properly and favorably declared in two instructions given for the defendant. The jury were simply told in this instruction that the homicide could not be justified by the previous threats of the deceased alone, unaccompanied by any hostile demonstration at the time; nor can anything therein contained be fairly construed to intimate to the jury that such threats might not be considered by them for any legitimate purpose in the case. The criticisms of counsel on this instruction are unwarranted.

3. There was no error in refusing defendant's second instruction, which was upon the law of justifiable homicide, and which was fully covered by two other instructions given for the defendant in unobjectionable phraseology.

4. There was no error in admitting the evidence of Milton Campbell, who about dusk on the evening of the homicide, and within half an hour thereof, met the defendant with his gun on the road within a quarter of a mile of Tal-ent's house, and who testified that defendant drew his gun on him, and compelled him to give him (defendant) his pistol. Deliberation and premeditation are essential elements of the crime with which defendant was charged. Preparation beforehand of the means by which to perpetrate the homicide tend to prove the existence of these elements. The state had the right to show that defendant armed himself in preparation for the commission of the homicide; and, although in that preparation he may have committed another crime, the evidence thereof was none the less admissible. And in this case, where the pistol was procured within a half hour of the time when, and within a quarter of a mile of the place where, the homicide was committed by the defendant, while on the road to that place, partially armed already for the purpose, it may be said to be but a connecting part of the entire transaction, commencing with the defendant's arming himself with the shotgun, and ending with the killing of the deceased; and for this reason, also, the evidence was admissible. *State v. Nugent*, 71 Mo. 136; Whart. Crim. Ev. § 31. It is not perceived how the evidence of Dobyons, that deceased told him, about two weeks before the homicide, that he had had sexual intercourse with Mrs. Rider, could in any manner tend to prove that deceased assaulted defendant, as testified to by him. Nor do we think the court erred in refusing to permit evidence to be given of the declarations of the defendant, made to Merrill a few minutes after the homicide had been committed, and after the defendant had gone two or three hundred yards, in the night, from the scene thereof. They were not a part of the *res gesta*, and were not admissible for any purpose. *State v. Brown*, 64 Mo. 367; *State v. Walker*, 78 Mo. 380; Whart. Crim. Ev. § 262 *et seq.* The court, in this as in the former trial, after the defendant had testified as a witness in his own behalf, permitted the state to introduce evidence

as to his general reputation for truth and veracity, chastity and morality. It was not held to be error then, and we see no good reason for holding so now. It is in harmony with all the rulings of this court on that subject since the adoption of the statute permitting a defendant in a criminal case to testify in his own behalf. *State v. Rider*, 90 Mo. 54, 1 S. W. Rep. 825. In conducting the examination of witnesses on the question of character, the court and counsel met with the usual difficulty in getting the witnesses to answer the questions properly; but, upon the whole, we find no avoidable error in the examination prejudicial to the defendant. There was no error in the action of the court in sustaining the objection to the remark of counsel for the defendant, which, in the connection used, might be construed as a reflection, in offensive terms, upon the fairness of the court, and which gave no additional weight or force to the argument which that remark concluded, but to which it was superfluous.

Finding no error in the record in this case which calls for a reversal, the judgment is affirmed.

All concur.

NOTE.

RES GESTÆ—DECLARATIONS. The declarations of a party made while doing an act, the nature, object, or motive of which is the subject of inquiry, are admissible in evidence as a part of the *res gestæ*, if they tend to elucidate or give character to the act itself. *State v. Walker*, (Me.) 1 Atl. Rep. 357.

Where, a few minutes after an assault and robbery, the prosecutor described the appearance of his assailants to a police officer, held such statements were admissible as part of the *res gestæ*. *State v. Horan*, (Minn.) 20 N. W. Rep. 905.

What was said to a person charged with larceny at the time he acquired possession of the stolen property is admissible as part of the *res gestæ*. *State v. Jordan*, (Iowa,) 29 N. W. Rep. 480; *State v. Kelly*, (Iowa,) 11 N. W. Rep. 635.

Statements of deceased, made some days after the shooting, are not admissible in evidence as part of the *res gestæ*. *People v. Wasson*, (Cal.) 4 Pac. Rep. 555.

In a prosecution for rape of a child, her answers two or three days after the alleged injury, to the questions of her mother, are admissible as part of the *res gestæ*. *People v. Brown*, (Mich.) 19 N. W. Rep. 172.

Where one starts out from his house with a loaded revolver in his pocket, and proceeds directly to a fatal encounter with an enemy, his statements to his wife on starting out may be admitted as part of the *res gestæ*, tending to show that he did not go out for the purpose of a hostile meeting. *State v. Cross*, (Iowa,) 26 N. W. Rep. 62.

On the trial of a man for procuring an abortion, the declarations of the woman upon whom the abortion was produced, narrative of a past occurrence, and constituting no part of the *res gestæ*, are inadmissible in evidence. *People v. Murphy*, (N. Y.) 4 N. E. Rep. 326.

In the trial upon an indictment for murder the exclamations of the deceased immediately upon the firing of the shot by which he was killed, and in answer to a question asked within a very few minutes thereafter, are admissible as part of the *res gestæ*. *People v. Simpson*, (Mich.) 12 N. W. Rep. 662. The defense may show conversation at the time. *Mack v. State*, (Wis.) 4 N. W. Rep. 449.

A witness, in describing a fight, fixed the time at which he became aware of a certain occurrence therein by saying: "I did not know it until D. said he knew M. had a knife;" the remark of D. mentioned by the witness having been made then and there, while the fight progressed. Held, this remark was properly admitted in evidence as part of the *res gestæ*. *Barrow v. State*, (Ga.) 5 S. E. Rep. 64.

A declaration made by an officer after going two and a half blocks from the place where he had made a levy under an execution, to the effect that the defendant in execution had demanded that his exemption should be laid off, is not a part of the *res gestæ*. *Simon v. Manning*, (N. C.) 6 S. E. Rep. 101.

Declarations of deceased to his father, to the effect that defendant shot him, made 15 or 20 minutes after the shooting, and as soon as deceased could speak, are admissible as part of the *res gestæ*. *Irby v. State*, (Tex.) 7 S. W. Rep. 705.

Since the admission of the testimony of the accused in his own behalf, the rule of *res gestæ*, as applied to his own declarations, is not so rigidly enforced; the jury being properly charged as to its weight. No weight is to be given to a declaration by the accused, unless the jury are satisfied that it was made at a time when it was forced out as the utterance of truth by the particular event itself, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for the declarant to say. *U. S. v. King*, 34 Fed. Rep. 302.

On a trial for assault to commit murder, evidence as to acts and declarations of a third party, tending to show a conspiracy between him and defendant to commit the crime,

is admissible as part of *res gestæ*. *People v. Bentley*, (Cal.) 17 Pac. Rep. 486. See, also, *Railroad Co. v. Crowder*, (Tex.) 7 S. W. Rep. 709, and note, as to when a declaration is admissible as part of the *res gestæ*.

CARNEY *et al.* v. CARNEY *et al.*

(*Supreme Court of Missouri.* June 4, 1888.)

1. STATUTE OF FRAUDS—AGREEMENTS RELATING TO LAND—EXECUTED CONTRACT.

Defendants, under a verbal contract with their father to pay the interest and debt due on certain land for the purchase price, and to take care of their father and mother for life, and in consideration thereof to have the land, had for 15 years labored on the land, paying debts and liabilities, and taking care of their parents according to the contract. *Held*, that the contract was so far executed by them as to take it out of the statute of frauds.¹

2. EJECTMENT—EVIDENCE—ADMISSIONS OF DECEASED GRANTOR.

Where defendants, in an action of ejectment, claim title to the land involved through a verbal contract with their father, since deceased, evidence of statements made by the father to others in relation to the contract may be received in connection with other testimony.

3. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

An objection to the competency of a witness, on the ground that the other party to the transaction testified to is dead, will not be considered by the appellate court, when that specific objection to the evidence was not expressly raised in the lower court.

4. SAME—PRESUMPTIONS.

The ruling of the trial court, excluding certain records and papers of the probate court, will be presumed to be correct where there is nothing in the record to identify or show what those papers were.

Appeal from circuit court, Knox county; BEN E. TURNER, Judge.

Ejectment by Jackson F. Carney and others against Isaac Carney and George

S. Carney. Judgment for defendants. Plaintiffs appeal.

S. F. Cottey, for appellants. *O. D. Jones*, for appellees.

RAY, J. This is an action of ejectment, with petition in the ordinary form. The plaintiffs (with the exception of Cottey, who is a purchaser from one of the heirs) and defendants are all children of one Alexander Carney, deceased, who died in 1879. Plaintiffs claim five-eighths of the land in controversy as heirs of said Carney, while the defendants, Isaac and George S. Carney, who are in possession, claim the entire tract under the parol agreement, alleged in the answer to have been made with their said father in 1865 or 1866, by the terms of which they were to pay the interest and debt on the land, take care of their father and mother, who were then old, as long as they lived, which they alleged has been done by them, and in consideration thereof they were to have the land in dispute as their own. The answer, in addition to the said parol agreement, sets up the statute of limitations, which, however, cuts no figure in the case. The plea of the attempted execution of a will by said Alexander Carney, devising the lands in question to defendant Isaac, in furtherance of said verbal agreement, is also immaterial, even if well pleaded, and need not be noticed further in this connection. The pleadings are of unusual length, and a further statement of them, we think, is unnecessary to a proper determination of the questions involved in this appeal, which is taken by plaintiffs from the judgment in the cause had and obtained in favor of defendants.

The position of plaintiffs, which was asserted at the trial in several ways, and is now urged here, that the verbal agreement set up in the answer, and relied on by defendants, is within the statute of frauds and perjuries, is, we think, under the facts, untenable. It appears that Alexander Carney, de-

¹ As to the part performance that will take a parol contract for the conveyance of land out of the statute of frauds, see *Martin v. Patterson*, (S. C.) 2 S. E. Rep. 859, and note; *Clark v. Clark*, (Ill.) 18 N. E. Rep. 553; *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 297; *Stub v. Grimes*, (Minn.) 37 N. W. Rep. 445; *Pitt v. Moore*, (N. C.) 5 S. E. Rep. 889; *Everett v. Dilley*, (Kan.) 17 Pac. Rep. 661; *Evans v. Miller*, (Minn.) 86 N. W. Rep. 640; *Reno v. Moss*, (Pa.) 13 Atl. Rep. 716; *Burns v. Fox*, (Ind.) 14 N. E. Rep. 541.

ceased, bought the land, and gave bond for the purchase money to Knox county in 1855; that he moved upon it shortly thereafter, and that in 1865 or 1866 some 10 or 20 acres had been put in cultivation, and a log house built thereon; that, being old and unable to do much work, in debt for the land and apprehensive about payment of the interest and balance of the purchase money due the county, he at that time made the said verbal agreement with his two sons, who were then living with him on the place; that shortly thereafter said Alexander Carney and defendants went to the county-seat with a view of having the county court transfer the lands to defendants; but the court was busy that day, and told them to come back, which, however, it seems they neglected to do, and no further action in that behalf was ever taken. It seems that the other children, who are plaintiffs in the action, all married, and at various times, long prior to the death of said Alexander Carney, went to their own homes while the two defendants continued to reside on the place with their father, and after said parol agreement in 1865 or 1866, and in pursuance thereof, possessed and cultivated the farm, furnished the family supplies, did the cooking and farm work generally, paid some interest on the bond for the purchase money, and perhaps one payment of \$50 on the principal; also some taxes and some other debts of their father, and at the date of suit had extended the cultivation of the farm so as to embrace some 65 acres. The father and mother continued to live on the place with their said sons until their death; the death of their mother occurring, we believe, in about the year 1870, while that of their father occurred, as stated, in the year 1879. The evidence, as preserved in the bill of exceptions, is perhaps in some respects not altogether as full and satisfactory as it might be, but in view of the fact that the jury have found in favor of the equitable right of defendants under said parol contract with said Alexander Carney, deceased, under instructions which required them to find the evidence in that behalf "clear and satisfactory to their minds," and as the trial judge and chancellor was satisfied with the finding of the jury, to whom he submitted the equitable issues in the cause, we feel constrained to defer to such finding under all the facts and circumstances. In this view of the evidence the parol agreement was in fact made as alleged, and has been so far executed by the defendants, by the 15 or 20 years of labor they have put in upon said farm, possessing and cultivating it under their said claim, paying debts and liabilities, and taking care of their parents in accordance with the terms of said contract, that it would be inequitable if the same was not now deemed to be executed as against said Alexander Carney and the heirs claiming under him. The statute of frauds is not applicable to the facts of the case. *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. Rep. 107, and cases cited.

2. The point is made in this court that George S. Carney, one of the defendants, who testified for defendants as to said verbal contract, was incompetent for the reason that his father, who was the other party to said contract in issue and on trial, was dead. But it is urged in reply, on defendant's behalf, that said objection to his competency as a witness, even if well taken, was not made at the trial, and is urged here for the first time, and therefore, under repeated rulings of this court, cannot now be considered. We have made a careful examination of the record in this behalf, and find it to be as follows: When said George S. Carney was offered as a witness, no objection to his competency as such was made. After he was cross-examined, "plaintiffs objected to all evidence in relation to a verbal contract concerning said farm, as irrelevant, incompetent, and immaterial." The same objection was also made to the testimony of the witness Linville, and perhaps to that of other witnesses. The objection made at the trial as to competency was manifestly that the verbal contract was within the statute of frauds. In the demurrer to the answer, and motion to strike out parts of the same, and in instructions asked on behalf of plaintiff, and in motion for new trial, the objection always made and

presented to the trial court was that the alleged contract was not in writing, and that evidence thereof was incompetent for that reason. The incompetency of the witness, for the reason urged, was not made at the trial, no ruling was had thereon, and no exception taken in that behalf, and for this reason the objection comes too late in this court. *Primm v. Raboteau*, 56 Mo. 407; *Sumner v. Rodgers*, 90 Mo. 330, 2 S. W. Rep. 476; *Russell v. Glasser*, 93 Mo. 353, 6 S. W. Rep. 362.

3. Some question is made here as to the testimony of the witnesses Strange and Baltz as to the declarations of Alexander Carney, in substance that they had heard him say that he was not able to pay out, and that the farm belonged to the boys, Sam and Isaac. In and of themselves these statements may be, as plaintiff contends, "loose and disjointed," and insufficient to satisfactorily establish any definite or certain contract, or any of its terms. Loose declarations of persons, since dead, are to be received with great caution, and testimony and verbal admissions of parties since dead must be clear, strong, and unequivocal if relied on; but statements, such as are under consideration, are, we think, relevant and competent, and may well be received in connection with other testimony in the cause.

4. The remaining question is as to the propriety of the court's action in excluding the "records and papers" of the administration of the estate of said Alexander Carney in the probate court of Knox county, and refusing plaintiffs' offer to "prove by said records and papers" that the administrator had paid taxes on said land and interest on the bond to Knox county, and had paid the expenses of the last sickness and funeral of said Alexander Carney, and had inventoried and rented said land as the property of the estate. None of said "papers or records" in the administration proceedings have been preserved in the transcript, and there is nothing to identify or show what they were. In the entire absence of these papers from the record, it is impossible for this court to determine whether they were competent in rebuttal of defendants' theory or not, and in their absence the ruling of the trial court in that behalf will be presumed to be correct, even if there was no other objection to their admissibility for each purpose. Records and proceedings of common-law court, when material, are always admissible to prove that such records and proceedings were made and had, but generally are not evidence of the truth of the facts therein recited. This leads to an affirmance of the judgment, and it is accordingly so ordered, with the concurrence of the other judges.

MAYS v. PRYCE *et ux.*

(Supreme Court of Missouri. June 4, 1888.)

1. HUSBAND AND WIFE—CONVEYANCE BY WIFE—ACKNOWLEDGMENT—IMPEACHING THE CERTIFICATE.

A wife who, with her husband, executed a deed, was not informed by the notary taking the acknowledgment, neither did she know, that the deed conveyed the land included therein, and did not acknowledge nor did he ask her whether she executed the deed freely, without compulsion or undue influence of her husband. Rev. St. Mo. § 680, enacts that no acknowledgment of a writing conveying real estate, by a married woman, shall be taken unless she is first made acquainted with the contents of the instrument, and shall acknowledge, on an examination apart from her husband, that she executed the same freely, and without compulsion or undue influence of her husband. *Held*, that said deed was, as to the married woman, invalid, although the certificate of acknowledgment showed on its face full compliance with the statutory requirements.

2. SAME—NOTARY AS WITNESS.

In such case, the testimony of the notary who took the acknowledgment is admissible to contradict the statements of his certificate.

3. SAME—SETTING ASIDE DEED—DECREE.

In such case, a decree setting aside such deed *in toto* for such defect, and vesting said married woman with all the rights of the grantee, is erroneous, the proper decree being simply to set aside the deed as to her.

4. EJECTMENT—EVIDENCE—PLEADING AND PROOF.

In ejectment against husband and wife, where the wife's answer avers, and the replication does not controvert, that the wife was, at the time plaintiff acquired the title under which he claims, the owner in fee of the real estate in question, the sole issue being the validity of a certain deed made by her, plaintiff cannot, without amendment, prove another title in himself, derived from the husband, and not put in issue by the pleadings.

Appeal from circuit court, Lewis county; BENJAMIN E. TURNER, Judge.

Ejectment by John Mays against Thomas Pryce and Susan, his wife, to recover certain lots in the town of La Grange, in Lewis county. Trial by jury; verdict for defendants; judgment thereon; and plaintiff appealed. Rev. St. Mo. § 680, enacts that no acknowledgment of a writing conveying real estate, by a married woman, shall be taken unless she is first made acquainted with the contents thereof, and shall acknowledge, on an examination apart from her husband, that she executed the same freely, without compulsion or undue influence of her husband.

Blair & Marchand, for appellant. *Anderson & Scofield*, for respondents.

BRACE, J. This was an action in ejectment in the circuit court of Lewis county, instituted by the plaintiff against the defendant Thomas Pryce, to recover the possession of lots 6, 7, 8, 9, and 10, in block 24, in Wright & Shropshire's addition to the town of La Grange, in said county. The petition was in the usual form. Summons issued, returnable to the March term, 1885, of said court, and served upon said defendant, at which term the parties appeared, and on motion Susan Pryce was made a party defendant, and leave granted both defendants to answer 60 days before next term. On the 27th of June following, in vacation, the said Susan filed her separate answer to the petition, in which, after denying generally each and every allegation in the petition, she set up substantially the following defense: That she is a married woman, and the wife of her co-defendant; that she is the owner in fee-simple of the real estate described in the petition, and has been ever since the _____ day of _____, 18—; that, being so the owner thereof, on or about the 21st of June, 1881, she was induced by the false representations of her husband to sign and acknowledge a certain deed of trust of that date executed by her said husband, conveying said real estate to one Joseph T. Benson, as trustee, to secure the payment to plaintiff of certain promissory notes executed by her husband to plaintiff for the purchase money of a certain quarter section of land, which was also included in said trust deed; that at the time she executed and acknowledged said deed she was not acquainted with the contents thereof, and did not know that said lots were included therein; that the notary public by whom her acknowledgment was taken did not read the same to her, and wholly failed and neglected to make her acquainted with the contents thereof, and that, if she had known that said lots were included in said deed of trust, she would not have signed or acknowledged; that she executed said deed freely, and without compulsion or undue influence of her said husband; that the sole and only title the said plaintiff has in and to said lots is derived through the trust deed aforesaid, the sale thereunder by the trustee, and the deed executed by the trustee after the sale aforesaid. Defendant Thomas Pryce did not answer. Plaintiff, at the ensuing September term, filed a reply to the separate answer of defendant Susan, in which, without denying the allegation in the answer that she is and had been since, etc., the owner in fee-simple of the premises, he admits the giving of the deed of trust by defendants, and that he claims title to said lots through a sale thereunder by the acting trustee, and denies specifically all the other allegations of the answer. The case was tried by the court, without a jury, upon the issue made by the answer and the reply. No instructions were asked or given. The court made a finding of the facts, and rendered a judgment and decree for the defendant, from which plaintiff appeals.

On the trial the plaintiff introduced the deed of trust referred to in the pleadings, executed and acknowledged in proper form by the defendants, and including the lots sued for,—the deed of the acting trustee properly reciting his power, the default, notice, sale, and purchase by plaintiff, and in proper form conveying the interest of defendants in said lots to plaintiff; the rental value of the premises was agreed upon; and the plaintiff rested his case. The defendant Susan Pryce was then introduced in behalf of the defendants, and testified directly and unequivocally to the facts, as substantially set up in her answer. Robert M. Wallace was then introduced as a witness in behalf of defendant, who testified that he was a notary public; that he took the acknowledgment of defendants to the deed of trust; and proceeded as follows: "My recollection is that Judge Pryce, one of the defendants, gave the deed to me; took his acknowledgment first, and Mrs. Pryce's next." His attention being directed to the certificate, he said. "That is my certificate of their acknowledgment to said deed, and that is my name to the certificate pointed out by you." Defendants' attorney then asked the witness to state whether or not he read the deed to Mrs. Pryce before he took her acknowledgment, to which question plaintiff's attorney objected for the reason that, if the object is to have the witness restate the facts contained in the certificate, the evidence is unnecessary, and, if the object is to contradict the facts certified to in the certificate, he is incompetent to so testify. He cannot contradict the facts certified to by him. It would be contrary to public policy, and operate a fraud upon plaintiff to permit him to do so. Thereupon, the attorneys for the defendant being asked by the court what they proposed to prove by the witness, stated: "We propose to prove by the witness that he did not read said deed to defendant Mrs. Pryce; that he did not explain it to her; that he did not tell her what real estate was contained in said deed, and did not make her acquainted with the contents thereof before he took her acknowledgment to said deed." Thereupon the objection was overruled, and the witness, over the objection of the defendant, was permitted to testify as follows: "I did not. *Question.* Did you explain the deed to her, or tell her what real estate the deed contained? *Answer.* I did not. When I went to take her acknowledgment I said to her, 'I suppose you have read the deed, and are fully acquainted with the contents thereof;' to which she answered, 'Yes.' *Q.* Did you make her acquainted with the contents of said deed before you took her acknowledgment thereto? *A.* I did not. *Q.* Did you ask her, in taking her acknowledgment to said deed, whether she executed the same freely and without fear, compulsion, or undue influence of her husband, defendant Thomas Pryce?" "I did not. I don't think, but can't state positively, whether I asked her that question or not." To all the foregoing questions plaintiff objected, and the action of the court in overruling the objections was excepted to, and is assigned for error. The witness then further testified: "I then supposed that all that was necessary was to ask her if she knew all that was in it. I do not think I asked her if she executed it freely and without fear, compulsion, or undue influence of her husband. I put the questions about this way: 'Mrs. Pryce, I suppose you are acquainted with the contents of this deed?' She said she was, but I did not read it to her, or explain it to her, or make her acquainted with the contents of it." Here defendant closed her evidence, and the plaintiff was introduced, and testified to some declarations of Mrs. Pryce tending to show that she did know that her lots were included in the deed, after which Mrs. Pryce was again introduced in rebuttal, and testified that she made no such declarations. Thereupon the plaintiff offered to read in evidence two deeds,—one from Sheriff Richardson to one Jeffries, and from Jeffries to Mrs. Susan Pryce, to show that defendant Thomas Pryce had "a possessory right in, was at the institution, and now is, entitled to the possession of, the lots in plaintiff's petition mentioned." To the introduction of this evidence defendant objected. The objection was sustained. Plaintiff excepted, and also assigns this ruling for error.

Since the case of *Wannell v. Kem*, decided in 1874, it has been uniformly held in this state that the certificate of the acknowledgment of a married woman to a deed conveying her real estate, in substantial conformity to the requirements or the statute, is only *prima facie* evidence of the facts therein recited. 57 Mo. 481; *Sharpe v. McPike*, 62 Mo. 300; *Steffen v. Bauer*, 70 Mo. 399; *Clark v. Edwards*, 75 Mo. 87; *Belo v. Mayes*, 79 Mo. 67; *Drew v. Arnold*, 85 Mo. 128; *Webb v. Webb*, 87 Mo. 541. And while it may be said that the presumption in favor of the certificate ought to prevail, unless the contradictory evidence is clear, cogent, and convincing, yet it is not conclusive, and the evidence of competent witnesses may be introduced to show that its recitals are untrue, directly, or to prove other facts from which its falsity may be clearly deduced. The notary, who was most conversant with the facts recited in his certificate, was, of all persons, the most competent to testify on that subject, whether in support or in impeachment of the verity of its statements. The only rule that could possibly close his mouth as a witness would be one making his certificate absolutely conclusive; one that would preclude him or anybody else from calling in question the verity of that certificate. In the argument of the learned counsel for the plaintiff much is said in support of the proposition that such ought to be the rule, but, it having been long settled the other way, it must follow from the rule as now established, that the notary is as competent as any other witness to testify touching his knowledge of the facts recited in the certificate, the verity of which, under that rule, is a legitimate subject of inquiry,—a corollary recognized in the cases cited *supra*, in nearly all of which the notary testified sometimes in support of, and sometimes in impeachment of, his certificate; and his competency was never questioned. There was no error in admitting the testimony of the notary.

No default was taken against the defendant Thomas Pryce, and he seems to have been entirely lost sight of after the filing of Mrs. Pryce's answer. In her answer she denied that he was in possession, and in effect said: "I am in possession of the premises. I was the owner of the fee-simple title at the time you acquired the only title which you claim under the deed of trust, and am the owner of that title. You did not get my title by reason of the fact that I didn't acknowledge the deed of trust in such manner as to convey the title to the trustee." This was the sole issue tendered in the answer. The plaintiff was at liberty to decline or accept it. He accepted it by admitting she was the owner in fee-simple of the premises, and denying every allegation of the defendant tending to show that she had not acknowledged the deed in such manner as to convey that title to the trustee, and by virtue of which he claimed to have acquired it. As the pleadings stood, if the defendant failed to make out her defense, the plaintiff was entitled to recover; if she succeeded, she was entitled to judgment. No issue was raised as to her title when the deed of trust was executed. She claimed, and he conceded, that she was then the owner in fee-simple. The only issue was whether that title passed by the execution of the deed of trust. After all the evidence was in on that issue, the plaintiff proposed, by the deeds of Richardson and Jeffries then offered in evidence, to shift the issue, without amending his pleadings, and to show that, if he did not acquire her fee-simple title by the deed of trust, he may have acquired some title that would avail him in his action for the possession of the premises. The court properly refused to permit the evidence to be introduced. The object of pleading is to produce an issue; and, when that issue is produced, the evidence should be confined to it; and, when the parties have gone to trial, and introduced their evidence on it, it can only be altered or changed by amending the pleadings on terms.

The court found the issue for the defendant, and, among other things, found "that at the time said Susan Pryce executed said deed of trust she was not, by the notary public who took her acknowledgment thereto, made acquainted with said deed of trust, and was not acquainted with the contents thereof, and did not know that it contained the real estate first aforesaid, (lots in petition

described;) and that the said notary did not ask the defendant Susan whether, nor did she acknowledge to him that she executed said deed of trust freely and without compulsion or undue influence of her said husband." If the facts stated in this finding are true, then, under all the decisions in this state cited *supra*, such an acknowledgment of the deed did not comply with the requirements of the statute, and could not impart to the deed of Mrs. Pryce the effect of conveying her interest in the real estate to the trustee; and while this court in actions at law, when the trial court is intrusted with both the law and the facts, will assume the facts to be as that court finds them, (*Hamilton v. Boggess*, 68 Mo. 283,) and even in cases of purely equitable cognizance will defer somewhat to the finding of the chancellor, (*Hendricks v. Woods*, 79 Mo. 590,) it is but proper to remark that the finding of the court in this case is well sustained by the evidence.

The defendant Mrs. Pryce, in her answer, prayed for equitable relief "that the deed of trust and the trustee's deed to plaintiff be set aside and for naught held, and that the title acquired by plaintiff by virtue thereof be divested, and vested in her," etc. The court, in answer to this prayer, decreed "that the said deed of trust, and the said deed of said sheriff, executed as aforesaid, be, and the same is hereby, set aside and for naught held, so far as it affects the said real estate; and that the plaintiff be, and he is hereby, divested of all right, title, and interest therein; and that the title therein be, and the same is hereby, vested in the said Susan Pryce." This decree is too broad. The deed of trust having never been properly acknowledged, the title of Mrs. Pryce never passed to the trustee, and was never acquired from him by the plaintiff. On the issue tried, the court had only to do with the title of Mrs. Pryce. The only relief she was entitled to is to have the muniment of title which, on its face, purports to pass her interest in the real estates set aside as to her, leaving her in just the same situation in respect thereof as if she had never signed or acknowledged it in any manner. With any other interest the court had nothing to do. A decree to the following effect would be within the proper limitation, and would give the relief to which she showed herself entitled on the evidence: "It is further ordered, adjudged, and decreed that the said deed of trust, and the said deed of said sheriff, executed as aforesaid, be, and the same is hereby, set aside, canceled, and for naught held, so far as it affects the right, title, and interest of the said Susan Pryce in and to said real estate, and that said deeds be held to be of no other or greater force and effect than if the deed of trust aforesaid had been executed by the said Thomas Pryce alone." In order, therefore, that a judgment and decree may be entered in accordance with the views expressed in this opinion, the judgment of the circuit court is reversed and cause remanded.

All concur.

LEWIS v. MASON.

(Supreme Court of Missouri. June 18, 1888.)

For original opinion, see 5 S. W. Rep. 911.

BLACK, J., (*concurring*.) We think it proper to make these additional remarks to the opinion filed in this cause. There is evidence tending to prove the following facts: Levy owned a stock of goods valued at \$6,000. He and Landecker combined together to defraud the creditors of Levy, and pursuant thereto, Levy sold the goods to Landecker, for the agreed consideration of \$2,500, on the 12th July, 1883. On the same day Landecker turned the goods over to the plaintiff, an auctioneer and commission merchant, who advanced to Landecker thereon the sum of \$2,500. While the goods were being delivered to plaintiff, the defendant, as sheriff, seized them under the writs of attachment sued out by the creditors of Levy. Plaintiff then brought this suit of replevin, and under the writ got possession of the goods, and subsequently

sold them for \$14,400. The trial court directed a judgment for the plaintiff. It is conceded that in an action of replevin, if one party shows that he has a special interest in the property, and the other has no interest therein, is an entire stranger, then the party having the special interest has a lien thereon for advances, may recover the goods without regard to the amount of his lien, and without ascertaining the amount of the advances. But the present is quite a different case. If, as between Levy and Landecker on the one hand, and the creditors of Levy on the other, the sale was fraudulent, then, as to the creditors, it was void. The sheriff, in defending his possession, under the writs of attachment, had a right to set up as he did and to show that the sale was fraudulent, and therefore void. When he established the fraudulent character of the sale, he established his right to seize and hold the goods, subject to any advances made in good faith by the plaintiff. What, then, is the relation of the parties to this suit to the property in question? The sheriff, for the creditors, represents the general ownership. We say this because the attachments in amount cover the entire value of the goods. The plaintiff has a special interest to the extent of his advances, with a lien therefor on the property. Now, the former decisions of this court establish the doctrine that when, in an action of replevin, it appears the parties to the suit have different interests in the property, their respective rights may be adjusted in the replevin suit. *Dilworth v. McKelry*, 30 Mo. 149; *Fret v. Vogel*, 40 Mo. 149; *Gillham v. Kerone*, 45 Mo. 487; *Boutell v. Warne*, 62 Mo. 353; *Dougherty v. Cooper*, 77 Mo. 535. In the case first cited the suit was by the general owner of the property against a person claiming a lien on it. The verdict was for defendant, and then followed an assessment of the full value of the property in favor of the defendant. This court then said the judgment should have been for the value of the defendant's interest, or for a return of the property until that value was paid. It makes no difference whether the party having a special lien on the property is plaintiff or defendant in the replevin suit. In either case his rights can be adjusted. As said in the case of *Dilworth v. McKelry*, *supra*: "The judgment in each case must be modified by the circumstances so that the merits of the controversy may be settled in one action. The statute is a general one, designed to meet all exigencies which the old action of replevin did; and the equity of its provisions will embrace these modifications of the forms in which judgment should be entered." It is too late to question the authorities before cited. The forms prescribed in the statutes for judgments in replevin suits apply where one party recovers, and as a result the other is adjudged to have no interest whatever in the property. Where, however, both parties have an interest in the property, the judgment must be made to conform to the rights of the parties, and these rights may be adjusted in a replevin suit. In the present case the plaintiff was entitled to retain the amount of his advances and commissions; and, after payment of the costs of this suit, the residue of the \$14,400 should be paid to the sheriff. This, of course, on the theory that the sale by Levy to Landecker was fraudulent. As the rights of the parties may be adjusted in this suit, it cannot be said that the sheriff was bound to tender the advances to plaintiff before the seizure of the goods under the writs of attachment. He had the right to contest the amount and validity of the plaintiff's claim. The only result of a failure to make the tender is that the costs of this suit must be paid by the defendant, as the plaintiff's claim for his advances is a valid one. It can make no sort of difference that Landecker is no party to this suit. If the sheriff wrongfully seized his property, he has various remedies. The argument made in the briefs that the whole of the goods should be returned to plaintiff, so that he may account to Landecker, is no more than to say that the property must be returned to a fraudulent vendee, and thus the fraudulent scheme becomes ratified by the judgment of the court. The law contemplates no such results as we think.

SHERWOOD and BRACE, JJ., agree with me in these additional observations.

STATE *ex rel.* WATERS-PIERCE OIL CO. v. BAGGOT.

(Supreme Court of Missouri. June 18, 1888.)

1. INSPECTION—OIL—DUTY OF INSPECTOR.

Under Rev. St. Mo. §§ 5839, 5840, 5842, 5849, making it the duty of the inspector of petroleum oils to inspect, gauge, and brand oils, and, when contained in large tanks or reservoirs, to see that the oil inspected is placed in the packages in which it is intended to be sold, and to gauge and brand them, and fixing the fee for inspecting, gauging, and branding each barrel or larger or smaller package, the inspector is bound, after having inspected oil in bulk, and seen it transferred to smaller receptacles, to brand them, whether they are barrels, casks, or wagon tanks, as the statute does not require such receptacles to be exclusively barrels, nor fix a limit of the number of gallons such packages may contain.

2. SAME.

But when such inspector has tested the oil in a large reservoir, but has not seen, and has had no opportunity to see, that it was transferred to small tanks on premises other than those where the large reservoir was located, he is not required to gauge and brand such tanks without a new test.

3. MANDAMUS—PROCEDURE—AMENDMENT.

Where, by the return to an alternative writ of *mandamus*, it appears that defendant, an oil inspector, is legally bound to inspect and brand certain tanks, but not all the tanks prayed for, the petition may be amended by striking out so much as relates to the latter, as the article of the practice act concerning amending pleadings and proceedings is extended by Rev. St. Mo. § 3535, to writs of *mandamus*.

Original proceedings in *mandamus*.

C. P. & J. D. Johnson, for relator. A. & J. F. Lee, for respondent.

BLACK, J. The respondent, in compliance with the stipulation of the parties to this suit, pleaded to the petition, treating it as an alternative writ of *mandamus*. The relator demurred to the return, and the case stands on this state of the pleadings. The relator is a corporation engaged in refining petroleum oils in the city of St. Louis, and William Baggot, the respondent, is the state inspector of such oils for that city. The facts as admitted by the pleadings are these: The relator has a large tank or reservoir in which oils for illuminating purposes are stored. A practice has grown up by which the oil was inspected in the reservoir, and then, under the eye of the inspector, transferred to wagon tanks, holding from 285 to 585 gallons; and these wagon tanks were then gauged and branded by the inspector. The oil was then hauled to the retail dealers, and sold to them from the wagon tanks, and placed in small metal store receptacles, which were not branded by the inspector. On the 9th April, 1888, Baggot inspected a sufficient quantity of oil in the reservoir to fill the relator's wagon tanks to the number of 20 or more, and found it to be of the statutory standard for illuminating purposes; but he declined to see the same placed in the wagon tanks, which were then produced and at hand, and he also declined to gauge and brand the same. It is conceded that the relator intended in good faith to haul the oil to the retail dealers, and there sell it to them from the wagon tanks. The respondent admits it to be his duty to inspect the oil in the reservoir in bulk; but he contends that he is only required to gauge and brand it when in barrels "composed of wooden staves and heads, bound with hoops, or in packages of similar construction." His claim, put in a practical shape, is that the retail dealer can only sell from a branded barrel or branded package, and that it is this package from which the retail dealer must sell, and this only which he is required to brand. The material portions of the statute of 1879, the subsequent amendments not affecting these questions, are as follows: "Sec. 5839. It shall be the duty of the inspector or his deputy, when called upon for that purpose by the owner, manufacturer of, or dealer in any of the oils or fluids specified in the preceding section, to promptly inspect, gauge, and brand the same within the city * * * for which he is appointed. When the oil or fluid is contained in a barrel or other small package, he shall take the sample with which

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to make the test from the package to be inspected, gauged, and branded, and in no case shall he mark or brand any package before inspecting the contents thereof in the manner heretofore prescribed. Sec. 5840. All oils or fluids, when once inspected, gauged, and branded, as aforesaid, shall not again be subject to inspection in this state. Sec. 5842. It shall be the duty of the inspector, when requested so to do by the owner or the person having charge of the same, to inspect any of said oils or fluids specified in section 5838, contained in large tanks or reservoirs, by making a single test in the manner prescribed by this article: provided, that the sample with which the test is made shall be taken from the top of the tank or reservoir: and provided, further, that after making such inspection in bulk, the inspector or his deputy shall see the oil or fluid so inspected placed in the packages in which it is intended to be sold, and shall properly gauge and brand said packages in the manner provided for. Sec. 5843. If any person shall sell to any other person whatever any of said oils or fluids for consumption for illuminating purposes within this state, before first having the same inspected as aforesaid, * * * he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, punished by a fine not exceeding \$300, and imprisonment in the county jail for thirty days." Section 5849 fixes the fees for inspecting, gauging, and branding, as follows: "For each barrel or larger package, the sum of twelve cents; for each small package, the sum of six cents; and, when an inspection in bulk is made in the manner provided for in section 5842, the sum of twelve cents for each barrel or other package filled, gauged, and branded, according to the provisions of said section."

The point made by the respondent, that the oil must be put in barrels or other wooden casks of like construction before being branded, is technical, and without merit. Illuminating oils were thus transported to and sold in our market when these statutes were first passed; but it does not follow that there can be no deviation from that method of transportation and sale. The legislature has expressed no intention to prohibit better and safer methods of transportation and storage. The statute speaks of barrels and packages; and in section 5840, which provides for attaching the brand or device, packages only are mentioned. It is clear that the word "package" is used in a broad and general sense, and that it not only includes barrels, but casks and small tanks as well. Nor does the statute fix any specific limit upon the number of gallons of fluid these packages may contain; for it speaks of barrels, and of larger and smaller packages. Perhaps, the equity of the statute is that, when the oil is tested in bulk, the fee for testing, gauging, and branding should be at the rate of 12 cents for each ordinary barrel of fluid. But, however that may be, the fluid may, when tested, be put into barrels, casks, or wagon tanks of the character described in these pleadings; and it is the duty of the inspector to brand these barrels, casks, and wagon tanks. If the oil should be put into a barrel, and then branded, no one could reasonably question the right of the owner to put the barrel on wheels, and peddle out the contents to his customers, who are consumers; and we see no reason why the same thing may not be done by the more convenient method of a wagon tank. The question, then, is whether sales may not be thus made to grocers and small dealers without a new inspection. Section 5842, which makes it the duty of the inspector to test the oil in "large tanks or reservoirs," provides that he shall see the oil "placed in packages in which it is intended to be sold." Sold to whom? The consumer or the retail dealer? The statute does not say. The oil can, of course, only be branded by branding the cask; but the statute is express in saying that, when once inspected, gauged, and branded, it shall not again be subject to inspection in this state. We fail to find anything in the statute which prohibits the transfer of the fluid, in whole or in part, from a branded cask to an unbranded receptacle, or which prohibits the sale of it from such unbranded receptacle. Unless the law so declares, it may be done.

Woodworth v. State, 4 Ohio St. 488; *Cheadle v. State*, Id. 478. The argument against this conclusion of most merit is that the detection of violations of the law will be rendered difficult. This may be true, to some extent; but it is not the test by which the statute must be tried. The theory of the respondent would prevent the sale of oils designed for illuminating purposes in any other way than in branded packages, so that the consumer would be required to buy a whole package or none. The law does not prohibit breaking bulk after inspection, for purposes of sale, and one inspection is sufficient, and we conclude the retail dealers may purchase from branded tanks, and sell the same to consumers without any other or further inspection or branding.

2. It also appears that the relator has on his premises a small store tank, of the capacity of 57 gallons, which is used for the purpose of vending oil therefrom, by open measure, in small quantities, to consumers. To enable the relator to thus sell oil therefrom, it requested the respondent to inspect the oil in the tank, and gauge and brand the tank, which respondent refused to do. It follows from what has been said that it was his duty to inspect the oil; and, if found to be of the statutory standard, to gauge and brand the tank.

3. As to the third and further claim, it is sufficient to say that it relates to three small tanks on premises other than those where the large reservoir was located. It must be taken as admitted that the inspector did not see, and had no opportunity to see, that the inspected oil in the reservoir was actually transferred to these tanks. He was therefore not bound to gauge and brand them without an inspection or test. He can only gauge and brand the packages without a test where the oil has been tested in bulk, and removed to the packages under his eye.

4. It has been several times held that the peremptory writ of *mandamus* must, in all substantial respects, follow the alternative writ; so that, if the alternative writ commands the doing of several things, the relator, to be entitled to the peremptory writ, must show that he is entitled to the performance of all of them. *State v. Railroad Co.*, 77 Mo. 144; *School-Dist. v. Lawlerbaugh*, 80 Mo. 190. But the article of the practice act concerning amending pleadings and proceedings applies to writs of *mandamus*. Section 3585, Rev. St. It is proper practice to amend the alternative writ so that it and the peremptory writ will correspond. High, Extr. Rem. (2d Ed.) § 519; *State v. Francis*, ante, 1. We take what is said in the relator's printed argument to be a sufficient request to amend the pleadings. The prayer of the petition will be amended by striking out so much as relates to the three small metal store tanks, the demurrer to the return will be overruled, and a peremptory writ awarded to conform with the prayer of the petition as amended.

RAY, J., absent. The other judges concur.

STATE v. GRAVES.

(Supreme Court of Missouri. June 4, 1888.)

1. LARCENY—EVIDENCE—SUFFICIENCY.

Upon an indictment for larceny, the evidence tended to prove that the money stolen was taken from a safe in the night-time; that an overshoe track was found near the place of the crime, leading to a place where horse tracks were found, which were followed several miles to the place of defendant's home, who was there next day; that a bottle, identified as having been in his possession on the evening before, was found on the way, near the overshoe tracks; that, on the day of his arrest, defendant stated that he had got his overshoes wet, and asked a man to take care of them, who put them in the stove, though defendant did not ask him to do so; and that defendant, on the day following the larceny, avoided the owner of the money, whom he knew well. There was also evidence tending to impeach the character of some of the state's witnesses for veracity. Held, that a verdict of guilty would not be set aside as contrary to the evidence.

2. CRIMINAL LAW—CONDUCT OF TRIAL—COMMENTS ON DEFENDANT'S FAILURE TO TESTIFY.

Upon trial for felony, defendant having testified upon one point only, the prosecuting attorney, in argument, over the objection of defendant, was permitted to allude to the failure of defendant to testify upon another question. Held reversible error under, Rev. St. Mo. §§ 1918, 1919, which provide that an accused may testify in his own behalf, and may be cross-examined as to any matter testified to; and that his failure to testify shall not be construed against him, or referred to by any attorney in the cause, nor considered by the judge or jury. *BEACE and SHERWOOD, JJ.*, dissenting.

Appeal from circuit court, Hickory county; *W. I. WALLACE, Judge.*

C. S. Essex, Amos S. Smith, and Smith, Silver & Brown, for appellant.
B. G. Boone, Atty. Gen., for the State.

NORTON, C. J. At the May term, 1887, of the Hickory county circuit court, defendant was tried upon an indictment charging him with larceny in stealing \$950 from one William Howard. He was convicted, and his punishment assessed at four years' imprisonment in the penitentiary, and the cause is before us on his appeal.

It is insisted by counsel that there is no evidence to support the verdict, or at least such a lack of evidence as to justify the belief that the verdict was the result of passion or prejudice. The evidence tended to show that Howard, whose money defendant is charged with stealing, was treasurer of Hickory county, and lived at Hermitage, the county-seat; that he kept his money in a safe in a small building in the court-house yard; that on Friday night, the 8th of December, 1883, about 1 or 2 o'clock, his safe was blown open, and about \$950 taken therefrom; that, upon an examination being made, a track made by an overshoe was discovered in the vicinity of the said building; that, on the road leading to Mill, a small bottle was found by the side of, or a short distance therefrom, of a track made by an overshoe, that in a field two horses had been hitched; that they had been taken in at a gate, and hitched in the field, and had been taken out at the same gate; that the tracks of the horses were followed in the direction of Cross Timbers; that beyond Mill Creek a measure was taken of one of the tracks, which corresponded exactly with that taken in the field; and that the tracks went on to Cross Timbers, without turning off on either side of the road. Defendant lived at Cross Timbers, a distance of several miles from Hermitage; and the evidence tended to show that, the evening before the Friday night on which the larceny was committed, defendant was in possession of the same bottle found near the overshoe track, as before stated. It also tended to show that when Howard, whose money had been stolen, arrived at Cross Timbers the next day, (Saturday,) that defendant, with whom he was well acquainted, passed in 15 or 20 feet of him, and seemed to avoid meeting him; that defendant went into a grocery store on the day of his arrest, and said to one Wright, who kept the store, that he had got his overshoes wet in walking across the square in Cross Timbers, and asked him to go and put them away for him; that Wright took them, and put them in the stove, but defendant did not tell him to do so. There is evidence in the record tending to impeach witness Wright, who testified to giving the small bottle, found as aforesaid, Friday evening, to the defendant at Cross Timbers, and also gave the most damaging evidence against defendant. As he was before the jury, as well as the witnesses by whom it was sought to impeach him, it was for them to pass upon his credibility. The circumstances in evidence, above detailed, point strongly enough to defendant as a participant in the larceny charged to prevent us from holding that there is no evidence to sustain the verdict, or such a lack of it as to warrant the belief that it was the result of either passion or prejudice.

The defendant offered himself as a witness, and testified as follows: "I never received any bottle of medicine of Hub Wright. Had nothing to do with it." This was the whole of his evidence. The prosecuting attorney, in

his closing argument, was permitted by the court, without rebuke, (although objection was made,) to comment on the fact that defendant, when on the stand, could have told where he was on the night of the larceny, but failed to make any statement as to where he was. We are asked to reverse the judgment on this ground; and this brings up the question as to whether or not the prosecuting attorney, in commenting upon the evidence given by a defendant in a criminal case, who testifies in his own behalf, is confined to what he swore to on his examination, or whether he may, in addition to making comments on what he swore to, also comment on what he might have sworn to, but did not swear to. By section 1918, Rev. St., it is provided that a defendant criminally charged may testify in his own behalf, and "shall be liable to cross-examination as to any matter referred to in his examination in chief." By section 1919 it is provided that, "if the accused shall not avail himself or herself of his or her right to testify, * * * it shall not be construed to affect the innocence or guilt of the accused, nor be referred to by any attorney in the cause, nor be considered by the court or jury before whom the trial takes place." Under these statutory provisions, it is clear that a defendant who offers himself as a witness cannot be cross-examined except as to such matters as may be referred to by him in his examination in chief; and it would seem to follow necessarily from this that the comments on his evidence should be confined to such matters as he testified about in his examination in chief and cross-examination. If a cross-examination is limited only to such matters as the witness testified about in chief, upon what principle can the right be maintained to comment in argument upon matters about which a cross-examination, under the statute, would not have been allowed? The statute having conferred the right upon such a defendant, when he takes the stand, to testify only in regard to such matters as he may choose, this right of choice would, in effect, be taken away by a ruling which would justify comments to be made, and unfavorable inferences to be drawn from what he might have testified about, but about which he did not testify. Under this statute the defendant has two options; the first of which is that he may elect either to go on the stand or not as a witness; and, second, when he elects to go on the stand, he may testify only to such matters as he may choose. It is clear that under the statute, if he elects not to go on the stand, the fact that he did not testify at all could "neither be construed" to affect his innocence or guilt, nor be referred to by any attorney in the case. If the statute forbids comment upon what he might have sworn to when he elects not to go on the stand, why does it not, in its essence and spirit, when he elects to testify, also forbid comment upon what he might have sworn to while on the stand, and which he elected, as under the statute he had the right to do, not to testify about? In case of *State v. Anderson*, 89 Mo. 380, 1 S. W. Rep. 135, it is said, *in arguendo*, "that under the statute no comment or allusion can be made as to the failure of a defendant to testify in his own behalf. Yet this rule extends no further than the terms of the statute; so that when a defendant in a criminal cause takes the stand, and fails, as in this case, to testify to and explain damaging facts peculiarly within his own knowledge, the inferences from such failure are as adverse as though he was a witness in a civil case." The principle above announced finds support in the cases cited in the opinion from New York, which have been followed in the case of *Brashears v. State*, 58 Md. 568. But the statutes in New York and also in Maryland are unlike ours, in this: that in neither of them is it provided that the cross-examination of a defendant who takes the stand as a witness shall be limited to such matters as are referred to by him in his examination in chief; and under the New York statute, in the case of *Stover v. People*, 56 N. Y. 815, where the doctrine is announced that when a defendant takes the stand, comment might be made on matters not testified about by him, there was a divided court,—two of the judges concurring fully, one in the result, and two dissenting. The

act giving defendants criminally charged the option to testify in their own behalf was first passed in this state in 1877, (Acts 1877, p. 356,) and is similar to the New York statute, in that it did not limit the right of cross-examination. Under that statute, we held in 1878, in the case of *State v. Clinton*, 67 Mo. 380, that a defendant in a criminal case, who went upon the witness stand, thereby subjected himself to the same rules, as to cross-examination and impeachment, as other witnesses. After the rendition of that opinion, the legislature, in 1879, amended the said act of 1877 by limiting the cross-examination to matters referred to in the examination in chief. It has been held, in a number of cases, that when a trial court allows such a defendant to be cross-examined as to matters not referred to in his examination in chief, that such action would be reversible error. And if that would be reversible error, why would it not be reversible error to allow comment to be made upon what would be reversible error if brought out on cross-examination. In the present case, the defendant only testified to the fact that he never "got any bottle of medicine from Hub Wright, and had nothing to do with it." Now, if, on his cross-examination, he had been asked, "Where were you on the night this larceny was committed?" and he had been required to answer over his objection, and had answered he was in Hermitage; or if he had been asked, "Were you at Cross Timbers on the night of the larceny?" and he had answered that he was not,—and the prosecuting attorney had or not commented on this evidence thus brought out, under our rulings in the following cases, the judgment, if rendered against him, would have to be reversed: *State v. Porter*, 75 Mo. 171; *State v. Douglass*, 81 Mo. 231; *State v. McLaughlin*, 76 Mo. 320; *State v. Patterson*, 88 Mo. 88; *State v. Chamberlain*, 89 Mo. 129, 1 S. W. Rep. 145. In the case last cited it is said: "And it has been uniformly held that no question can be asked the defendant on cross-examination except of the character designated by the statute. In this instance the questions propounded to the defendant were altogether beyond the confines of the statute. This error must cause a reversal." If it is reversible error to inquire, on cross-examination, about a matter not referred to in the examination in chief, why is it not reversible error if the prosecuting attorney comment upon a matter concerning, which if the defendant had been required to testify, the judgment would be reversed? Any other ruling or construction of the statute would necessarily have the effect of compelling a defendant in a criminal case either to elect not to go on the stand at all as a witness, or, if he elected to go on the stand, to compel him to testify fully in regard to all matters connected with the charge, even though he might thereby criminate himself.

For the error committed in allowing the prosecuting attorney to comment, without rebuke, (after the attention of the court had been called to it,) as to what defendant might have testified about, but did not testify about, the judgment will be reversed, and cause remanded; in which RAY and BLACK, JJ., concur, and BRACE and SHERWOOD, JJ., dissent.

C. AULTMAN & Co. v. BOOTH *et al.*

(*Supreme Court of Missouri*. June 4, 1888.)

FRAUDULENT CONVEYANCES—CONSIDERATION—PAROL AGREEMENT.

Where the owner of land, being old and infirm, conveyed it to his nephew in consideration of support during life, under an agreement to convey back to him in case he became dissatisfied, and the land was reconveyed to him according to agreement, and then conveyed by him to the nephew's wife, such reconveyance by the nephew is valid as against his creditors, although the agreement was by parol, since the giving of the deed was a waiver of the defense of the statute of frauds.

Appeal from circuit court, Greene county; W. F. GEIGER, Judge.

Proceeding in equity by C. Aultman & Co., a corporation, against John M. Booth, Sarah Booth, and Eliza Twigg, to set aside certain conveyances. Judgment for defendants, and plaintiff appeals.

Francis H. Sheppard, for appellant. *O. H. Travers*, for respondents.

NORTON, C. J. This is a proceeding in equity in which it is alleged that plaintiff corporation obtained judgment in the circuit court of the United States for the Eastern division of the Western district of Missouri, on the 18th of April, 1883, against the defendant John M. Booth for \$873.46; that execution issued on said judgment, under which the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 23, township 31, range 21, situated in Greene county, were sold on August 1, 1883, by the marshal of said court, as the property of said Booth, and plaintiff became the purchaser, and received the marshal's deed therefor. This suit is brought to vacate a certain deed made by said Booth and wife, dated April 7, 1883, conveying said lands to Eliza Twigg, and a certain deed from said Twigg, dated April 10, 1883, conveying said lands to defendant Sarah M. Booth. It is alleged that these deeds were voluntary, and made without consideration, for the purpose of defrauding plaintiff in the collection of its debt, and for that reason the court is asked to declare them void. The answer denies all fraud, and sets up a special defense which the evidence hereinafter considered will disclose. On the trial, judgment was rendered for defendants, from which plaintiff has appealed, and insists that under the evidence the decree should have been for plaintiff.

Plaintiff introduced defendant Twigg as a witness, who testified as follows: "I am 73 years old. I lived in Cloud county, Kan., before coming here, on my farm of 160 acres. Defendant John Booth is my nephew. His mother and my wife were sisters. He lived on a place adjoining mine in Kansas. My farm was a little better than his. Aultman & Co. sued him for a machine he bought and had not paid for. He has no property in Kansas now. He lives in south-east corner of Polk county, near Greene county line. I did have a little store there; am running it still. I bought the land in Polk county, and paid what has been paid on it. It is not all paid for. Don't know this land by the numbers. Don't know the sections. The lands do not lie together. The northern forty in Greene county is the best. Don't know what it is worth. Mrs. Booth has a crop on it now. I sold my farm in Kansas; sold and traded it together. Got five or six hundred dollars in money, I believe; also two horses. Don't know what they were worth,—\$50 or \$75 each I suppose. That was all I got for the farm. There was no water on the Kansas farm except well water. I sold the southern forty in Greene county to Gray. Don't recollect when. Got some money, and something out of the store. I don't recollect what time I sold these forties to Booth. It was about two years ago. I was old and crippled up when I came to the country, and Booth and his wife had been taking care of me. I was not able to work, and I gave them the place on the agreement that they should take care of me while I lived. They agreed if I got dissatisfied, and wanted it back; they would give it back to me. I deeded the land to them in consideration of their supporting me, taking care of me, feeding me, clothing me, etc. I was to live in the house with them. I paid for it with the proceeds of my farm in Kansas. Booth and his wife had no money in the farm. Both deeds were made to Booth and his wife. I wasn't able to do it, and sent them to Springfield to get the deeds made out. I then gave a mortgage on the land, and paid it off with my own money. Neither Booth or his wife ever had a cent in the land. I got dissatisfied, and had a deed made to Mrs. Booth; taking the land out of Booth, and vesting it exclusively in Mrs. Booth. I thought it would be safer in her hands. That is why I had the deed made to her. I have been crippled and infirm about four years; have kidney disease. I am not able to work now; am permanently disabled, and was when I made the deed to Booth. Booth did not have any other means to take care of me. He sold his own land in Kansas. I think it would be hard for them to take care of me without the land I gave them or Mrs. Booth. They have

five or six children. There is a dwelling on the Polk county land. I built it. Booth has no money in it. He has not put any fencing on the land since going there. He helped build the house and stable. He did not clear any of the land. Two forties in Greene county and one in Polk county make the farm. I fixed it so the farm would maintain me. I put it in Booth's name first; got dissatisfied, and changed it to Mrs. Booth. The reason I did not take back the land to myself was because I could not pay Mrs. Booth for her labor. No money passed between us. I was dissatisfied because I thought Booth was not doing exactly right. I bargained the other forty to a man near Fair Grove, but you spiled it. Booth had no interest in the land. He made no improvements on it. If she was willing, I could sell the land. I have it fixed so that I could do that. The land was mine, and I thought I could do as I pleased with it. There was no talk between Booth and myself about his indebtedness, and I did not have him deed the land away, and then deed it to Mrs. Booth, to defraud any person. It was my land, and I thought it would be safer in Mrs. Booth's hands or name." Defendant Booth was also introduced as a witness by plaintiff, and in his evidence fully corroborates Twigg as to the fact that neither he nor his wife had paid one cent for the land, but that it was bought and paid for with the money of Twigg; also as to the agreement that he was to support and care for Twigg, as testified to by him, and convey the land back to him when he wanted it. He also testified that outside of the land he had no other means to carry out his agreement with Twigg. The fact that the land in question was bought and wholly paid for with the money of Twigg is established by the evidence offered by plaintiff, and it is also established that the title thereto was put in defendant Booth in consideration of his agreeing to support and maintain Twigg during his life, and the agreement of Booth to convey the land back to Twigg when he requested it or became dissatisfied.

It is insisted that said agreement to convey not being in writing, but resting in parol, is within the statute of frauds. Granting this to be so, and Booth might have declined to execute the contract on that ground, he did not do so; but, on the contrary, waived his right in that respect, and executed the deed to Twigg, according to the intention of the parties, the agreement made, and the right of the matter. As early as the case of *McGowan v. West*, 7 Mo. 570, it was laid down that "the person making a parol contract to convey lands may or may not insist on the protection of the statute of frauds. If he will confess the agreement, and not insist on the statute, its performance will be enforced against him." The doctrine of that case is reaffirmed in *Farrar v. Patton*, 20 Mo. 81. There is no equity in plaintiff's case under the evidence; and, the judgment being for the right party, it is hereby affirmed.

All concur.

STATE v. TABOR.

(Supreme Court of Missouri. June 4, 1888.)

1. HOMICIDE—MURDER—WHAT CONSTITUTES.

Upon trial for murder, an instruction that if the jury believe that defendant took the life of deceased "by shooting him in a vital part, with a pistol loaded with gunpowder and leaden ball, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason, cause, or extenuation, then such killing is murder in the first degree," properly defines the offense charged, and affords no ground of exception. *NORTON, C. J.*, and *BRACE, J.*, dissenting.

2. SAME.

Where defendant and deceased had been in a saloon drinking and playing pool together, and, at the time of the killing, deceased had taken defendant by the arm, and they were going, in a good humor, towards a hotel, defendant being an assenting party, the crime is not reduced to manslaughter by the fact that before they left the saloon deceased had announced his intention to arrest defendant, and take

him to the calaboose, in the absence of evidence that defendant believed, or had good reason to believe, that such arrest was really intended to be made by force. **NORTON, C. J., and BRACE, J., dissenting.**

3. SAME.

Where two men of nearly the same size, were walking along the street together, conversing in a low tone, when one of them suddenly made a loud exclamation, and the other began firing with a pistol upon the one making the exclamation, who was unarmed and had not shown, drawn, nor, as far as could be seen, attempted to draw, a weapon, and the former continued to fire upon him after all attempts to avoid the aim had ceased, the killing was not in self-defense.

4. SAME—EVIDENCE—PROOF OF ANOTHER CRIME.

Upon trial for murder, it is error to admit evidence that defendant was an escaped convict, for the purpose of supporting a theory of the prosecution that defendant killed deceased on the belief that he was a detective seeking defendant's arrest, there being no evidence that defendant had such a belief. **NORTON, C. J., and BRACE, J., dissenting.**

5. SAME—TRIAL—BURDEN OF PROOF.

Upon an indictment for murder in the first degree, the homicide having been proven, and no countervailing circumstances being evolved by the testimony of the prosecution, the burden of proof to show that the offense was one of less degree, or that the killing was done in self-defense, is cast upon defendant.

6. SAME—INSTRUCTIONS.

Upon an indictment for murder, where defendant and deceased had been playing pool and drinking together, and were seen walking along pleasantly together, arm in arm, conversing in a low tone, when deceased suddenly exclaimed, "you will play hell," and, after a brief struggle, defendant shot deceased, there is no evidence showing who brought on the difficulty, and an instruction as to the responsibility of a party who brings on a difficulty is improper. **NORTON, C. J., and BRACE, J., dissenting.**

Appeal from circuit court, Cass county; CHARLES W. SLOAN, Judge.

Indictment of Charles Tabor for murder in the first degree. Verdict of guilty, and defendant appeals. The objection made to the fourth instruction quoted in the second paragraph of the opinion was that it did not correctly define murder in the first degree.

H. Clay Daniel, Geo. Bird, and W. D. Summers, for appellant. B. G. Boone, Atty. Gen., Whitsett & Jarrott, and Railey & Burney, for the State.

SHERWOOD, J. The following is a sufficient outline of the salient facts and features of this case to enable it to be understood. Appeal from the circuit court of Cass county, from the verdict of a jury finding defendant guilty of murder in the first degree. On the 17th day of June, A. D. 1886, defendant was convicted of burglary in the second degree in the Vernon circuit court, and sentenced to the penitentiary for a term of three years. In that case he was tried and convicted under the name of Robert Clark. Defendant was confined in the penitentiary until the 9th day of February, A. D. 1887, at which time he made his escape. On the 19th of August following, he came to Pleasant Hill, and early in the morning made the acquaintance of Maj. C. C. Dawson. Dawson was assistant station agent for the Missouri Pacific Railway Company at Pleasant Hill. After he made the acquaintance of defendant, they went to a billiard saloon, and engaged in a game of pool. Dawson, it seems, was successful in every game; but, as Tabor claimed to have no money, Dawson settled for the games they played. Tabor invited the crowd in the saloon to come to the bar and take a drink. The bar-keeper told Tabor that he would not let him have the drinks unless he had the money to pay. Tabor said that he did not have money enough. Dawson remarked: "If you do not intend to pay, I guess I will have to arrest you and take you to the calaboose." Tabor said: "All right, you will have to arrest me then." Dawson proposed to loan defendant a dollar, and settled for the drinks himself. They were both laughing and joking at the time they drank the liquor. Dawson took Tabor by the left arm, and they walked out of the saloon, arm in arm, laughing and talking, and were in the best of humor, and, it being about 12:30 o'clock, they walked in the direction of the Soldanell Hotel.

Dawson was smiling, and seemed to be in a good humor. While they were walking in this manner, conversing in a low tone, Dawson was heard to say, "you will play hell." Tabor then drew his pistol, and fired; the first shot taking effect in the center of Dawson's chest. Dawson attempted to step behind Tabor in order to get out of his way. Tabor reached further around, and fired again, the shot taking effect in the left side of the breast, in front of the shoulder. Dawson made another effort to get behind Tabor. Then Tabor reached further around, and fired the third shot, missing Dawson. Dawson fell to the ground, and expired. The pistol Tabor used was a large 44 caliber. Dawson was unarmed at the time, and a portion of the evidence shows that he made no resistance to Tabor. There is testimony, however, showing, that at or immediately before the shooting, there was between Dawson and defendant "a kind of scuffle; they squirmed around." There was also testimony to the effect that the scuffle between Dawson and defendant was quite pronounced, one of the witnesses going so far as to pronounce it a street fight, though no one pretends that any blows were struck. The witness who testifies as just stated, also says that Dawson seemed to be jerking the defendant around with both hands, so that he could hardly keep on his feet. But this witness was some 65 yards from the scene of controversy, and describes the occurrence very differently from those who were within a few feet of the parties. The theory of the prosecution is that Dawson, who had been playing pool with defendant nearly all the morning, paying for his drinks, etc., and seemed to be fond of his society, was then taking him to dinner; but that defendant, without any reason therefor, suspected that Dawson was a detective, trying by a ruse to capture and return him to the penitentiary. This theory, however, is founded upon sheer surmise, and has not the slightest support in the testimony. To sustain this theory evidence was offered and admitted showing that defendant had been confined in the penitentiary, and had made his escape, as already stated. This evidence was objected to, and its admission is assigned for error.

1. There was no foundation laid for admitting evidence showing that the defendant had been confined in the penitentiary and had escaped therefrom. Evidence of another crime is never admissible unless so connected with the one then being investigated as to show that the commission of the former had something to do with the perpetration of the latter. Unless the apparently collateral crime be brought into a common system,—a system of mutually dependent crimes,—or unless it be so linked to the crime under trial as to show that the former, though apparently an extraneous offense, is not so in reality, such evidence is not admissible; because it would be highly unreasonable and unjust to convict a man of the crime charged simply for the reason that he had been guilty of another and distinct offense. Whart. Crim. Ev. §§ 29, 80, 81, 82, 46, 47, 49, 50, and cases cited; Best, Ev. (Chamberlayne), § 644. In the present case, there was no such obvious connection shown between the crime for which the defendant was sent to the penitentiary, his subsequent escape therefrom, and the crime for which he was tried. The evidence in question, admitted by the court, did not bear immediately or mediately on the matters in dispute. Best Ev. *supra*. If it had been developed at the trial, not only that defendant was an escaped convict, and that Dawson became aware of it, and tried to arrest him, then a motive of defendant in shooting Dawson, in order to avoid arrest, and the motive of Dawson in attempting defendant's arrest, if he did attempt it, would have rendered relevant and admissible evidence of defendant's previous crime, and escape from confinement. As it was, however, no foundation being laid, no visible connection between defendant's former criminal act and the one for which he was tried being shown, evidence of such former crime and escape was wholly inadmissible. It may indeed be conjectured that defendant, an escaped convict, sought to escape from Dawson, under the belief that the latter was try-

ing to arrest him; but it will not do, upon a mere conjecture, to admit evidence which had no other foundation but such conjectural basis. Error was therefore committed on this point, and for the same reason like error was committed in giving instruction 15, it being based upon such incompetent evidence.

2. This was the fourth instruction given at the instance of the state: "No.

4. The court further instructs the jury that he who willfully—that is, intentionally—uses upon another, at some vital part, a deadly weapon, as a loaded pistol or firearm, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend the death which is the probable and ordinary consequence of such an act, and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly or from a bad heart. If, therefore, the jury believe that defendant took the life of Christopher C. Dawson by shooting him in a vital part with a pistol loaded with gunpowder and leaden ball, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason or cause or extenuation, then such killing is murder in the first degree; and while it devolves upon the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing, and, if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding the defendant guilty of murder in the first degree." This instruction is taken from *State v. Talbott*, 73 Mo. 347, and has frequently received the approval of this court. *State v. Holme*, 54 Mo. 153; *State v. Underwood*, 57 Mo. 40; *State v. Foster*, 61 Mo. 549. This is enough to say regarding the objection made to the instruction in question.

3. The sixth instruction given by the court of its own motion is the following: "The jury are instructed that, even though you shall find and believe from the evidence that the deceased, Christopher C. Dawson, announced his intention to arrest the defendant and take him to the calaboose or cooler, and then proceeded to take hold of defendant's arm and walk away with him, still such facts do not constitute any defense in this cause, nor operate to reduce the offense from murder to manslaughter, unless you shall further find and believe that the defendant had good reason to believe and did believe that the deceased really meant and intended to arrest and restrain him—the defendant—against his will, and that defendant believed, and had good reason to believe, that deceased was actually using, or was about to use, force in such attempt to arrest defendant." Considering the testimony already set forth, I see nothing in the instruction which could operate prejudicially to the defendant. The evidence tends very strongly to show that Dawson's taking defendant by the arm, and walking away with him towards the hotel, the defendant being an assenting and willing party, and evidently concurring in what every one present regarded as a mere freak of humor, certainly would not by itself afford the defendant any valid ground for using a deadly weapon upon Dawson, nor cut down the crime of slaying him to a lower grade than one of the degrees of murder. The objection to this instruction is therefore without merit.

4. The court also gave instruction 12 of its own motion. This was the stereotyped instruction about bringing on a difficulty, etc. Conceding, for argument's sake, the correctness of this instruction, there was no propriety in giving it, because there is not a particle of evidence in this case showing which party engaged in the fatal occurrence "brought on the difficulty." Two men, after playing pool and drinking, and cracking their jokes, are seen walking along pleasantly, arm in arm, conversing with each other in a low

tone, when suddenly one of them exclaims, "You will play hell," and then, after a brief struggle or scuffle, the other shoots him to death with a pistol. Error was therefore committed in giving this instruction for the reason stated, and that is sufficient to dispose of the point, without adverting to other reasons.

5. Nor do I believe that there was any self-defense in the case. Self-defense, as has been aptly said, is the law of necessity. It is the *dernier* resort; the exercise of an extreme and supreme right; and is not to be invoked except when other means fail, or are apparently likely to fail, owing to the fierceness of the assault, or some other equally pregnant circumstance. Here the record discloses no such basis for calling into activity "the first law of nature." And that the purpose of the defendant was not to defend himself from any anticipated attack from Dawson is shown by the persistency with which he continued to fire upon his victim after all attempts on his part to avoid his murderous aim had ceased. *State v. Gilmore*, ante, 359, (decided at present term.) Besides that, Dawson was unarmed, had not shown, drawn, nor apparently attempted to draw, a weapon; nor was there any such disparity in the respective sizes of the two men as to induce a reasonable belief in the defendant's mind that Dawson intended, or was capable, even if he had threatened, of inflicting any great bodily harm upon him. On this point I desire to quote some remarks made by Judge AGNEW as being pertinent to the point in hand: "To excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible, or at least probable, means of escaping, and that his act was one of necessity. The act of the slayer must be such as is necessary to protect the person from death or great bodily harm, and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life or great bodily injury. If there be nothing in the circumstances indicating to the slayer at the time of his act that his assailant is about to take his life, or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal, or nearly equal, strength, in taking his assailant's life with a deadly weapon. In such case it requires a great disparity of size and strength on part of the slayer, and a very violent assault on part of his assailant, to excuse it. The disparity on the one hand, and the violence on the other, must be such as to convince the jury that great bodily harm, if not death, might have been suffered, unless the slayer had thus defended himself, or that the slayer had a reasonable ground to think it would be so. The burden lies on the prisoner, in such a case, of proving that there was an actual necessity for taking life, or a seeming one so reasonably apparent and convincing to the slayer as to lead him to believe he could only defend himself in that way." *Com. v. Drum*, 58 Pa. St. 9.

6. The doctrine in the case just cited from Pennsylvania, from which state our statute respecting murder was obtained, that a homicide being proven or admitted by the prisoner, and no countervailing circumstances being evolved by the testimony of the prosecution, the burden is then cast upon the prisoner to show to the reasonable satisfaction of the jury such circumstances of excuse or palliation as will take away the presumption drawn by the law that the killing was murder in the second degree, and show that he was guilty of a less crime, or that the homicide was committed in his lawful self-defense, is well settled in this state. *State v. Hays*, 23 Mo. 287; *State v. Holme*, 54 Mo. 153; *State v. Underwood*, 57 Mo. 40; *State v. Grant*, 76 Mo. 236; *State v. Anderson*, 89 Mo. 312, 1 S. W. Rep. 135. This was the rule as to murder at common law, saying nothing of any degree of that crime. 3 Greenl. Ev. § 144; *Rea v. Greenacre*, 8 Car. & P. 35.

7. Taking the foregoing positions as correct, there being no self-defense

established in the case, nor shown by the attendant circumstances, the guilt of the defendant is to be determined on one of these points: (1) Whether he is guilty of murder in the first degree; (2) murder in the second degree; or (3) of manslaughter in one of its degrees; and if, upon return of this cause, the evidence is substantially the same as this record discloses, the trial court will not give an instruction to the jury based upon the theory of self-defense, but will instruct them so far as above indicated, *i. e.*, in relation to the burden being cast upon the accused where a homicide is proven to show circumstances of palliation or excuse.

8. I see no error in the refusal of the court to give the instructions asked by defendant, but for the errors aforesaid the judgment will be reversed, and the cause remanded.

RAY and BLACK, JJ., concur. NORTON, C. J., concurs as to paragraphs 5 and 6. As to the other paragraphs NORTON, C. J., and BRACE, J., dissent.

STATE v. JACKSON.

(*Supreme Court of Missouri. June 4, 1888.*)

1. HOMICIDE—MURDER.

Evidence that deceased was murdered by some one; that defendant was impecunious, and knew deceased to have a large sum of money on his person; that deceased was last seen alive in his company; that defendant admitted to have been with deceased at the place of the murder; that defendant, one hour after the murder, was seen one and three-fourths miles distant from the place of the murder; that, instead of availing himself of an opportunity to procure work, in search of which he and deceased were traveling together, defendant left the county and state; that he made false statements about his conduct at the time, and, when arrested on the charge of murder, endeavored to procure tools to break jail,—sufficiently supports a verdict of guilty of murder in the first degree, (a new trial having been granted on other grounds,) though a great deal of mystery is connected with the crime, and defendant's clothes, after the murder, were not noticed to be blood-covered, and foot-prints at the scene of the crime did not conform to the length of defendant's foot.

2. SAME—EVIDENCE—CONDUCT OF DEFENDANT WHEN ARRESTED.

On trial for murder, testimony, by one sent to receive defendant from the authorities of another state, that the prisoner was not delivered up without proof of his identity, is irrelevant, since the fact that defendant did not facilitate his transportation affords no presumption of guilt.

3. SAME—ADMISSIONS.

On trial for murder, evidence not amounting to an acknowledgment of guilt, but simply that defendant had stated to witness that, when he learned from a newspaper in another state that he was accused of the murder, he felt so distressed that he went stealing horses to pacify his mind, is inadmissible, not being a confession of the crime charged.

4. SAME.

A statement to a fellow-prisoner by one accused of murder that he knew that the deceased had a large sum of money in a belt upon his person is admissible in evidence as tending to show a motive for committing the crime.

5. SAME.

Admissions to a fellow-prisoner that defendant had attempted to break jail in another state on learning that he was to be brought to this state on the charge of murder, are admissible against him on his trial for that crime.

6. SAME—ATTEMPT TO ESCAPE.

On trial for murder, it is competent to show that defendant requested a fellow-prisoner to assist him in escaping from the jail in which he was confined, and the jury may take that fact into consideration in determining defendant's guilt or innocence. NORTON, C. J., and RAY, J., dissenting.

7. SAME—TRIAL—INSTRUCTIONS.

In the absence of evidence as to when the murder was committed, and where defendant was at the time, it is not error to refuse to instruct the jury on the subject of *alibi*; that not having been made an affirmative defense.

8. SAME.

An instruction, on trial for murder, that flight raises the presumption of guilt, and that, if defendant fled the country, they might consider it in determining his

guilt or innocence, but that they should not consider such leaving as a flight if defendant left on his own proper and legitimate business, and not for the purpose of avoiding arrest or trial, is unobjectionable, where defendant, after the commission of the crime, left for another state.

9. **SAME—CONDUCT OF PROSECUTING ATTORNEY.**

On trial for murder, it is reversible error for the prosecuting attorney, over defendant's objection, to state, in opening the case, that defendant, when about to be brought from another state, denied his identity there,—there being no evidence of the fact except that before extradition proof of prisoner's identity was required,—and that defendant had admitted that, on learning of the charge of murder against him, he went stealing horses to pacify his mind, even though the court, on exception to the first statement, admonished the jury not to permit it to influence their minds. **NORTON, C. J., and RAY, J., dissenting.**

10. **SAME.**

A judgment on a verdict of guilty of murder in the first degree will be reversed on the ground that the prosecuting attorney, in his closing address, remarked, in urging the jury to convict, that "escape of criminals at the hands of juries brings on lynch law." **NORTON, C. J., and RAY, J., dissenting.**

Appeal from circuit court, Franklin county: **RUDOLPH HIRZEL, Judge.**

Webster Jackson was indicted for the murder of Alexander McVickers, tried, and convicted of murder in the first degree. He appeals. Upon the trial the court gave the jury, *inter alia*, the following instructions: "(15) Flight raises the presumption of guilt; and if the jury believe from the evidence that defendant, after the commission of the alleged crime, fled the country, and tried to avoid arrest and trial, they may take this fact into consideration in determining his guilt or innocence; but if the jury believe from all the evidence that the defendant did not fly from the county, but left it on his own proper and legitimate business, and not for the purpose of avoiding arrest or trial, then such leaving of the county raises no presumption of guilt whatever, and the jury should not consider such leaving as a flight. (16) If the jury believe from the evidence that the defendant, while being in jail and in custody of the sheriff, charged with the crime of killing Alex. McVickers, sought means of escape, and undertook to get proper tools for that purpose, and, to accomplish his escape, sought the assistance of other parties, they may take this fact into consideration in determining the guilt or innocence of the defendant."

J. C. Kiskaddon and Jas. Booth, for appellant. Atty. Gen. Boone, for the State.

SHERWOOD, J. Labadie is a town in Franklin county, on the Missouri Pacific Railroad, near the Missouri river. At that point, the railroad, in pursuing its general eastwardly course towards St. Louis, turns a little east of south in going to Gray's Summit, the next town on the railroad. Pacific is the next town on that road, situate at the junction of the Missouri Pacific and the Frisco Railroads, and nearly due east from Gray's Summit; so that Pacific, in consequence of the elbow thus formed, is nearly due south-east from Labadie, and much nearer in an air line to that place than by the railroad route. These facts are gathered from a map of the state, and not from the record; and this is done in order to a better understanding of the facts which this record does disclose. At about 9 o'clock on the morning of October 22, 1886, the train arriving from St. Louis brought to Labadie the defendant, Webster Jackson, then some 22 years of age, and another man of 60 years, named Alexander McVickers. They had previously worked together for some time as cooks, etc., at Keene's camp, in the neighborhood, but had quit there a month before, and the defendant had gone to St. Louis, and, upon his return after a short absence, had returned to Labadie, and worked a few days at Shaefer's camp, and after that had gone again to St. Louis. Both men, it seems, were well known in the vicinity. Upon alighting from the train, Keene, their former employer, spoke to both of them, and said: "Hello, Jackson! What brings you back in this country?" To which Jackson replied:

"I am just going back into camp." F. M. North, who knew McVickers by sight, but was well acquainted with Jackson, met them, after they had alighted from the train, and spoke to Jackson, who "said that he and the old man [meaning McVickers] had got a job at Schaefer's, and were going down to cook there." Jackson seemed to be in a hurry, and said the old man was ahead of him. They were then going toward's Schaefer's camp, which is about five miles east of Labadie, and the path they were taking leads directly to the to the road that goes to Reed's Landing, and that road crosses Fiddle creek on a bridge, and goes from there to Pacific. Reed's Landing is about three and one-half miles from Labadie, and that the bridge is about equidistant between Labadie and Reed's Landing; and the road going from the bridge leads to Schaefer's camp, turning off at Utter's place, which is a mile and a quarter to a mile and a half from Schaefer's camp. T. M. Luce, a practicing physician, also saw Jackson and McVickers at Labadie at the time already mentioned; and, while the doctor was speaking to Jackson, McVickers walked on. Dr. Luce says he inquired of Jackson where he was going, and Jackson replied that he was going to Schaefer's camp to cook, when Dr. Luce told him that he had seen Mr. Stevens at Schaefer's camp, who had said to him that Jackson's services were not required. That Jackson then said: "That is all right. I have been to the company's office in town, and have seen Mr. Schaefer, and he told me to go up to Pacific, and get the old man and come out; no trouble about my and the old man's wages." Jackson's last words to the doctor were: "Well, there goes the old man; I must catch up;" and they went off in the direction of Schaefer's camp. Dr. Luce also testified that Jackson was not well at the time he saw him at the train; that he had been treating him for malarial trouble; and that his face on that morning displayed unusual pal'or. Jackson and McVickers were next seen together by James G. North, who saw Jackson, and an old man with him, about half past 9 o'clock, as near as the witness could judge, having heard the 9 o'clock train pass up. The point where North saw and spoke to Jackson was about 50 yards from Alkire's west line, about a mile and a quarter or a mile and a half east from Labadie; and the bridge is at Alkire's east line, about half a mile from where North saw them. They were on the Labadie side of the bridge, and were traveling east in the direction of it, and about a half a mile therefrom. The road they were on leads from Labadie to Reed's Landing, and is the road used to go to Schaefer's camp. Alkire, who was working in his field that morning, some 30 yards from the county road, at about 10 o'clock, as well as he could guess, saw two men passing by, apparently closely engaged in conversation. He had never seen them before, but he says one of them resembled Jackson, and the other McVickers. They were walking very slowly, and the older one appeared to be sick or lame, and carried a satchel or valise. They were going east in the direction of the bridge; and were about one-fourth of a mile from it. Shortly after passing Alkire's house, which is one and one-half miles east from Labadie, the road turns, and goes down hill, towards the bridge, which crosses Fiddle creek, before mentioned, and is in the woods, though the road, of the usual width, is fenced on both sides. This bridge is some 34 feet long, and the floor of it some 10 feet above the water. Jackson was next seen alone beyond the bridge, and on its east side, something over a mile and a half east from the bridge, and about a half mile east of Meyer's vineyard, and on the same road; and Meyer's vineyard is something over a mile from the bridge. This was near Reed's Landing, on the Missouri river, and the parties who next met him were Reed and his son, who were riding in a wagon. This was just about 11 o'clock, and this time is fixed by young Reed as the time he usually went to his dinner; and his father was of the same opinion as to the time. It seems that young Reed knew Jackson, who was walking along at an ordinary gait, with a little grip-sack in one hand, and a spring overcoat on his arm; and, when they met, Jackson spoke and smiled as he

passed on. He was next seen at Henry Utters's, sometimes called "Keene's Camp," where Jackson and McVickers had formerly worked together. This is about two and one-half miles from the bridge. Here Jackson spoke to Henry Utters; said, "Hello!" went to the wagon, shook hands with him; and then went over to Marquitz's store, close by, spoke to Marquitz and his partner, with whom he was well acquainted, took a couple of drinks of water, tried to trade watches with Calvin, and remained there something like a half an hour, and, when he left, went in the direction of Staples' place. This was between 11 and 12 o'clock, but the exact time is not known.

The testimony of the witnesses who testified as to Jackson being at that point is, in substance, as follows: *David Marquitz's Testimony.* "In 1886, I lived at Fiddle creek, in this county, four miles from Labadie. I had a dry-goods and furnishing store there. I have known both Jackson and McVickers since about March or April, 1886. He came to my tent often. My camp was located on the road that goes from Labadie to Mr. Utters'. I saw Webster Jackson, October 22, 1886, alone, between 11 and 12 o'clock, with a little black satchel in his hand, and a brown spring overcoat on his arm. Before he came to me, he was at Mr. Utters', talking with that gentleman, and he said he was going away. When he came to me, I said: 'How do you do, Mr. Jackson?' And he says: 'How do you do?' Well, certainly he did not tell me in the same tone he did some other times. I told him: 'It is good you have come, Mr. Jackson. At Keene Brothers you will have good employment?' He did not answer me at all. The next time I spoke to him I said: 'Why don't you go down to see about that employment?' And he gave a very strong-voiced answer: 'Give me time, and I will go.' I never knew him to speak to me in that way before, and I did not talk to him any more, for I saw that he was kind of desperate. He afterwards went out, and took a looking-glass, and looked in it. After that he asked about the road to Pacific, and how far it was. He also asked where Mr. Staples lived. He said he was going to Pacific. He was very nervous, and always looking towards the Labadie road. I believe he asked me if I could take him to Pacific; if I had a horse and light wagon. I told him my horse could not carry him, and road was not good to Pacific. I came to Mr. Utters' camp about March or April. I had my goods in a wagon for a few days. I don't know whether Jackson was careful about his dress or not, but I know he dressed neatly. I saw him looking in the glass, but I did not notice him brush his clothes. I did not pay much attention to him. I would not have thought his actions unusual if I had not heard of the murder." *H. Wexler's Testimony.* "In the summer of 1886 I lived at Henry Utters' place. I was a merchant there. I knew Webster Jackson, but did not know Alex. McVickers. I saw Jackson in our tent at our store on October 22, 1886. He came to Henry Utters, and said, 'Hello!' then went to the wagon, and shook hands with him. Then he came up, and I spoke to him. He had an overcoat and a satchel, which he put on a chair, and got a drink, and then came into our store. He looked very bad; he was pale. My partner and I looked at his coat; it being pretty nearly like ours. He then went out of the store, and was looking in a glass behind the store. Then he got another drink of water. Then he came back, and asked, 'Do you know where the expressman is?' We had a fellow who took passengers to the railroad, and we called him the expressman. I told him he had gone to Pacific with a lady passenger. He then went to the back-house, and met Mr. Calvin, with whom he wanted to trade watches. He then came back, took his overcoat and satchel, and asked my partner if Mr. Staples lived very far from there. My partner told him the distance, when he said, 'Good-bye,' and left. He said he wanted to go to Pacific. That was between 11 and 12 o'clock, but I can't say whether it was near 11 or 12. My partner is Mr. Marquitz. I did not know that he had quit Mr. Keene's sometime before on account of being sick. This expressman I spoke about some-

times carried passengers to Labadie, and sometimes to Pacific. Jackson was about our store probably about half an hour. I did not notice any blood on his clothing. I deal in clothing, and I take notice of the kind of clothing people wear, and whether is neat or otherwise. I did not notice anything peculiar about his clothing. I noticed it had a fine check like our suits. I noticed he was looking at his clothing all the time." *Isaac Calvin's Testimony.* "I am acquainted with Jackson, and saw him at Henry Utters' on October 22, 1886. I spoke but a few words with him. I did not notice him particularly. I believe I was talking to him about trading watches, but we did not trade. I was in a hurry. This was about 11 o'clock. He pulled out his watch, and spoke to me about trading watches. I was in a hurry, and did not look at it particularly, as I wanted to go to Pacific before the train went down, and I had to walk. We just passed, and he spoke to me about the watch. I took hold of the watch, but did not open it. He did not take hold of mine. He said he wanted \$8 to boot. I did not notice the time either by his watch or my own, nor was the time mentioned. Jackson was in a hurry to get to Pacific, and wanted Mr. Utters to take him. I was in a hurry to get there too. I had to walk, and Mr. Staples took him in a wagon."

Jackson was next seen at Staples', which is about a half mile from the last place mentioned, and about two and three-fourths miles from the bridge. The testimony of Staples and his son is, in substance, the following: *Louis Staples' Testimony.* "I was acquainted with Jackson in the year 1886. I have seen McVickers, but was not very well acquainted with him. Jackson was at my house in the middle of the day on October 22, 1886. My house is about a half a mile from Marquitz's store. Jackson came to my house just as we were sitting down to dinner, about 12 o'clock; but my clock had stopped. He told me he had come from Labadie, and he wanted me to take him to Pacific. He said he had a notion to go out to the Indian Nation. I asked him if the old man was with him, and he said 'Yes;' that he had gone up with him as far as the vineyard on Mr. Meyers' place, and had then gone back again, he thought, to the Keene Brothers' camp. I did not notice his actions particularly that day. He asked me for a drink of water, and I asked him to come right in the house, and he could not drink the water, but threw it right out, saying: 'I am very dry, but I cannot swallow this water.' He said he had been sick; and I said: 'Yes, you look pale; I guess you have been sick.' He asked me how far it was to St. Louis by the line of railroad, and I told him about 40 miles. He asked me if there was any nearer station than Pacific for going out west, and I told him there were two nearer, Labadie and Gray's Summit; but, if he wanted to go west, I would not take him to any other station. I told him if he wanted to go to Pacific we had plenty of time, but he was a little anxious to get away. He asked me if I could take him to the station below Pacific; and I told him, 'No;' I would not take him to any other station; but, if he wanted to go to Labadie or Gray's Summit, I had no objection. Pacific was the place he asked for first. I know where the bridge is where Mac was found dead. I live pretty nearly three miles from that bridge. So far as I understood him, he told me the old man wanted to go with him to the Indian Nation, but that at the vineyard he had turned back. He spoke something about working at Schaefer's camp, and that he had got sick. Meyers' vineyard is probably half a mile from my place. Mr. Reed's place joins Meyers' place, and is nearer to me than the vineyard. I had my boy take him over to Pacific. While I was hitching up my team he looked at his watch, and said, 'It is half past one now.' In the house he had said his watch had stopped. I think he had been at my house about an hour and a half. He was anxious to get away. That is all I could notice in him. Jackson looked pale, and said he had been sick. I did not know that he had been sick at Keene's camp, and had left there for that reason. It is between 7 and 8 miles from my place to Pacific, and we call it 4 miles to Labadie. I

did not pay much attention to his clothing. He seemed to be neatly dressed. We call it a mile from my house to Reed's, and may be it is half a mile further to Meyers' vineyard. It is something over a mile and a quarter from Meyer's vineyard to the bridge where Mac's body was found." *Joseph Staples' Testimony.* "I am a son of Louis Staples. I know Jackson, and knew McVickers. I saw Jackson at our house, October 22, 1886, and took him to Pacific. He asked us if we could take him to Pacific, and we said, 'Yes; after the horses were fed.' My father asked him where he was going, and where the old man was; and he told him that he came with him from Labadie; that they were going to some camp, I think; and that he came to the vineyard and went back. I think he said he wanted to go to the Indian Nation. I did not notice his manner there at the time. I had seen him always, and did not pay any attention to it. I had brought milk to Keene's camp three or four times a week for two or three months while Jackson and McVickers were cooking there. I was not present at all the conversation between him and my father. While driving to Pacific, I did not notice anything particular about him; only hurrying me to go faster, saying that he might be too late for the train, and he would look at his watch, and look back every once in a while. We didn't talk much. He took out his pocket-knife, and whittled on straws. I drove pretty fast. I don't know what time we got to Pacific, but I think about two o'clock, or a little after. I don't know what time the train got there. We went to the depot, and stayed there about ten minutes, and he asked me to play a game of pool with him, but I declined, and left for home. He paid me \$1.25 for taking him to Pacific. I did not particularly notice Jackson's conduct while he was at our house. He seemed to be in a hurry; afraid he would miss the train."

As to Jackson's conduct on reaching Pacific, we have this: *Emily Reid-enauer's Testimony.* "I am not acquainted with Jackson, but I saw him October 22, 1886, at Pacific. I noticed he was restless; that he would get up in the waiting-room two or three times, and go to the door and examine his cuff. He purchased the ticket at the Pacific Railroad office, and then jumped on a train on the Pacific track. The 'Frisco' started first, but only for an instant first. I was going to St. Louis at the time. I could have taken either the Pacific or 'Frisco' train. The only peculiar actions I noticed about him was that he was restless. I have never traveled much. I know how it feels to wait for a train. It makes one restless; but it don't make all those actions. The Pacific train was behind time that afternoon. He called for a ticket to the city, not to go west." *John Dickerson's Testimony.* "I am now, and was on October 22, 1886, agent for the 'Frisco' road at Pacific. I don't know Jackson, but I think I saw him on that date at the Union depot in Pacific. He seemed to be in a rather nervous state of mind, and anxious to take the train. I judge so from the fact that he asked me twice about the train. Our train got to Pacific at 4:36, if I mistake not. The first train on the Missouri Pacific gets there at 4 P. M., and the second at 4:43, I think. When I went out to put my express on the train, he was standing with his grip in his hand, and overcoat on his arm, just as if he were about to get on the train; but I did not see him get on. He did not buy a ticket from me. A Missouri Pacific ticket is not good on the 'Frisco' trains. J. C. Hennessy was station agent of the Missouri Pacific at that time. I think it a little unusual to tell parties twice when trains leave. Persons waiting for trains are a little more nervous than at other times, whether there is anything the matter or not."

On the day already mentioned, Wiley Russell, who was at work shucking corn at Powell's place, some 250 yards from the bridge, heard three shots, two quite close together, fired from a pistol or a gun. This was in the direction of the bridge over Fiddle creek, and, as near as the witness could judge, between 9 and 10 o'clock in the morning; and he forms his opinion, in part, upon having heard the local train reach Labadie, and that shots were fired

after that time. About 12 o'clock on that day, Henry Bradley, who had been to Labadie, and was returning, as he walked along the bridge just mentioned, saw a man's hat, going to get which he discovered the body of a man afterwards proved to be that of Alexander McVickers. It was on the opposite side of the creek from Labadie, in a narrow gully, with steep sides, only some two and a-half or three feet from the north-east corner of the bridge, sitting or lying at an angle of about 45 deg., and pretty well concealed by brush, etc., thrown over and around it. Some of the brush has been brought a distance of 20 or 25 feet. Leading down by the side of the corpse were the tracks of but a single person. They led to the water under the bridge, and in a pool of water there was found a small satchel broken open, which contained a few articles of clothing. The tracks then returned, passed the corpse, and went into the wagon track, and then disappeared. The ground, being soft under the bridge, afforded good opportunity for measuring the full impression and length of the tracks. This was done with a rule at the time of the discovery of the body, and they measured exactly nine inches. An inquest being held upon the body, it was fully identified as that of McVickers. The left temple was somewhat powder-burned, as if the pistol were not more than 18 or 20 inches distant when the shot was fired. A bullet hole was found in the parietal bone above the left eye, and the bullet had evidently penetrated the brain some four inches, and then made its egress at the inner corner of the left eye. And it was in evidence that the shot must have been fired while McVickers was below the person shooting, and that the ball ranged downward and inward. The throat was cut, and the wind-pipe, jugular vein, and carotid artery severed, as if with a knife. It was testified that either the gunshot wound or the knife wound were sufficient to cause death. The body had bled very profusely, and the woollen clothing upon it was drenched with blood, and the bottom of the gully was bloody. There were no marks of a struggle upon the road or elsewhere; nor were there any blood-stains upon the ground except as stated. The pockets were turned inside out, and the seam of the pants cut. There was no money found on the body, and there were indications of a belt having been worn about the waist, causing discoloration. It was in evidence that there was a great deal of travel upon the road where the murder occurred, and that there was scarcely an hour in the day when persons might not have been seen traveling afoot along that road. It was testified by one of the medical experts that if a man be first shot—shot through the brain—that the effect would be to retard the flow of blood caused by severing the jugular vein and the carotid artery. There is nothing on the subject that I can find in works on medical jurisprudence; but I am assured by an eminent physician of this place that if a man were first shot dead by a bullet through his brain, and then his throat cut immediately or in a few minutes afterwards, the blood would gush as freely as if the vein and artery had first been severed.

Jackson, the defendant, was indicted for the murder of McVickers, and brought back from Ohio, upon requisition, and, being put upon his trial, the testimony already set forth was elicited, as well as other testimony to be hereafter mentioned. Being unable to employ counsel, the court appointed Messrs J. C. Kiskaddon and James Booth to defend him. It was also in evidence that Jackson was aware of the fact that McVickers carried a considerable sum of money about his person, and that, some months before the death of McVickers, Jackson had told Dr. Luce that McVickers had about \$500 or \$600, which he carried in a belt about his person. It seems, however, that it was commonly known about the camp that McVickers was the possessor of a considerable sum of money. It was disclosed by the testimony that about one week prior to the murder of McVickers, Jackson, on his return from St. Louis, had shown F. M. North an overcoat, and said that is what he had used his money for, and was "busted flat then." W. A. Keene testified that Jackson, about the same time, made a similar declaration to him. This kind of testimony was

introduced in order to show a motive on Jackson's part to commit the crime with which he is charged. The witness Meyer, having testified that the ground under the bridge was "kind of miry," that the tracks were those of one man, and that they measured 9 inches long from heel to toe, said, upon cross-examination: "I am positive that the measurement of the track was 9 inches from end to end. I am sure of it; no mistake about it." The defendant was then requested to approach the witness, and have his foot measured with the same rule with which the tracks had been measured, and the witness who measured it said: "It measures 11½ inches." Requested then to remove his shoe and sock for the measurement of his bare foot, the defendant did so, and, the witness having measured it, said: "It measures 9½ inches; but the heel may have projected out." Defendant was then requested to place his bare foot upon a piece of paper, which was then marked both at the heel and the toe with a pencil. The witness, having taken the measure, said: "That is ten inches, less a small fraction." Similar testimony was adduced tending to show that Stewart, another witness, was in error as to the length of defendant's foot, which he said was much shorter than his own. The testimony of Schafer and of Stevens, his book-keeper, showed that the statement of the defendant that he had been employed by Schaefer, as stated by defendant to F. M. North and Dr. Luce on the morning defendant and McVickers left the train at Labadie, was untrue.

Stephen Hartley was confined in jail for 40 days, in the same jail with the defendant. His testimony as to conversations with the defendant was this: "We were in there day and night, and were pretty near all the time talking. We were talking about his case and mine together. He told me about his case, and how it came up, and what caused it. He said he was going down here at the camp on the railroad at Keene Bros., I think it was, and got sick, or something or another the matter, and he went down for Mac, this old man, and he returned to Labadie. On his return, he met Frank North at the depot, and he asked him [Jackson] where he was going; and he said, 'I am going to Keene Bros.' camp;' and he said, 'It is no use for you to go there, you won't get a job.' Then he started towards Pacific, he and Mac, and passed several different parties, and then went on down near Withington's farm, and there they sat down, and had a conversation, and then Mac got up, and started towards Keene's camp to get work, and he started for Pacific. He said he went to a man by the name of Staples, I think his name is, and called there for a team to take him to a station on the Pacific Railroad. That he got there about dinner time. That they wanted him to eat dinner, but he did not feel well. After they got through their dinner, they got their team, and the boy took him to Pacific, where he remained until that night,—I think it was until evening,—and then he got on the train, and went to St. Louis, and there he remained one day and two nights, as well as I remember; but I'm not positive. Then he went over to Ohio, either Cleveland or Dayton, I'm not positive, and remained there three, four, or five days. While he was around in a store, I believe, he picked up a newspaper, and examined it, and he saw that Mac was dead, and that he was accused of the murder, and it wrecked his mind so he did not know what to do; so he went to stealing horses to pacify his mind. That is the way he stated it to me. He and his partner stole two horses a piece; that is, four. They got him after that, and had him in jail, and he stood his trial, and was condemned to the pen after that for two years. After he had been condemned to the pen, and found out that he was going to be brought back to this state, is the time he tried to make his escape from jail. There was a hatch-hole in the jail, he called it; and they tied some sticks together with pieces of blanket, and fixed it so they could reach up to that hole, and he got up and put his hand on the hatchway; and the man in the building shot at him, any he let go, and went back. We had a talk about this jail. He told me he wanted me to get him some tools to get him out with. That

was about a week before my time expired. He said I could get the tools after I got out, and put them through the back part of the house in some way or another, he did not say how, and then he could make his way out. We had a conversation about Mac's money. He told me he had seen Mac's money when they were in camp together, and had seen it lying around on the table and bed; that Mac was very careless with his money; and that he had taken it up several times and handed it to him. I think he said he had \$600 or \$700 when he was in camp. Jackson told me that McVickers had \$600 in his belt and \$150 that he carried for change; that he had seen the money several times when they were cooking together." To this testimony the defendant objected upon these grounds: That said testimony was not a confession of anything tending to show his guilt of the crime charged in the indictment, but was only the confession of the commission of another crime; that testimony of a confession that defendant had made an attempt to escape was too remote; and that all such evidence merely tended to prejudice the case with the jury, without raising any sufficient presumption to be permitted to go to the jury. But the court overruled said objections, and the defendant excepted.

This was, in substance, all the evidence offered on the part of the state, except Noelket's testimony, which was the following: "I know Webster Jackson. He came from Ohio. That was in November or December, I forget now; but I brought him from Hamilton, Butler county, Ohio. I got him on a requisition from the governor of Missouri on a warrant. I arrested him there at Hamilton. I had to go there twice. I spent altogether about a week there in getting him. The reason I couldn't get him, the first time the warrant was directed to the sheriff of Warren Co., and they required me to bring proof along. I got another warrant, and then identified Jackson as the party. He was not delivered to me then. I could not get him unless I had some proof of his identity. I telegraphed for Mr. Keene and Mr. North. I then got him, and brought him here, and delivered him to the sheriff of this county." Exceptions were taken to the admission of this testimony.

The defendant, on his own behalf, testified as follows:

"I am 24 years old. My home is 10 miles north of Dayton, Montgomery Co., Ohio. I have a mother living. I came to Franklin Co., Mo., on the last Sunday in April, 1886. I came up the Missouri river to Fiddle creek, where I was engaged as a cook by Keene Brothers at \$30.00 per month. I did not have a dollar when I got there. I worked three days in the kitchen, when I told Mr. Keene that I could not fill the bill, and asked him to give me another position, and he put me in the dining-room at \$15 a month. I continued in that position during the month of May, and then I worked in the kitchen at \$30.00 a month, board and lodging included. I knew Alex. McVickers. He came to Fiddle creek after I got there, and went to work in the kitchen as baker. He was a right nice old man. I believe his wages were \$45 a month. I was in the employ of Keene Bros. until September 22, 1886. The last two months I got \$35 a month. Sickness—malarial fever—caused me to leave their employ. I got some quinine from Dr. Luce at Labadie. McVickers and I got along all right while we were with Keene Bros. We worked together in the kitchen,—he as baker, and I as cook. Mac got sick the latter part of August. He went to bed, and I doctored him, and did his work and my own both, until September 22d, and I worked myself sick to do it. I did it in order to hold his job until he got well. There was something the matter with his leg,—an abscess or something on the side of it. I know that Mac had some money. He had \$150 in camp with him. He used to leave it on the bed, and he left it in my care day after day. I know nothing about his having money in a belt. It was commonly known among the men in camp that Mac had money. There were about sixty men at the camp I was at, and there were three or four other camps up and down the road besides the one I was at. There were 100 men at Schaefer's camp, just a mile

or so below. These men were very flighty; work a day or so, and then go off to another camp; liable to go at any time; no dependence to be put in them; work a day or so, and pull up and go somewhere else; just about all the time on the go. I did not tell Dr. Luce that Mac had money in a belt. I may have told him he had money to pay his bills. When I told him that, it was simply because I had got some medicine from the doctor for Mac, and it was very natural for me to tell him Mac had money to pay his bills. He had always paid his bills so far as I knew. I don't remember the date when I gave Mr. North that \$50,—probably the month before I left there. He had it in his possession probably a couple of weeks. George Bobb, a clerk for Keene Bros., got short of money, and wanted to cash some checks for the firm, and asked me for \$50. I got the money from Mr. North. He wanted to cash some time-checks, fifty per cent. off. I let that money stay there to be kept until I left, and then I got it and some more with it. When I left Keene Bros., and started for St. Louis, I am not positive how much money I had, but I had in the neighborhood of \$100. I worked from April to May at \$15 a month; and June and July at \$30 a month; and August and 22 days in September at \$35 a month. I had the whole of that, with the exception of a couple of dollars I had spent. I went to work in April, and worked until September 22d, and I had no opportunity to spend money. I used to go to Labadie to get medicine, and I got some few little articles from Mr. North,—probably a shirt or something of that kind. When Mac learned I was going to leave Keene Bros. he got ready to go along. He went to Pacific, and I went to St. Louis. I bid him good bye in Pacific, not knowing that I would ever see him any more. At St. Louis I got a room and some medicine, and doctored myself up. I stayed in St. Louis a week or so, and then came back to Labadie. When I got to Labadie, I went to board with Mr. Jahrauh, and stayed there three or four days. Dr. Luce told me that some cooks had quit at Schaefer's camp. He gave me a letter of recommendation there, and I went down to see about getting a job. I have not the letter of recommendation now. I don't know where it is,—likely I threw it away or tore it up. At Schaefer's camp I saw Mr. Stevens,—he is clerk and book-keeper for Schaefer & Nichols,—and made arrangements about working for them. He asked me if I could get any one to go in with me, and I told him I thought I could get Mac. He told me to go to Pacific and get Mac, and he would put us both in the kitchen. I went to Pacific, met Mac, and stayed with him that night; and the next morning we took the train, and came to Labadie, and went down the public road to Schaefer's camp. I asked what salary they would give us to go in the kitchen and run it, and was told \$85 between us,—\$45 for the old man, and \$40 for me. I went out of the tent, and told the old man, and he said, 'I won't go in for less than \$90.' They wouldn't give us more than \$85, so the old man said: 'Well, you can stay if you want to, but I won't stay for that. There are lots of men here, and it is pretty hard work, and I am not going to stay for less than \$50?' He went off, but I stayed to work in the kitchen at \$45 a month. I worked there three or four days, and got so sick I could not work. I told Mr. Stevens I was sorry to disappoint him so, and he said: 'If you are sick, you will have to take care of yourself.' So I got my time for the three or four days I had been there. I sold Mr. Stevens a watch while I was there. I got the watch in St. Louis. I paid \$6, and got \$8 for it. At that time I had money. I had between \$60 and \$70, besides what I drew from the company at Schaefer's camp. That is what I had left of my earnings at Keene Bros.' camp, and some little transactions I had with watches. I had four watches I got to trade with. When I left Schaefer & Nichols, I went to St. Louis, and doctored myself up a few days. Going up Broadway one day, I met Mac. We sat down on the courthouse steps, and had some conversation. We met there two or three days after that. I told him I was going to Ohio; and he said: 'You had better go

out, and see if we can get a job.' I did not know as I would be able to work, but we went out to see if we could secure a position. We went to Labadie on October 22d. I remember the date from the fact that I have been charged with something to make me remember it. We went out on the No. 5 passenger train, and arrived at Labadie at about 9 o'clock. I don't remember on which side of the train we got off; nor do I know positively who we first met. I saw Mr. North, Dr. Luce, and Mr. Keene. I shook hands with Mr. Keene, and he asked, 'Where are you going?' I think I told him we were going down to see about a job. He smiled, made me no reply, and went about his business. I do not really know whether I had a conversation with Mr. North or not. I spoke to him, and he may have asked me where I was going, and I may have told him where. Dr. Luce asked me where I was going, and I told him down the line to see about getting a job at Schaefer's. He said he did not think it necessary for me to go, as he had been at the camp the day before, and the book-keeper had told him that I did not give satisfaction when I was there previously. I remarked: 'I don't know as I can do anything more than go down and see.' We started out of Labadie on the Fiddle Creek road, and on the way down I saw James G. North on a horse going up the road. We were about 100 or 150 feet apart at the time. His horse was going on a trot. I spoke to him. The old man's leg was sore. It crippled him some, so we walked along very leisurely. I had a valise and an overcoat. My overcoat was on when we met North. The old man also had a valise. I noticed a bridge where the old man is said to have been murdered, but I paid no attention to it. I noticed we walked along a bridge, but we did not stop there. The first place we stopped was opposite the vineyard, near Mr. Meyers' or Worthington's house. I am not acquainted with the names of the people down there, but it was there where we stopped. We sat down a little while, and I told him what Dr. Luce had said to me at Labadie; and then the old man said: 'If we can't get any job, it's no use to go down, as it is a good distance.' So he concluded to go back to Labadie, and see Mr. Keene about a situation. 'Well,' I said, 'I will go on down to Utters' and see those parties, and get some one to take me to Pacific.' I bid him good-bye, he turned to go back towards Labadie, and I went towards Utters'. That is the last I saw of him. I kept right on the road. The first parties I met after leaving the old man was Mr. Reed and his son. I spoke to them as I went by. This was a little before 11 o'clock. I then went on to Mr. Utters'. I had some conversation with Mr. Utters. After that I spoke to the young man who testified here yesterday about trading watches,—I don't know his name; it was Mr. Calvin, as you call my attention to it. It was 11 o'clock when I got to Mr. Utters'. We talked about trading watches, and I noticed the time then. We did not trade, and I went over to the tent of those Jews in Mr. Utters' yard. I was acquainted with them, and I talked a few minutes with them. I asked them concerning the expressman who was hauling passengers and vegetables to Keene's camp, if he was gone, as I wanted to go to Pacific with him. I think they said he had already gone. I bid them good-bye, and went off towards Mr. Staples'. I had on a nice coat, and the Jews looked at it, as was natural for them. I don't know anything about going out and looking over myself. Yes, sir; I'm a little inclined to be neat, and I like to have good clothes. That was a dusty day; the roads were dusty. It is likely I was at Utters' half an hour altogether. I got to Mr. Staples' about 12 o'clock, I think; for they were eating dinner when I arrived. I spoke to Mr. Staples about taking me to Pacific. I was slightly acquainted with Mr. Staples, and I picked up a cup, and went to the water bucket, and I got a smell of the water, and took some in my mouth, and there was sulphur in the water, if I remember right. At least, it had a bad taste of some kind, and I stepped to the door, and threw it out, and I may have made the remark that the water didn't taste right. I made arrangements to be taken to Pacific. It was likely

half past one when we left Mr. Staples'. Staples, Jr., took me to Pacific. It was a very rough road, and we went in a big farm wagon with four horses, and made very slow progress. On the road I told the young man I was afraid we would miss the train. I told Mr. Staples I did not know for sure whether I would go to the Indian Territory or to Ohio. I believe I consulted him about the trains. He told me the best he knew. We got to Pacific in the neighborhood of three o'clock. The boy went with me right to the depot, and I went to the 'Frisco office, and also to the Missouri Pacific office, and asked them when the trains would come in. After that I asked the boy if he would play a game of pool, but he declined. After the boy left, I went over to Mrs. Langerbacher's, and asked if she could give me something to eat. She got me up some supper. I eat, paid her for it, and then went back to the depot, and stayed there a long time waiting for a train. Was told at the office that the Missouri Pacific train was behind time, and for that reason I took a 'Frisco train, it being the first one in. If I bought a ticket, I didn't remember it, as I very seldom buy a ticket any way. I talked to the station agent several times. May have inquired at the 'Frisco window twice. I stayed in St. Louis until next morning, and then I went to Cincinnati, paying \$10 fare. I am not positive how much money I had when I got to St. Louis, but in the neighborhood of \$80 or \$90. I had all my money from my summer's wages, except a few dollars for expenses, which you can estimate very easily. I had to pay board and lodging in St. Louis and for medicine, and that is about all the expenses I had. I smoke cigarettes. I am not in the habit of drinking,—never drank in my life."

The trial resulted in a verdict of guilty, and the defendant appeals to this court, alleging numerous errors. The evidence has been set down thus at large because it is altogether circumstantial, and it is insisted that it does not support the verdict; and because the action of the trial court in giving and refusing instructions, and in its other rulings, may be the better understood.

1. Much of the testimony of Hartley was wholly inadmissible. It related to the commission of another crime; *i. e.*, horse-stealing,—a crime entirely disconnected from that with which the defendant was charged, and for which he was being tried. The rule is certainly as absolute in criminal as in civil cases that "the evidence must correspond with the allegations, and be confined to the point in issue." 1 Greenl. Ev. §§ 50-52; *Bank v. Murdock*, 62 Mo. 70. The admission of evidence of such collateral facts would be to oppress the party implicated by trying him on a case for preparing which he had had no notice; tend to prejudice the jury against him, by the disclosure of extraneous crimes; would injuriously prolong the trial, becloud the real issue, divert the attention of the jurors from the *gravamen* of the accusation, and tend to cause their verdict to be taken on side issues,—issues wholly foreign to the charge. Whart. Crim. Ev. § 29 *et seq.*; *State v. Martin*, 74 Mo. 547; *Bank v. Murdock*, *supra*. In order that evidence of facts otherwise extraneous shall become relevant and admissible, it is necessary that those facts should be such as to shed light on the charge then being tried; to show that the apparently collateral criminal act is not collateral, but a part of the common system with the criminal act then under trial, and to establish such a visible connection between them,—so link them together by the chains of testimony as to tend to show that he who did the act offered to be proven also did the other for which he is then being tried. *Ex. gr.*, that a prisoner charged with and on his trial for murder stole a horse to go to the scene of his crime, or a weapon with which it was committed, or an instrument with which its perpetration was concealed, or by which his escape was effected. *State v. Lapage*, 57 N. H. 245; Whart. Crim. Ev., *supra*; *Griffits v. Payne*, 11 Adol. & E. 131; *Cole v. Com.*, 5 Grat. 696; *Coleman v. People*, 55 N. Y. 81; *State v. Cornell*, 6 Cent. Law J. 403; *Shaffner v. Com.*, 72 Pa. St. 60; Best, Ev. (Chamberlayne), § 6. There was no such obvious connection, or,

indeed, any connection whatever, between the subsequent horse-stealing and the previous murder. There was no relationship between them. Evidence that defendant had committed a murder in Missouri would have been just as relevant in Ohio when the defendant was on his trial there for stealing horses.

2. And the objections of the defendant were sufficiently specific. It is quite evident that the testimony of Hartley related, not to one, but to many conversations; to a series of them,—conversations extending during a period of weeks; in short, a ceaseless tide of words. If there had been but one conversation offered in evidence, and that had related to the commission of the crime for which the defendant was being tried, and in the same conversation he had made admissions of another crime, all of the conversation would have been admissible, as it would have been impossible to have separated the admissible from the inadmissible, and consequently the whole conversation must have been received; and the rule announced in *Underwood's Case*, 75 Mo. 230, would apply. But it is to be noticed that in this case there was no admission by the defendant, in any of the alleged conversations, that he had committed the crime for which he was then upon his trial, as was the fact in *Underwood's Case*, *supra*. And the alleged reasons of the defendant for stealing horses were equally as irrelevant as his admission of the crime itself. Testimony of reasons prompting him in that case were just as irrelevant, just as inadmissible, as if he had stated that, seeing the statement in the newspaper referred to, he had been led thereby to commit arson.

3. It is to be further noticed that in none of the conversations can the defendant be said to have made any confession of the crime which is the basis of the present prosecution. A person's admission or declaration of his agency or participation in a crime, or, in other words, a confession, is limited, in its precise scope and meaning, to the criminal act itself for which the confessor is then on his trial. It is not an admission of a fact or circumstance from which guilt of that crime may be inferred. *State v. Red*, 53 Iowa, 69, 4 N. W. Rep. 831; *People v. Parton*, 49 Cal. 632; 1 Green. Ev. § 170; 3 Amer. & Eng. Cyclop. Law, 439, and cases cited. These remarks are sufficient to condemn the fourteenth instruction, which is in these words: "(14) The jury are instructed that the confessions and admissions of the defendant are competent evidence, but are in themselves insufficient to convict the defendant unless corroborated by other evidence, which, considered with such alleged confessions, will satisfy the jury beyond a reasonable doubt that the defendant is guilty of the crime charged." Similar instructions were condemned in *State v. Red*, *supra*. There is absolutely nothing in the conversations testified to by Hartley that assumes the shape of an acknowledgment of his guilt.

4. But such portions of Hartley's testimony as related to the defendant's requesting him to assist him in escaping from the jail in which he was then confined on the present charge were admissible, and properly received. Such testimony rests upon the same footing as escapes, or attempts to escape. *State v. Williams*, 54 Mo. 170, and cases cited. Whart. Crim. Ev. § 750, and cases cited.

5. For the reasons just stated, testimony was admissible that the defendant admitted that he had attempted to break jail in Ohio on learning that he was to be brought back to this state.

6. Relative to alleged statements of the defendant to Hartley, that he knew McVickers had a large sum of money in a belt upon his person, such testimony was admissible as tending to show a motive for committing the crime.

7. The objection of the defendant's counsel to the introduction of Noelke's testimony should have prevailed. The mere fact that he did not take an active part in facilitating his transportation to a distant state afforded no ground for unfavorable presumptions against him, or tended in the least to shed any light on the charge on which he was tried. Its only tendency was to prejudice the jury against him, and should not have been admitted.

8. The prosecuting attorney, in his opening statement, made the following remarks: "Jackson was traced up by our sheriff, and found in the state of Ohio, and brought here. It seems that the gentleman had denied his identity there, and it necessitated witnesses being brought to Ohio, and showing that he was the man that had been here in Missouri. He was then under the charge of another crime." To all of which defendant then and there objected and excepted as being improper. Thereupon the court told the jury to disregard the statement of the prosecuting attorney, and not to permit it to influence their minds; to which remark of the court defendant objected and excepted on the ground that the remarks had already done the harm intended.

Second Exception. Whereupon the prosecuting attorney further proceeded with his opening statement to the jury, in which he used the following language: "After he was turned over to the sheriff in Ohio, he volunteered the statement that upon hearing through newspaper reports that he was charged with the crime of murdering McVickers, that he got so excited that he did not know what to do, and then went to horse-stealing to pacify the mind." To all of which defendant duly objected and excepted, at the time, as being improper. There is no evidence in this record that the defendant denied his identity when in Ohio; and, as evidence of the commission of another and independent crime was inadmissible, so, likewise, any allusion to such inadmissible evidence was equally inadmissible. It is true, when the prosecuting attorney made the first remark aforesaid, the court, upon objection made, told the jury to disregard it, and not to let it influence their minds. But all those who have ever engaged in active practice know how difficult it is for the court, by some such simple reprimand, to eradicate from the memories of jurors the evil of such illegitimate statements. Like the tares mentioned in Holy Writ, which the enemy sowed while men slept, they become as ineradicable as the good wheat of legitimate testimony among which their mischief-bearing seeds are cast. Besides, the prosecuting attorney made the second of those statements, and received no rebuke whatever. In arguing to the jury on the merits of the cause, the prosecuting attorney again repeated the substance of the second remark already quoted, and objections were made to it in vain. In his closing remarks to the jury, the prosecuting attorney also said: "Escape of criminals at the hands of juries brings on lynch law;" to which remark due exception was taken. Such remarks should not be tolerated in a court of justice. No attorney, whether for the state or for the prisoner, has a right to travel outside of the record and *dehors* the evidence, appeal to improper motives, and invoke a verdict on anything else but the evidence adduced. The case of *State v. Emory*, 79 Mo. 461, has been cited by the prosecution as giving countenance to such appeals to the jury. But it does nothing of the kind. That case only sanctions just and fierce invective when based upon the facts in evidence, and all legitimate inferences therefrom. It goes no further. In *State v. Kring*, 64 Mo. 591, the circuit attorney made the following remarks: "If you wrong the accused by finding him guilty, that wrong can be righted, because there are two courts above this in which the accused can have this reversed,—the court of appeals and the supreme court. If you are not justified in finding this man guilty, it is in their power to rectify any error; while if, on the other hand, you turn the murderer loose in the community, no matter how frail might be the scaffolding, it takes him forever in the light of freedom again. You will make a wound in this community that will never be healed." Passing upon these remarks, this court said: "The statement that the higher courts referred to had the power to review the finding of the jury on the weight of evidence was calculated to induce the jury to disregard their responsibility. * * * The judge presiding at the trial, in our opinion, should not have permitted such remarks to be made, on the close of the argument, without a prompt correction." The only difference between the case referred to and the one at bar is that in the former an attempt was made

to induce the jury to find a verdict of guilty upon the ground that, if they committed any error, it would be corrected by an appellate court, while here a similar attempt was made to induce a verdict of guilty by an intimation, amounting almost to a covert threat, that, if they failed to find a verdict of guilty, their error would be corrected by an outside tribunal acting independently of and in defiance of all law. Language fails to express in terms sufficiently strong the condemnation which should always promptly attend the utterance of such unworthy words when a human being is on trial for his life before a tribunal organized for the purpose, and for the sole purpose, of administering the law. Improper language of prosecuting attorneys has frequently been made the basis of severe animadversion by this court. *State v. Mahly*, 68 Mo. 316; *State v. Lee*, 66 Mo. 165; *State v. Reed*, 71 Mo. 200; *State v. Martin*, 74 Mo. 547. See, also, *Cross v. State*, 68 Ala. 476; *Brown v. Swineford*, 44 Wis. 282. Because of the foregoing remarks by the prosecuting attorney, the judgment should be reversed.

9. But the prosecuting attorney was within the bounds of legitimate argument when he referred to the failure of the defendant to deny that he had made certain admissions to Hartley. In so far as Hartley's testimony was admissible, it was competent for the prosecution to comment on the failure of the defendant to contradict or deny it. A defendant in a criminal cause, when he takes the stand as a witness, is, aside from certain statutory provisions, upon the same footing as any other witness in a civil or criminal cause. His failure to deny damaging statements of other witnesses alleged to have been made to them by him, or to explain prominent and damaging facts peculiarly within his own knowledge and under his own control, is a fit subject to be commented upon, and for unfavorable inferences to be drawn from such failure. *State v. Anderson*, 89 Mo. 312, 1 S. W. Rep. 135, and cases cited; Whart. Crim. Ev. (9th Ed.) §§ 435a, 681. In New York the statute provides that, upon the trial of all indictments charging a criminal offense, the person charged shall, at his own request, but not otherwise, be deemed a competent witness; but that the neglect or refusal to testify shall not create a presumption against him. And, in passing on that statute, GROVER, J., said: "The general rule is that when it appears that a party charged with the commission of a crime has the power, if innocent, to explain a fact or circumstance tending to show his guilt, fails to give such explanation, such failure may be considered as a circumstance against him. In the present case the question is whether his failure to give any explanation of such a fact or circumstance, which he could do if innocent, when testifying in his own favor, he having requested to become a witness, comes within this general rule. The argument in behalf of the accused is that he cannot be made a witness at all except by his own request, and that his failure to be a witness shall not create any presumption against him, and that if he requests to be a witness, and becomes such, he need give testimony only to such parts of his case as he may choose; and as to other parts, as to which he does not request or desire to give testimony, no presumption can be created against him for his failure to testify. In this construction I cannot concur. True, it is at the option of the accused whether or not to become a witness; but when he has exercised this, and become a witness, he is made competent for all purposes in the case. If, by his own testimony, he can explain and rebut a fact tending to show his guilt, if innocent, and he fail to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness if in his power so to give it. The reason for the presumption is alike in both cases. It arises from the known desire of parties to explain or repel accusatory evidence against them, if in their power; and the basis of the presumption is that the case shows that it is in their power if innocent. Hence the failure tends to show absence of innocence." *Stover v. People*, 56 N. Y. 317. Under the provisions of just the same statute, a similar ruling has been made in Maryland. *Brashears v. State*, 58

Md. 563. Section 1918, Rev. St., does but announce the rule generally prevalent throughout this country, that the right of cross-examination does not extend to the whole case, but is restricted to matters touched upon in the direct examination. Best, Ev. (Chamberlayne,) § 644, and notes. The legislature, by pointing out, in section 1918, *supra*, just how far the right of cross-examination shall extend, thereby established a single exception, and leaves a prosecuting attorney the same latitude of comment as to all things else save those expressly included within the terms of the exception itself. And to this statute the familiar maxims, "*expressio unius*," etc., and "affirmative specification excludes implication," apply. Dwar. St. 655; *Maguire v. Association*, 62 Mo. 344. In short, the right of the prosecution, as towards a defendant witness, is limited alone by the statute; and consequently the right to unfavorably comment upon the failure of such witness to testify as to matters within his own knowledge is just as broad and as clear as his right to exemption from unfavorable comment when he abstains altogether from asserting his statutory privilege. Cooley, Const. Lim. (5th Ed.) 317, and notes. Section 1919, Rev. St., bears out the same idea; because that section provides that if the accused shall not avail himself of his right to testify, that such failure shall not raise any presumption of guilt, nor be referred to, etc. In this case the defendant did avail himself of the right to testify, and therefore comments not forbidden by the statute were legitimate. The discussion of this point has been lengthened because of the frequency of its occurrence in criminal practice.

10. The tenth instruction is in these words: "In law a person accused of crime is presumed to be innocent. This presumption entitles him to an acquittal unless it is overcome by evidence which establishes his guilt beyond a reasonable doubt. A juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the party accused is guilty as charged. You should acquit the defendant if you entertain a reasonable doubt as to his guilt; and you *should also acquit if it is as reasonable, considering all the facts or circumstances proven, to conclude that he is innocent as to conclude that he is guilty*, or if all the facts and circumstances can be reasonably reconciled with any theory other than that of his guilt. A doubt, to authorize an acquittal, however, should be reasonable and substantial, and one fairly deducible from the evidence considered as a whole. A mere possibility that the defendant may be innocent will not warrant a verdict of not guilty." This instruction is erroneous. I have italicized the erroneous portion of it. That portion announces the same rule that prevails in civil cases,—a rule obviously inapplicable to those of a criminal nature. An instruction substantially identical with the one under consideration was condemned, for a similar reason, in *State v. Schaeffer*, 89 Mo. 271, 1 S. W. Rep. 293. It is true, the next instruction, the eleventh, that gave the jury the correct rule as to what evidence would authorize a conviction in a criminal cause; but it is impossible to tell what injurious effect the tenth instruction had upon their minds, or which instruction they took for their guide. *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. Rep. 7; *State v. McNally*, 87 Mo. 644; *State v. Simms*, 68 Mo. 305; *State v. Mitchell*, 64 Mo. 191; *Frederick v. Allgater*, 88 Mo. 598.

11. The fifteenth instruction, in regard to flight raising a presumption of guilt, is unobjectionable, and left the matter very fairly to the jury to determine whether the defendant had really fled the country or not.

12. Nor is there any objection to the sixteenth instruction, which authorized the jury to take into consideration any attempts made by defendant to secure tools so as to make his escape from the Franklin county jail.

13. I see no error in failing to instruct upon the point of an *alibi*. There was no evidence to warrant such an instruction. The defendant, nor any one else, testifies as to when McVickers was killed, nor where defendant was at that time. Besides, an *alibi* was not made an affirmative defense. *State*

v. *Murray*, 91 Mo. 95, 3 S. W. Rep. 397. I discover no ground for just criticism as to the action of the trial court as to giving or refusing other instructions.

14. I come now to a matter which has given me no little trouble. It is whether the evidence supports the verdict. It is insisted that it does not. In order to determine this point, I have read this voluminous record with the most patient attention, and, after doing so, I am free to confess that there is a great deal of mystery connected with the murder of McVickers; for murdered he undoubtedly was,—suicide is out of the question. It seems to be quite certain that whoever did or was concerned in the murder made the tracks leading down to the pool of water under the bridge where the satchel of the deceased, broken open, was found; but the careful measurements of those tracks do not seem to conform to the length of the defendant's foot. But suppose that two were engaged in the murder? Again, it seems difficult to believe that if the defendant alone did the murder, and cut the throat of the deceased, how it was that his clothes were not covered with blood; that is, if the blood gushed freely from the gaping wound in the throat. But defendant's clothes were free from any appearance of blood-stains, or of any appearance of blood-stains having been recently removed. But suppose that, according to Dr. Martin's theory, the flow of blood was retarded in consequence of the fatal effect of the gunshot wound in the head; or suppose, according to another theory, that the blood did gush freely, but that the defendant was provided with another suit of clothes, which he changed, placed the blood-stained suit in his satchel, and put on the clean suit; or suppose, further, that two of the three shots fired pierced the heart of the victim, and thus, by internal hemorrhages, drew off a large portion of the vital tide, (and it does not appear that any examination was made to ascertain if any shots entered the body of the deceased,)—then this may account for the fact that if the defendant did the murder, that his clothing showed no external indications of it. And if he really committed the crime, and committed it at 10 o'clock, there was, it seems, time enough for him to have done so, and still reached Reed's Landing, about one and three-fourth miles to the eastward, by 11 o'clock. My impression from reading the testimony is that McVickers was seated upon the north-east corner of the bridge when shot; that he may have been shot in the body twice,—perhaps in the head last; then thrown into the gully, but about two and one-half feet away, when his throat was cut. But still this impression must be at fault, if the blood gushed freely when the throat was cut, because no one pretends that any indications of blood were seen on the sides of the gully, or on the brush at the sides of the body.

But, leaving this branch of the subject, it is shown, (1) by the testimony that the defendant was impecunious—"broke"—only about a week before the 22d of October; (2) that he was aware that the deceased was the possessor of a considerable sum of money; (3) that he was in proximity to the scene of the crime,—i. e., within one-fourth of a mile from where it was committed; (4) that he was with McVickers, so far as the testimony shows, when last seen alive, and by his own admission crossed the bridge with him; (5) that though intending, as he says, to return to Ohio, he tried to create the impression upon the mind of Staples that he intended going to the Indian Nation; (6) that he endeavored to induce Hartley to supply him with tools, so that he could break jail; (7) though aware, when at Labadie, that he could not get employment at Schaefer's camp, still, according to his own story, he allowed McVickers, who had an abscess on his leg, to travel, as he stated, to Meyer's Vineyard, a distance of three miles from Labadie, before he informed him of what Dr. Luce had told him, that it would be needless to go to Schaefer's camp for work; (8) that he told a falsehood about having secured work for himself and McVickers at Schaefer's camp; (9) that though he left St. Louis, and went to Labadie in search of work, yet that, after being disappointed in his

expectations of getting work at Schaefer's camp, he still neglected to avail himself of the opportunity of securing employment at Keene's camp, but a short distance away, when informed by Marquitz that he could secure employment there. When all these things are taken into consideration, as well as defendant's actions at Staples' place, on the way to Pacific, and when he arrived there, I am not prepared to say that there is no evidence to support the verdict, or that this court ought to interfere on that account. And I say this the more readily because, when the cause goes back to the lower court, the testimony may take on a different and more satisfactory shape either in favor of innocence, or in favor of guilt, when the cause shall have been more thoroughly tried. To that end, the judgment will be reversed, and the cause remanded.

All concur in reversing the judgment; but their concurrence is based on various grounds, as hereinafter indicated: As to paragraphs 1 and 2 no one agrees with me. In paragraphs 3, 4, 5, 6, and 7 all concur. In paragraph 8 BLACK and BRACE, J.J., concur. As to language in regard to "escape of criminals" NORTON, C. J., and RAY, J., dissent, as to whole of paragraph. In paragraph 9, BRACE, J., alone concurs. In paragraph 10, RAY, J., alone concurs. In the remaining paragraphs all concur.

LONG v. LONG.

(*Supreme Court of Missouri. June 18, 1888.*)

APPEAL—PRACTICE.

Where the appellant fails to furnish the supreme court with a clear and concise statement of the case, and of the points intended to be insisted on in argument, and also fails to prepare an abstract of the record setting forth so much thereof as is necessary to a decision of the case, and the points relied on are not thus preserved, in compliance with the statutes and rules of court governing appeals, the court will not examine the transcript of the record, and give judgment thereon, but, acting on the presumption that the judgment of the circuit court was correct, will affirm it.

Appeal from circuit court, Knox county; BEN E. TURNER, Judge.

Ejectment by David Long against Joseph Long for land in Knox county, Mo. Judgment for plaintiff, and defendant appealed.

O. D. Jones, for appellant. *Blair & Marchand* and *David Long*, for appellees.

SHERWOOD, J. This cause has been here before. It is reported in 79 Mo. 644, and is ejectment for about 470 acres of land in Knox county. On the former appeal, the judgment was reversed, and the cause remanded, with directions that if, pending the appeal, the plaintiff had been placed in possession, that a writ of restitution issue, restoring the defendant to the premises in controversy, and that then the plaintiff's action be dismissed. The mandate of this court was obeyed, the defendant was restored to the premises in controversy, and plaintiff again brought ejectment, claiming title under another and different deed of trust and sale made thereunder,—the Howerton deed. The answer was a general denial, and also a special defense charging fraud, etc. In a criminal cause the statute makes it the duty of this court to examine the record, and to give judgment thereon, whether any brief, statement, or assignment of error be filed or not. But in civil actions the rule is different. In such cases, it is the duty of the parties to make out and furnish this court with a clear and concise statement of the case, and of the points intended to be insisted on in argument. And our rules require that the appellant prepare an abstract of the record, setting forth so much thereof as is necessary to a full understanding of all the questions necessary for a decision, etc. Neither the statute nor our rules have been observed in this case. It is true, we have filed herein a number of abstracts, counter-abstracts, briefs, counter-briefs, and supplemental briefs; but from them all no intelligent idea

of the case is to be gained. Referring to the record, however, we find that, after a long and tedious trial, the court instructed the jury to find for the plaintiff that upon the evidence he was entitled to recover, giving at the same time a form for their verdict. The court also, of its own motion, gave certain instructions, which are not preserved in the bill of exceptions. The defendant asked 20 instructions, in 2 series, 2 in the first, and 18 in the second, all of which were refused. The jury thereupon returned a verdict for the plaintiff, and the defendant has appealed. Inasmuch as the defendant has failed to comply with the statute and the rules of this court in clearly setting forth the facts in this case and the points relied on, and inasmuch as the instructions given by the court of its own motion are not preserved, we shall act upon the familiar presumption that the court below ruled correctly, and accordingly affirm the judgment.

All concur, except RAY, J., absent.

STATE *ex rel.* LEWIS v. BARNETT *et al.*
(Supreme Court of Missouri. June 18, 1888.)

1. EXECUTION—EXEMPTIONS—DUTY OF CONSTABLE.

Rev. St. Mo. § 3846, gives a debtor who is the head of a family the right to select property, not exceeding \$300 in value, as exempt from execution; section 2847 makes it the duty of an officer holding an execution to notify the debtor of his rights, and set apart the property selected by him; and section 2519 makes wages for 80 days exempt from garnishment. A constable having an execution for \$100 garnished the debtor's employer, but the debtor was not notified of the garnishment, or of his rights. Judgment was rendered by default, execution was issued, and, upon payment by the garnishee, returned satisfied. The debtor then notified the constable that he was the head of a family, that the money collected was due as wages for the last 80 days, and that he selected the wages as his exemption. The constable paid the money to the debtor, and amended the return, showing these facts. *Held*, in a suit by the execution creditor against the constable on his official bond, that it was the duty of the officer to protect the debtor in his rights, and that the facts constituted a valid defense to the action.

2. JUSTICES—JURISDICTION—GARNISHMENT EXEMPTION.

A justice of the peace has no jurisdiction to determine the rights of a defendant debtor to exemptions in a garnishment proceeding, and where the debtor has no notice, and is not a party to the proceedings, and interposes no claim, his rights are not adjudicated thereby.

Appeal from circuit court, Pettis county; JOHN P. STROTHER, Judge.

Action by the state of Missouri *ex rel.* Henry Lewis against R. W. Barnett, a constable, and the sureties on his official bond, for failure to pay over money collected by him on an execution in favor of Lewis. The court gave plaintiff judgment upon the pleadings, and defendants appeal.

W. S. Shirk, for appellants. *C. L. Jackson*, for respondent.

SHERWOOD, J. Action on the official bond of the defendant Barnett, as constable, his sureties being joined as co-defendants. The breach of the bond assigned and the concluding portions of the petition are as follows: "For breach of said bond plaintiff states that at the times hereinafter mentioned defendant Barnett was constable of Sedalia township, as aforesaid, and plaintiff states that on the 11th day of October, 1882, an execution in the sum of one hundred dollars (\$100.00) in favor of said Henry Lewis, and against the Missouri Pacific Railway Company, was issued by J. R. WEBBER, then one of the justices of the peace of said Sedalia township, Pettis county, Mo., and delivered to defendant Barnett as constable, as aforesaid, who afterwards returned the said execution into the office of the said J. R. WEBBER, justice of the peace as aforesaid, with the following return indorsed thereon: 'Executed the within execution in the county of Pettis and state of Missouri on the 17th day of October, 1882, by collecting of the Missouri Pacific Railway Company (\$100.00) in full payment of this execution, and return the same satisfied.

R. W. BARNETT, constable of Sedalia township, Pettis county, state of Missouri.' Plaintiff further states that said defendant Barnett has failed and refused to pay the said sum of one hundred (\$100.00) so collected by him on said execution over to said Henry Lewis, or his attorney, although often requested so to do. Whereby plaintiff states that the said Henry Lewis has been damaged in the sum of one hundred dollars, (\$100,) with one hundred per cent. per annum interest thereon from the said 17th day of October, 1882." Wherefore plaintiff prays judgment, etc.

After certain formal admissions, the defendants answered as follows: "Defendants deny that said R. W. Barnett has committed a breach of said bond, as is alleged in plaintiff's petition, or otherwise. Defendants admit that on the 11th day of October, A. D. 1882, an execution in favor of the relator, Henry Lewis, and against the Missouri Pacific Railway Company, for \$100, was placed in said Barnett's hands, and that on the 17th day of October, 1882, he returned the same fully satisfied, as is alleged in plaintiff's petition; and defendants admit that said Barnett did not nor has he paid said sum of one hundred dollars so as aforesaid collected on said execution to the relator, Henry Lewis, nor ought he be compelled to do so, for the following good and sufficient reasons, to-wit: That on the 4th day of August, A. D. 1882, an execution in favor of the relator, Henry Lewis, and against one A. J. Mitchell, for the sum of one hundred dollars and costs, was placed in said Barnett's hands, as constable, for collection; that on the 13th day of August said Barnett garnished the Missouri Pacific Railway Company under said execution, as the debtor of said Mitchell, and that on the 17th day of August, said Mitchell having claimed said debt, being wages due him, as exempt, said garnishment was released; that on the 14th day of September, A. D. 1882, by order of the relator, said Barnett again summoned said railway company as garnishee of said Mitchell; that prior to the rendition of the judgment hereinafter mentioned against said railway company said Barnett did not find said Mitchell to notify him that he had garnished his wages in the hands of said railway company, and his rights in the premises, and that, said railway company having failed to answer said garnishment, judgment was rendered against said railway company in favor of the relator in the sum of one hundred dollars; that thereupon an execution issued on said judgment, which is the selfsame execution mentioned and described in plaintiff's petition, and was placed in defendant Barnett's hands for service; that on the 17th day of October A. D. 1882, said Barnett collected said execution as is hereinbefore stated; that as soon as said money came into the said Constable Barnett's hands the said A. J. Mitchell notified said constable that he was the head of a family, and that he had none of the property mentioned in the first and second subdivisions of section 2343 of the Revised Statutes of Missouri, and that the 100 dollars so collected of said Missouri Pacific Railway Company under the aforesaid execution was wages due him as an employe of said company for the last thirty days' service, and that as such wages, and in lieu of the property mentioned in said first and second subdivisions of said section 2343, he claimed said wages exempt, and demanded of said Barnett a return of said money to him; that thereupon said constable, finding that it was true, and defendants so allege the fact to be, that said Mitchell was the head of a family, and that he did not own any of the property mentioned in the first and second subdivisions of section 2343 of the Revised Statutes, and believing that said Mitchell had a right to claim said wages as exempt at any time before they were by him paid over to the relator, did thereupon set apart said wages, to the amount of \$100, to said A. J. Mitchell, as exempt, and did thereupon pay to said Mitchell said sum of one hundred dollars so as aforesaid collected of said Missouri Pacific Railway Company under said garnishment proceedings, as he was in law and duty bound to do, and did thereupon make full and true return of all said facts on the aforesaid execution in favor of said relator and

against said A. J. Mitchell. And, because of the above and foregoing recited facts, defendants say that relator cannot maintain any action against defendants on account of the facts set forth in plaintiff's petition, inasmuch as said garnishment, and the judgment and execution against said railway company, were only intermediate steps taken by said Barnett between the issue of said execution in favor of relator and against said A. J. Mitchell, and its final return, looking towards its collection, and that any action which relator may have in the premises must be based on a failure to make a true return on said original execution against said Mitchell, or a failure to pay over to the relator any funds collected by him under said execution of relator against said A. J. Mitchell." Wherefore defendants deny, etc.

Thereupon the plaintiff filed a motion for judgment, based upon the ground that the facts set up in the answer constituted no defense to plaintiff's action. This motion the court granted, and judgment went accordingly, to reverse which the defendants appeal.

The only question, then, is, do the facts set forth in the answer, and confessed by the motion to be true, form any bar to plaintiff's action? Under the provisions of section 2343, Rev. St., a debtor, when the head of a family, is entitled to hold as exempt from attachment and execution certain personal property. Under the provisions of section 2346, such debtor has his election whether he will select the property mentioned in the first and second subdivisions of the section already referred to, or whether he will select as exempt, and in lieu thereof, any other property, real, personal, or mixed, or debts and wages, not exceeding in value the amount of \$300. Under the provisions of section 2347, it is the duty of the officer into whose hands any execution may come, and before he shall levy the same, to apprise the person against whom such execution has issued of the property exempt under previous sections, and of his right to hold the same as exempt from attachment and execution, etc.; and shall proceed to set apart to the defendant the property exempt to him under the statute. Under the provisions of section 2519, no person can be charged as garnishee on account of wages due from him to a defendant in his employ for the last 30 days' service. In *State v. Barada*, 57 Mo. 562, it was ruled that a justice of the peace has no jurisdiction in a case of garnishment to determine the rights of a defendant to hold as exempt from execution the garnished debt, and that the protection of the execution debtor and defendant is cast by the law on the officer holding the execution, who is bound by the law to apprise the debtor of his rights, to allow him to make his selection and claim, and, in his return upon the execution, to show the amount of the debt set over to the defendant. It will be observed in this case that the defendant based his claim to hold his wages exempt, not only under the provisions of section 2519, but also under the exemptions of sections 2343, 2346. The ruling made in the case cited seems to determine the present one; because if, as there asserted, a justice of the peace has no jurisdiction to determine the rights of a defendant to a debt in a garnishment proceeding, then certainly the rights of the defendant in this instance were not prejudiced by the judgment of the justice, in a proceeding of which the defendant had no notice, to which he was not a party, made no claim, and those rights were not adjudicated. This being true, the case stands here just as if the garnishee, under the provisions of section 2551, had, before final judgment against it, discharged itself by paying to the constable the amount due by it to the defendant; or as if the constable, with the execution in his hands, had gone to the defendant, seeking property whereon to levy, and the defendant had thereupon made the claim he did. If the garnishee, instead of \$100 in wages, had a horse of the defendant's worth that sum in its possession, which, in discharge of its liability as provided in section 2551, it had turned over to the constable, and the defendant had thereupon met him in the way, and demanded such property as exempt, it could not be doubted that his claim must have been respected, and

that no liability would have been incurred by the constable in thus respecting it; thereby obeying a plain statutory duty. Several instances have occurred in this state where constables have been held liable because of failure to apprise a debtor of his exemptions under the law, and because of failure to respect such exemptions. *State v. Farmer*, 21 Mo. 160; *State v. Romer*, 44 Mo. 99; *State v. Beamer*, 78 Mo. 37. Now, it cannot be possible that the law would hold a constable responsible if he failed to observe and obey the mandates of sections already quoted, and still hold him equally responsible if he did obey them. In a word, a double liability cannot spring from the performance or non-performance of one and the selfsame act. The conclusion, then, must be that the answer of the defendants, taken as a whole and taken as true, constituted a valid defense to plaintiff's action.

No importance is to be attached to the fact that the execution had been returned satisfied, since the money had not been paid to the execution plaintiffs when demanded by the execution defendant, and since, also, the return on the writ was amended, and, no showing to the contrary being made, the presumption is the amendment was legitimately made; and, at all events, the claim of the defendant in the circumstances set forth was in time. It has been deemed unnecessary to discuss the constitutional questions upon which this cause has come up to this court; and this, because of our action on the merits of the cause any discussion of other questions would have been superfluous. Under recent constitutional amendments, the whole cause came before us for discussion, and it was only requisite for us to discuss such of the points involved as disposed of the case. Holding these views, the judgment must be reversed, and the cause remanded.

All concur, except RAY, J., absent.

STATE *ex rel.* LINGENFELDER *et al.* v. LEWIS *et al.*, Judges.

(*Supreme Court of Missouri.* June 18, 1888.)

APPEAL—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.

Where plaintiffs sue for \$7,311, and defendants set up a counter-claim for \$3,000, and the trial court find \$4,720 due plaintiffs on their claim, and \$2,766 due defendants on their counter-claim, and render judgment for plaintiffs for the difference between those sums, and defendants appeal, the amount in dispute is the sum found to be due plaintiffs, which being in excess of the jurisdiction of the St. Louis court of appeals, the appeal should be taken to the supreme court.

Original proceedings for writ of prohibition.

Kehr & Tittman, for petitioner. *Dexter Tiffany* and *B. Schnurmacher*, for respondents.

BRACE, J. In this proceeding the petitioners seek to restrain by writ of prohibition the respondents, judges of the St. Louis court of appeals, from proceeding to hear and determine the case of *P. J. Lingenfelder et al., Plaintiffs*, against *The Wainwright Brewing Company, Defendant*, taken on appeal to said court by the said defendant from the St. Louis circuit court, on the ground that the amount in dispute on such appeal is beyond the jurisdiction of said appellate court. In that action the plaintiffs sued the defendant for \$7,211.30, and the defendant denied plaintiffs' cause of action, and set up a counter-claim for \$3,000. The trial court found for the plaintiffs on their cause of action the sum of \$4,720.71, and for the defendant on its counter-claim the sum of \$2,766.13, and rendered judgment in favor of plaintiff for \$1,954.58, the difference between these two amounts, and the defendant appealed. The amount in dispute by which the jurisdiction of the appellate court is to be determined is not necessarily fixed by the amount of the judgment appealed from, (*State v. Judges*, 87 Mo. 569,) nor by the amount claimed on the cause of action sued upon, (*Kerr v. Simmons*, 82 Mo. 269,) but by the amount that remains in dispute between the parties on the appeal, and sub-

ject to the determination by the appellate court of the legal questions raised on the record, to ascertain which the appellate court is not confined to an examination of the judgment only, or the pleadings in the case, but may look into the whole record. Two amounts were in dispute in this case in the trial court, the amount claimed by the plaintiffs on their cause of action and the amount claimed by the defendant on its counter-claim. The difference between these two amounts was never in dispute at all. That amount was simply the necessary result of the determination of the two disputes between the parties as to the amount which each claimed. The finding of the circuit court in defendant's favor on the counter-claim, the plaintiffs not having appealed, eliminates that dispute from the case. The finding for the plaintiffs on their cause of action in an amount less than that sued for, the plaintiffs not having appealed, eliminates from the remaining dispute the difference between the amount sued for and the amount found, and leaves in the case as the amount alone in dispute the amount of that finding, which being in excess of the jurisdiction of the St. Louis court of appeals, the appeal should have gone to the supreme court. The position that the amount in dispute in this case is the difference between the finding for the plaintiffs on the cause of action and the finding for the defendant on the counter-claim finds no support in the case *State v. Judges, supra*, in which it was held that an appeal by defendant, in an action on a penal bond, the amount in dispute was the amount at which the damages were assessed for the breach; or in the case of *Kerr v. Simmons, supra*, in which it was held that an appeal by the plaintiff in an action on a contract, where it was admitted by the pleadings that a payment had been made on plaintiff's cause of action, that the amount in dispute was the amount claimed less such payment. The demurrer to the return is sustained, and peremptory writ ordered.

All concur, except RAY, J., absent.

STATE *ex rel.* CONRAN *et al.* v. WILLIAMS, Recorder of Voters.

(Supreme Court of Missouri. June 18, 1888.)

1. RECORDS—RIGHT TO COPY—REGISTRATION LISTS—MANDAMUS.

Mandamus will lie to compel the recorder of voters of the city of St. Louis to permit the copying of the registration lists in his custody, the same being public records, under reasonable regulations for their safety, for use by a "voluntary political organization" in holding a primary election, under the act of March 27, 1875, (Acts Mo. 1875, p. 54.) as the lists furnish the best evidence of the qualifications of voters prescribed by that act; but the writ will not be granted until the statutory notice required for such election has been given.

2. MANDAMUS—PROCEDURE—RETURN.

A return to an alternative writ of *mandamus* denying "any knowledge or information sufficient to form a belief" in respect to certain material allegations of the petition is insufficient; the provisions of the practice act, permitting such answer in ordinary civil cases, not being applicable to proceedings by *mandamus*.

Original proceedings in *mandamus*.

This action is brought in the name of the state, at the relation of Isaac Conran and others, constituting the Democratic central committee of the city of St. Louis, to compel Henry W. Williams, recorder of voters for said city, to allow the relators to inspect and take copies of the registration books and lists of the voters therein, for the purpose of holding a primary election, under the primary election law, of March 27, 1875, (Acts of 1875, p. 54.) The respondent made return to the alternative writ, and the relators demur thereto.

Charles B. Stark, for relators. *A. & J. F. Lee*, (*Henry W. Williams, pro se*.) for respondent.

BLACK, J. This case stands on a demurrer to the return made to the alternative writ of *mandamus*. The relators aver in the petition and writ that

they constitute the Democratic central committee of the city of St. Louis, the Democratic party being a voluntary political organization; that a general election will be held in this state on the 6th of November, 1888, for the election of various officers; that a number of conventions are to be held by the Democratic party to nominate candidates for such offices, and that delegates are to be selected from the city of St. Louis to attend those conventions; that local officers, such as constables, are to be put in nomination by the party organization; that on April 11, 1888, the relators, as such committee, passed a resolution declaring it to be to the interest of the party to select the before-named delegates and the candidates for the local offices by a primary election, to be held under the primary election law of 1875; that at the same time they instructed a committee to prepare and report plans and the form of notice to be given of such election; that to hold such primary election it is necessary that the judges and clerks thereat should have copies of the registration books and registration lists in the custody of the respondent, who is recorder of voters under the act of 1883; and the command of the alternative writ is that respondent permit relators to inspect the registration books and lists, and take copies thereof.

1. In respect of some of the material averments of the petition the respondent makes return thereto by saying that he has no knowledge or information sufficient to form a belief as to whether, etc.; reciting the allegation. This is true in respect of the allegation that the relators constitute the managing committee of said party in St. Louis, and the relators challenge the sufficiency of such a denial. The practice act permits this form of a denial in an answer in ordinary civil suits. At the adoption of the practice act, in 1849, it was provided, by section 6 of article 30, that the act should not affect proceedings upon *mandamus* until otherwise provided. At the present time the article relating to amendments is in express terms made to apply to writs of *mandamus*; thus showing by clear implication that in other respects it does not apply. Hence we held in *State v. Burkhardt*, 59 Mo. 79, that the general provisions of the practice act allowing all persons having an interest in the suit to be made plaintiffs or defendant had no application to proceedings by *mandamus*. It is therefore clear that the return must conform to the common-law rules; and this is none the less so because the relator may plead to or traverse all or any of the facts stated in the return. High says: "Unless, therefore, the alternative writ is quashed, the respondent is bound to make return, and to set forth either a positive denial of the truth of the allegations contained in the writ on which the relator founds his claim for relief, or to state other facts sufficient in law to defeat the relator's right." High, Extr. Rem. § 460. Substantially the same rule is laid down in *Mos. Mand.* 210, and in *Topp. Mand.* 390. Every distinct and material allegation in the writ, if intended to be controverted, must be denied, and the traverse must be single, direct, and certain. *Harwood v. Marshall*, 10 Md. 451; *Com. v. Commissioners*, 37 Pa. St. 237. Tested by these rules, a denial on information and belief is insufficient, and the material averments, thus attempted to be denied, must be taken as admitted. It may be stated that some of the denials on information, etc., relate to averments in the writ which are either conclusions of law or wholly immaterial.

2. Under the act of 1883, the recorder of voters must make a registration book for each election precinct, and the citizen can only vote in the election precinct where his name is registered, and in which he is registered as a resident. Copies of these registration lists, as corrected by a board of revision anterior to each election, are made out by the recorder, and delivered to the judges, and by them returned to the recorder after the election. It is these lists of which relators desire to take copies, and which the respondent refuses to permit them to do, though it stands admitted that he permits them to freely inspect the books and lists. The recorder seems to think that because he

must safely keep these registration lists, that he ought not to permit copies of them to be made; but in this he is in error. They are public records, and open to inspection like other public records. We said in *State v. Hoblitzelle*, 85 Mo. 624: "While we regard the poll-books as belonging to that class of public records open to inspection when the applicant who desires to inspect them shows that the purpose of inspection is to vindicate some public or private right, the courts will, by *mandamus*, compel the inspection on condition that the inspection be made under such reasonable rules and regulations as the court or officer having them in charge may impose." With greater reason may it be said these registration lists are public records. The right to inspect quite carries with it the right to take a copy. We think the same rules of law may be applied to these lists that prevail in respect of the records of municipal corporations, as to which Dillon says: "If such a corporation should refuse to give inspection thereof to any person having an interest therein, or, perhaps, for any proper purpose, to any inhabitant of the corporation, whether he had any special or private interest or not, a writ of *mandamus* would lie to command the corporation to allow such inspection, and copies to be taken, under reasonable precautions to secure the safety of the originals." 2 Dill. Mun. Corp. (3d Ed.) § 848. As to the records of municipal corporations, High makes this qualification to relief by the writ of *mandamus*: "It is, of course, essential to the exercise of the jurisdiction in such cases that the relator should show some interest in the records which he seeks to inspect, and it may well be doubted whether the writ would in any case be allowed upon the relation of a mere stranger. High, Extr. Rem. (2d Ed.) § 930. If these registration lists can be of any use to the relators in holding their primary elections, then they have shown such an interest as entitles them to take copies. The primary election law of March 27, 1875, (Acts 1875, p. 54,) authorizes any voluntary political organization, by a majority vote of its city central committee, to hold a primary election for the selection of delegates, and for the nomination of candidates for public offices. The voters at the primary elections must be qualified to vote in the precinct where the election is being held at the next state or municipal election. To this extent the primary election law defines the qualification of the voters, and to this extent the registration lists will furnish the primary and best evidence of the qualifications of persons who seek to vote at such elections. In other respects the law gives the committee power to prescribe the qualifications of the voters, evidently having reference to their party affiliations. The argument is made that the registration lists can be of no use or benefit to the relators, because they do not show who are and who are not Democrats, and because out of the 80,000 registered voters only 39,000 belong to the Democratic party. If one desired a copy of a public record to use in a litigated case, it would be no answer to his demand therefor to say or even show that the copy would not make full proof of the issues, or that it contained some matters of no value to him. The registration lists are certainly the best evidence of some of the indispensable qualifications of the voters, and that is enough. It may be that the right of persons to vote at these elections can be tried wholly by the oath authorized to be administered by section 4 of the primary election law; but, be that as it may, we are of the opinion that the registration lists are competent evidence at these elections, and we see no reason why they may not be used, and especially in view of the fact that the judges of such elections are sworn to protect the election from frauds. The law seems to throw its protecting arm around such elections, and we conclude that the recorder ought to permit copies of the registration lists to be made to use at such elections. No question of public policy forbids it.

There is another matter deserving of consideration, and it is this: Before an election can be held under the primary election law, the managing committee must give public notice, stating, among other things, the purpose, time,

and place of holding the elections, the qualifications of the voters, and that the election will be held under the "primary election law." It is a conceded fact on the pleadings that no notice has been given. To take copies of these lists for all of the precincts must, to a considerable extent, interfere with the work of the recorder; and since it stands admitted that he has and does allow the relators free and full inspection of the books, which is sufficient for all preliminary purposes, we are of the opinion that he ought not to be required to allow the copies to be taken until the notice has been given, and a necessity for the use of the copies made certain,—until there is some real occasion for the use of them. What we have said is enough to establish the right to take copies when there is a real occasion for their use. The demurrer is overruled, and the peremptory writ denied.

RAY, J., absent. NORTON, C. J., and BRACE, J., concur in the result. SHERWOOD, J., concurs in all that is said.

MULLERY v. McCANN.

(*Supreme Court of Missouri. June 18, 1888.*)

JUSTICES OF THE PEACE—APPOINTMENT—RESIDENCE.

By Rev. St. Mo. § 2810, no person is eligible to the office of justice of the peace who shall not have been an inhabitant of the township for which he is chosen six months before his election. Section 2805 divides the city of St. Louis into districts for the election of justices of the peace. By section 2806 a justice elected under section 2805 shall hold his court in the district for which he is elected, and, if he removes his office out of the district, his office shall be deemed vacated. Section 3065 provides that the powers and jurisdiction given by that chapter to county or township officers are also given to the like officers in any city not within a county, or any district in such city. *Held* that, to be eligible to the office of justice of the peace of a district in St. Louis, a person must have been a resident of such district six months before his appointment or election.

Appeal from St. Louis circuit court; ELMER B. ADAMS, Judge.

Transferred from St. Louis court of appeals.

John M. Holmes and *E. A. B. Garesche*, for appellant. *John J. McCann*, for respondent.

NORTON, C. J. This suit was brought in the circuit court of the city of St. Louis to recover the fees received by defendant while acting as a justice of the peace in the Fifth district in said city from November, 1880, till November, 1882. Defendant obtained judgment on the trial, from which the plaintiff has appealed. The record discloses the following state of facts: That, a vacancy having occurred in the office of justice of the peace for the Fifth district in the city of St. Louis, plaintiff Mullery was appointed to fill it by the mayor of said city in October, 1879; that said Mullery, at the time of said appointment, and for two or three years previous thereto, lived with his family in the Seventh district in said city; that after his said appointment he opened and kept an office at No. 623 Chestnut street, in said Fifth district; that in November, 1880, defendant was elected a justice of the peace in and for said district, and thereafter plaintiff delivered to defendant such records as he had pertaining to said office, and sold out his office effects, furniture, sign, etc., a part of them being sold to defendant; that plaintiff thereafter, in December, 1880, went to work for Justice Monahan in the Sixth district, and in the month of January, 1881, contracted to work for said Monahan in said district at a monthly salary, and continued to work under said contract till November, 1882; that defendant opened an office as justice of the peace in said Fifth district in November, 1880, and acted as such justice till November, 1882, receiving the fees incident to the office during that time; that in June, 1881, *quo warranto* proceedings were instituted by the state to oust defendant from said office of justice of the peace as an intruder, which resulted in a judgment

of ouster, the case in which this judgment was rendered being reported in 81 Mo. 479, where it is held that defendant acquired no title to said office under the election held in 1880. After the rendition of this opinion, the mayor, acting upon the belief that there was a vacancy in the said office, appointed defendant to fill it; and thereupon another proceeding by *quo warranto* was instituted by the state at the relation of the prosecuting attorney to oust defendant, which culminated in a judgment of ouster; the case being reported in 88 Mo. 386. While in these cases it is held that defendant had no title to said office, they do not establish plaintiff's title. During the pendency of this proceeding, plaintiff remained in the employment of said Monahan under his contract, and brings this suit to recover the fees collected by defendant as said justice from November, 1880, to November, 1882.

The right of a *de jure* officer, who is ousted of his office by an intruder, to recover from such intruder the fees received by him during his occupancy of the office, cannot be seriously questioned. But before such recovery can be had the plaintiff must show a valid title to the office, for it is only on the theory that he is *de jure* an officer that he can recover. The plaintiff in this case, as the basis of his title, alleges that on the 29th October, 1879, he was appointed by the mayor of the city to fill a vacancy in the said office of justice of the peace in the Fifth district, and that he was competent and qualified to fill said office. Defendant in his answer avers that the said appointment of plaintiff was null and void for the reason that plaintiff was not competent or qualified to fill the office in question at the time of his appointment. In the replication to this answer plaintiff denies that his appointment was void for the reason stated in the answer, and avers, on the contrary, that at the time of his appointment he was competent and qualified to hold said office. If plaintiff was an inhabitant of the Seventh district when appointed a justice of the peace for the Fifth district, and if section 2810, Rev. St., as to the eligibility of persons to the office of justice of the peace, applies to the districts in the city of St. Louis, the issue presented by the pleadings above quoted must be decided in favor of defendant. Section 2810 is as follows: "No person shall be eligible to the office of justice of the peace who is not a citizen of the United States, who shall not have been an inhabitant of this state 12 months, and of the township for which he is chosen six months, next before his election, if such township shall have been so long established; but, if not, then of the township from which the same shall have been taken." By section 2805 the city of St. Louis is divided into 14 districts for the election of justices of the peace, each of which is entitled to one justice of the peace, except the Fourth, which is entitled to two, and the Fifth, which is entitled to three. It further provides that the mayor and city register shall have the same powers as are conferred upon the county court and county clerk, respectively, relating to justices of the peace. By section 2806 it is provided that justices elected under the provisions of section 2805 shall hold their courts in the districts for which they were elected, and, whenever such justice shall remove his office out of the district, he shall be deemed to have vacated his office, and he shall thereupon proceed as provided in case of removal from a township. By section 3065 it is provided that "in every case when, by this chapter, power or jurisdiction is given to, or the performance of any duty is imposed upon, any officer in a county or township, the same power and jurisdiction shall be held to be given to, and the performance of the same duties shall be held to be imposed upon, the like officer or officers in any city not within a county, or any district in such city. * * *" It is clear, we think, from these statutory provisions, that, as to the eligibility of persons to the office of justice of the peace, the districts in the city of St. Louis bear the same relation to the city that municipal townships do to the various counties, and these terms in section 2806 and 3065 seem to be used as convertible and equivalent. Under this view, a person to be eligible to the office of justice of the peace in a

district in the city of St. Louis, among other qualifications mentioned in section 2805, must have been an inhabitant of such district six months next before his election or appointment. And inasmuch as at the time of plaintiff's appointment it satisfactorily appears from his own evidence that he was not an inhabitant of said Fifth district, but was at said time and had been for two or more years previous an inhabitant of the Seventh district in said city, he was not eligible to the office when appointed, and is not, therefore, entitled to recover the fees for which he sues. *State v. Sherwood*, 42 Mo. 184; *State v. Boal*, 46 Mo. 528.

There are other grounds upon which plaintiff's right to recover might well be denied, but, in the view we have taken of the case, it is unnecessary to consider them. The judgment, we think, is for the right party, and it is hereby affirmed.

All concur, except RAY, J., absent.

CHICAGO, R. I. & P. RY. CO. v. YOUNG *et al.*

(*Supreme Court of Missouri*. June 18, 1888.)

1. HIGHWAYS—ESTABLISHMENT BY STATUTORY PROCEEDINGS—JURISDICTIONAL REQUISITES.

Rev. St. Mo. § 6985, provides that applications for the establishment of new roads shall be made by petition, signed by at least 12 householders of the township through which the proposed road is to run, 8 of whom shall be of the immediate neighborhood. Section 6986 requires public notice of such application. *Held*, on *certiorari* to remove proceedings to open a public road from the county court to the circuit court, when it did not appear on the face of the proceedings that these sections had been complied with, that the proceedings should be quashed, the jurisdictional requisites not being affirmatively shown, although the petition stated the residence of the petitioners as complying with section 6986, and the order reciting the filing of the petition stated that due legal notice of the application had been given.

2. SAME.

Rev. St. Mo. § 6987, relating to opening public roads, recites: "The commissioner shall take the relinquishment of the right of way of all persons who may give such, and make report thereon. The commissioner shall also state in his report the names of all persons who have relinquished * * * or failed to relinquish the right of way, giving the names of both, and the reasons therefor." *Held*, that this contemplates a conference between the land-owners and the commissioner, which must affirmatively appear on the face of the proceedings before the county court can take jurisdiction to appoint jurors to assess damages.

Appeal from circuit court, Clinton county; GEORGE W. DUNN, Judge.

M. A. Low and *Thos. E. Turney*, for appellant. *A. J. Althouse*, for respondent.

SHERWOOD, J. By *certiorari*, the Chicago, Rock Island & Pacific Railway Company brought up to the circuit court certain proceedings had in the county court for opening a public road; and, when the proceedings of the county court were thus brought up for revision, moved to quash them for reasons to be presently noticed. This motion was denied.

Whenever the proceedings of a court, summary in their nature, are had with the view to take or condemn the property of a citizen, it must affirmatively appear on the face of such proceedings that all facts necessary to confer jurisdiction existed before final action taken in the tribunal depriving the owner of his property. Such jurisdictional requisites do not affirmatively appear in the case at bar. Aside from a mere statement to that effect in the petition, (*Backenstoe v. Railway Co.*, 86 Mo. 492; *Mitchell v. Railway Co.*, 82 Mo. 106; *King v. Railway Co.*, 90 Mo. 520, 3 S. W. Rep. 217,) it does not appear that 12 of the petitioners are householders of the township through which the proposed road is to run, nor that 3 of them are of the immediate neighborhood, as provided in section 6985; nor that notice of the intended application for the road had been given by hand-bills, etc., 20 days, etc., as re-

quired by section 6936. The statement in the order, reciting the fact of the filing of the petition, that due legal notice of the intended application was proved, does not meet the requirements of the statute, nor cause the necessary facts to affirmatively appear. *Van Wickie v. Railroad Co.*, 14 N. J. Law, 162. The fact of notice having been given in the mode pointed out by the statute is as much a jurisdictional prerequisite as is the residence of the statutory number of petitioners. If either be lacking, the jurisdiction fails, and for the obvious reason that such proceedings, being *in invitum*, in derogation of common law and common right, are always regarded as *strictissimi juris*, and receive no help from intendments or implications, and so this court has repeatedly held. *Ells v. Railroad Co.*, 51 Mo. 200, and cases cited; *Jefferson Co. v. Cowan*, 54 Mo. 234; *Whitely v. Platte Co.*, 73 Mo. 30; *Zimmerman v. Snowden*, 88 Mo. 218; *Anderson v. Pemberton*, 89 Mo. 61, 1 S. W. Rep. 216; *Colville v. Judy*, 73 Mo. 651; *Railroad Co. v. Campbell*, 62 Mo. 585.

Again, section 6937 says that "the commissioner shall take the relinquishment of the right of way of all persons who may give such, and make report thereon. The commissioner shall also state, in his report, the names of all persons who have relinquished the right of way, or who have failed to relinquish the right of way, giving the names of both, and the reasons therefor." It is quite apparent from the provisions of this section that it contemplates a conference between the commissioner and the owners of the right of way along the proposed route; for how else could he report to the county court what persons had relinquished the right of way, and what persons had failed to do so, "giving the names of both, and the reasons therefor," or how could he take the relinquishments of persons willing to make them? It does not appear that the commissioner, in this case, discharged his duty in this particular. And it is only upon failure of a land-owner or land-owners to relinquish that the county court has any authority to appoint three freeholders to view the premises and assess the damages. Section 6938. The failure of the owner to relinquish thus becomes a jurisdictional fact, and the rule laid down in *Ells' Case*, *supra*, and subsequent cases, applies. As was aptly said in a previous case in this court, when treating of the subject now in hand: "The power to take property for public use without the consent of the owner is in derogation of the rights of the citizen, and can only be justified on the grounds of absolute necessity; and, when exercised, the power conferring the right must be strictly adhered to and complied with. It is no answer to say that certain things in a given enactment conferring the authority do not appear to be essential. Everything is essential which the law has said should be done before this high prerogative can be carried out and enforced." *Lestie v. St. Louis*, 47 Mo. 474. But, furthermore, the writ of *certiorari* is in the nature of a writ of error, and operates in a similar way. *Water Power Co. v. Commissioners*, 112 Mass. 206; 3 Bouv Inst. 556. By it errors which might not be fatal in a collateral proceeding may be the basis of redress. The judgment should be reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

DAHLSTROM v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri. June 18, 1888.*)

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—TRESPASSERS.

One who crosses a railroad track in a city at a point 100 feet distant from the street crossing, at an opening in a train of cars standing on the track, there being no evidence that such opening was made for pedestrians to pass through, or that it was ever used for that purpose, is a trespasser, and crosses at his peril.

2. SAME—NEGLIGENCE—INSTRUCTIONS.

In an action for personal injuries, where it appears that at the time of the injury plaintiff was crossing defendant's railroad track at a place where he had no right

to be, an instruction that "although a person may be improperly or unlawfully upon a railroad track, that alone will not discharge the company * * * from the observance of reasonable care, and, if such person is * * * injured, the company will be responsible if its employees could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness," should be qualified by the addition of, "after discovering the danger or peril of the injured person on the track at the time, or if by the exercise of ordinary diligence his peril could have been discovered in time to have avoided injuring him."

3. SAME.

In an action for personal injuries, where it appears from the petition and plaintiff's evidence that, at the time of the injury, plaintiff was a trespasser on defendant's railroad track, an instruction that, if the injury was caused by the negligence of defendant's servants, as charged in the declaration, and without any greater want of care on plaintiff's part than was reasonably to be expected from a person of ordinary care and prudence in his situation, plaintiff was entitled to recover, is erroneous.

4. SAME.

In an action against a railroad company for personal injuries, where the petition charges that the place of injury was "near" the regular crossing, and plaintiff's evidence shows that it was 100 feet distant from the street crossing, at a temporary opening in a train of cars standing on the track, and there is no evidence that the public was accustomed to cross there, an instruction as to an injury occurring at a place where the public was accustomed to cross is erroneous, as not confining the jury to the injury and negligence alleged in the petition.

Appeal from St. Louis circuit court; WILLIAM H. HOMER, Judge.

Action by John F. Dahlstrom against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. That part of the third instruction referred to in the opinion, and necessary to its full understanding, is as follows: "If the jury believe from the evidence that the injury to plaintiff was caused by the negligence of defendant's servants, as charged in the declaration, and without any greater want of care on the part of plaintiff than was reasonably to be expected from a person of ordinary care and prudence in the situation in which he found himself placed, then the plaintiff is entitled to recover, and the verdict should be in his favor."

Bennett Pike, for appellant. *Pattison & Crane*, for appellee.

NORTON, C. J. This is an action to recover damages for personal injuries alleged to have been occasioned by the negligent and careless management of defendant's engines and cars, in which plaintiff had judgment, from which defendant has appealed. It is alleged in the petition that plaintiff, "while in the act of crossing Main street, near Chouteau avenue, in the city of St. Louis, was run over and injured by defendant's engine and cars, through or on account of defendant negligently and carelessly managing said engine and cars, both by running at a greater rate of speed than was justifiable, by not having an employe on the ends of the train to warn pedestrians and keep a lookout, by not giving any warning of the approach of said engine and cars by sounding a bell or whistle, or otherwise, by obstructing the regular crossing for a great length of time, thereby compelling pedestrians to walk through and among moving and standing trains, and by not providing adequate means for the safe passage of pedestrians across a necessary and dangerous crossing." Plaintiff is the only witness who testified in regard to the way in which he was injured, and his evidence is to the following effect: That on the day he was injured he was going down Chouteau avenue to the levee, and that when he came to Main street where it crosses said avenue the way was blocked with cars standing across it; that he turned south, and went about 100 yards down Main street, and, discovering an opening between the cars,—20 feet wide as stated in his examination in chief, and 50 feet wide as stated in his cross-examination,—that he undertook to cross Main street through said opening, and was struck and injured while doing so; that he kept a lookout, but heard no noise before he was struck and run over. There is nothing whatever in his

evidence tending to show that the opening through which he attempted to go was either made by defendant for pedestrians to pass through, or that it was or ever had been used by pedestrians for that purpose, and in so using it plaintiff was a trespasser on defendant's track, and defendant owed him no duty except not to injure him, if after discovering his peril it could, by the exercise of ordinary care, have avoided injuring him, or could by the exercise of ordinary care have discovered his peril in time to have avoided injuring him. It is held in the case of *Stillson v. Railroad Co.*, 67 Mo. 671, that where a street crossing is obstructed by a train of cars, and there is an opening in the train at a place some distance from the crossing, a person who attempts to pass through said opening does so at his peril, and that those in charge of the train are not required to ring the bell or sound the whistle, as this is only required in approaching a crossing. The following instructions were given over defendant's objections: "If the jury believe, from the evidence, that the injury to plaintiff occurred at a place where the public were accustomed to crossing the track of defendant; that plaintiff, while crossing the track, exercised ordinary care and prudence; and that, by reason of the want of proper and reasonable care on the part of the agents or servants of defendant in the management of the locomotive or cars, plaintiff was run over and injured, they will render a verdict in favor of plaintiff." (2) "The jury are instructed that, although a person may be improperly or unlawfully upon a railroad track, that alone will not discharge the company or its employes from the observance of reasonable care; and, if such person is run over by the train and killed or injured, the company will be responsible if its employes could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness."

The first instruction given is clearly erroneous, in this: that it submits to the jury a question not made by the petition, viz., that the injury to plaintiff occurred at a place where the public were accustomed to cross the track of defendant. The petition only charges that the place of injury was near the regular crossing, and the evidence of plaintiff shows that the place where he attempted to cross the tracks of defendant was a hundred feet south of the street crossing at a temporary opening made in the train of cars standing on the track. And, besides this, there is not a particle of evidence in the record that the public was accustomed to cross the tracks of defendant where plaintiff attempted to cross. The instruction is also faulty in not confining the jury to the negligence alleged in the petition.

The second instruction is erroneous in not being qualified by the addition of the following: "After discovering the danger or peril of the injured person on the track at the time, or if, by the exercise of ordinary diligence, his peril could have been discovered in time to have avoided injuring him."

The third instruction given for plaintiff is also erroneous. It in effect told the jury to find for plaintiff if they found that the injury to plaintiff was caused by the negligence of defendant's servants, as charged in the petition, and that the plaintiff was not any more negligent at the time than a person of ordinary prudence and care would have been in a similar condition. For the errors noted the judgment is reversed, and cause remanded.

All concur, except RAY, J., absent.

UPDIKE v. MERCHANTS' ELEVATOR Co. et al.

(Supreme Court of Missouri. June 18, 1888.)

MORTGAGE—REDEMPTION—SECURITY FOR INTEREST.

Under Rev. St. Mo. § 3298, providing that land sold under a deed of trust, and bought by the *cestui que trust* or his assigns, shall be subject to redemption within one year from the date of sale; and section 3299, providing that no party shall have the benefit of the preceding section until he shall have given security for the pay-

ment of interest to accrue after the sale, such security must be given at or within a reasonable time after the time of sale, and a bond given more than four months after the sale does not give any right of redemption.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

Given Campbell, for appellant. Martin, Laughlin & Kern, for respondent.

BLACK, J. This was a suit to redeem from a sale under a deed of trust. The case is here on appeal from a final judgment sustaining a demurrer to the petition. The material facts are these: The Union Steam-Mills Company made two deeds of trust on the property to secure different debts; one dated 24th March, 1880, and the other the 20th July, 1882. There was a sale by the trustee under the second deed of trust, and by mesne conveyances the title to the property, subject to the first deed of trust, became vested in Lockwood, as assignee of the Union Flour-Mills Company. The title stood in this condition on the 29th September, 1884, at which date the property was sold under the first deed of trust. Johnson held the debt secured by that deed of trust, and he became the purchaser of the property at the trustee's sale, and received a trustee's deed of the same date. He sold to Slattery, and Slattery to the defendant the elevator company. It is this sale, made under the first deed of trust, from which plaintiff seeks to redeem, and his title is a deed from Lockwood, the assignee, dated 26th January, 1885. He bases his right to redeem solely upon section 3298, Rev. St. It is alleged in the petition that plaintiff has given bond and security to the satisfaction of the circuit court in favor of Johnson for the payment of the interest to accrue after the sale, and for all damages, etc.; but it is not stated when this bond was given. As the trustee's sale took place on the 29th September, 1884, and the plaintiff did not become the purchaser from Lockwood until 26th January, 1885, the bond must have been given some four months after the trustee's sale. There is no claim made that Lockwood ever gave bond. The above section of the statute declares that when any real estate shall be sold under a deed of trust pursuant to the powers therein, and shall be bought by the *cestui que trust* or his assigns, the same shall be subject to redemption within one year from the date of sale, and the purchaser at the sale shall receive a certificate of sale to hold until the expiration of the year. The next section (3299) says: "No party shall have the benefit of the preceding section until he shall have given security, to the satisfaction of the circuit court, for the payment of interest to accrue after the sale, etc. In case the circuit court is not in session, such security may be taken by the clerk of said court." These statutes were passed in 1877, and before that time there was no redemption in such cases. There is none now, unless the conditions of the statute be complied with. It is to be observed that the right exists only when the *cestui que trust*, his assignee, or some one for either of them, becomes the purchaser. No party shall have the benefit of the right to redeem until he shall give security. Give security when? If he can give bond at any time in the 12 months, then he need not give bond until he actually redeems, and the giving of a bond or security at such time is a useless ceremony. The security is designed to be a protection for the purchaser from the date of the sale. This is shown, too, by the fact that the clerk of the court may take the security if the court is not in session. There can be but one reasonable construction put upon the statute, and that is that the security must be given at the date of the sale. If not then given, no redemption exists, and the trustee may make a deed at once. If the beneficiary, or his assignee, should bid off the property, then the trustee should allow a reasonable time to appear before the court or clerk, and give the security. If this is not done within such reasonable time, the right to redeem is gone, or, rather, does not spring into existence; and the trustee may properly make a deed, instead of giving a certificate of sale. That the security was not given in a reasonable time in the present case is too clear to admit of

any doubt. In *Johnson v. Atchison*, 90 Mo. 48, 1 S. W. Rep. 751, no bond was given, and hence nothing was decided as to the time when the bond should be given. The judgment is affirmed.

RAY, J., absent. The other judges concur.

HILL v. SHERWOOD *et al.*

(*Supreme Court of Missouri.* June 18, 1888.)

TAXATION—TAX DEED—COLLATERAL ATTACK.

A sheriff's deed to a purchaser at a tax sale under an execution on a judgment rendered in the circuit court on a back-tax bill, for a tax properly levied and assessed, extended and returned delinquent, against a non-resident owner, properly served by publication, cannot, in ejectment by the purchaser, be defeated by showing that the taxes for that year had been paid before the land was returned delinquent and the tax suit instituted. Following *Jones v. Driskell*, 7 S. W. Rep. 111. SHERWOOD, J., dissenting.

Appeal from circuit court, Newton county; M. G. MCGREGOR, Judge.
Joseph Cravens, for appellants. *Geo. Hubbert*, for respondent.

BRACE, J. This is an action of ejectment to recover possession of a certain tract of land in Newton county. The case was tried by the court without a jury on an agreed statement of facts; and the single question presented on the record is whether a sheriff's deed, in regular form, to a purchaser at a tax sale, under an execution on a judgment rendered in an action in the circuit court on a back-tax bill, in favor of the state, at the relation of the collector, for the taxes of the year 1877, properly levied and assessed, extended and returned delinquent, against a non-resident land-owner, properly served by publication of notice, in an action of ejectment by such purchaser against such former land-owner, can be defeated by showing that the taxes on the land for that year had been paid by the owner before the land was returned delinquent, and before the suit was instituted on the back-tax bill, and that there were no taxes actually due and owing on said land at the time it was returned delinquent and the action instituted. This question must be answered in the negative, on the authority of the following cases: *Jones v. Driskell*, 94 Mo. —, 7 S. W. Rep. 111; *Allen v. McCabe*, 93 Mo. 138, 6 S. W. Rep. 62; *Brown v. Walker*, 85 Mo. 262; *Wellshear v. Kelley*, 69 Mo. 343. And, as it was so answered by the circuit court, the judgment is affirmed.

All concur, except RAY, J., absent, and SHERWOOD, J., who dissents.

STATE *ex rel.* ANHEUSER-BUSCH BREWING ASS'N *et al.* v. DILLON, Judge.

(*Supreme Court of Missouri.* June 18, 1888.)

APPEAL—EFFECT—INJUNCTION.

The allowance of an appeal to the supreme court, on affidavit and bond from a final decree granting an injunction, does not have the effect of dissolving the injunction, and the lower court has jurisdiction to punish a violation of such decree after the appeal.

On original proceedings for writ of prohibition.

Broadhead & Haeussler, for relator. *A. M. Sullivan, E. L. Carter*, and *Rassieur & Tiffany*, for respondent.

BRACE, J. Petition for writ of prohibition against respondent, judge of the St. Louis circuit court, to restrain him from further action in a proceeding commenced in that court, on the suggestion of George Glaisner, against Adolphus Busch, president of said association, *et al.*, for attachment for contempt in violating a decree of injunction rendered against them in a certain cause theretofore pending in said court wherein the said Glaisner was plain-

tiff, and said brewing association *et al.* were defendants, and which cause had theretofore been appealed to the supreme court. Two questions are presented for discussion on the return of the respondent, to which the petitioners demur: (1) Did the allowance of the appeal to the supreme court on affidavit and bond, in the action in which the decree of injunction on final hearing was rendered, have the effect of dissolving the injunction decreed by the circuit court,—no previous temporary injunction having been granted or bond given in the cause? (2) If the decree of injunction remained in force after the appeal to the supreme court, did the circuit court in which the decree was rendered have jurisdiction to punish for contempt a violation of that decree after such appeal? The law directly applicable to the case, and by which these questions are to be determined, is as follows: Rev. St. 1879, § 2703: "When it shall appear by the petition that the plaintiff is entitled to the relief demanded, and such relief * * * consists in restraining the commission * * * of some act of the defendant, the commission of which, during the continuance of the litigation, would produce injury to the plaintiff, an injunction may be granted to stay such act." Section 2710: "No injunction, unless on final hearing, or judgment, shall issue in any case * * * until the plaintiff execute a bond, with sufficient security, to the other party, in such sum as the court or judge shall deem sufficient to secure * * * all damages that may be occasioned by such injunction." Section 2722: "The remedy by writ of injunction shall exist in all cases * * * to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages." Section 1055: "Every court of record shall have power to punish as for criminal contempt persons guilty of * * * willful disobedience of any process or order lawfully issued or made by it." Section 3710: "Every person aggrieved by any final judgment or decision of any circuit court * * * may make his appeal," etc. Section 3713: "The court from which an appeal is prayed shall make an order allowing the appeal, and such allowance thereof shall stay the execution, * * * when the appellant, * * * together with two sufficient securities, shall, during the term at which the judgment appealed from was rendered, enter into a recognizance," etc. Section 3718: "On filing such recognizance, there shall be a stay of all further proceedings upon the judgment appealed from," etc. Section 3776: "The supreme court in appeals * * * shall examine the record, and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law," etc.

No system of jurisprudence would be complete that did not embrace within its scope a plan for the prevention of wrongs, as well as compensation for violated rights. The reason for the existence, in our system, of the preventive writ of injunction, is that in very many instances the commission of an act violative of the rights of others is not susceptible of adequate compensation in damages. In statutes enacted for the purpose of regulating the administration of this remedy by the courts, the substitution of the inadequate remedy of compensation in damages for a wrong perpetrated for the adequate remedy designed to prevent the perpetration of that wrong, is never contemplated, is foreign to and at war with the spirit and purpose of such enactments, and such a result cannot flow from a proper construction of them. Nothing can be found in the letter of the foregoing enactments, or in the history of our legislation on the subject, to warrant it. To secure a party against an infraction of his rights that would be adequately remediless in damages, the statute has provided that, before their rights are definitely ascertained and declared, a provisional writ shall issue, restraining the threatened wrongful act pending the litigation in the circuit court. In such cases the law requires that a bond be given. When those rights are definitely ascertained and declared on final hearing in that court, the writ issues, restraining in

perpetuance the threatened wrongful act, in which case no bond is required; but, whenever issued, it operates, *in præsenti*, and for the time being, to restrain the act. It commands no act to be done; issues, in contemplation of law, the moment the order is made, 2 High, Inj. § 1421; *McNeil v. Garratt*, Craig & P. 98;) operates upon the then *status* of things between the parties in respect of the subject-matter in controversy, and decrees that they stand fast forever. From this situation, in case of error, the law affords defendant relief by appeal to an ultimate tribunal, where a review of the action of the circuit court on its final hearing may be had, and where he may show that the circuit court was mistaken,—that he ought not forever to be prevented from doing the act he threatened and intended to do; and, if he succeeds, the decree will be reversed, the injunction dissolved, and he may proceed to the execution of his will in the matter; but, surely, if he fails, it was not intended that his adversary, at the termination of the litigation in which he has been successful, should find himself remitted to an inadequate remedy for the adequate one which he sought, and which the law promised him,—the defendant having been permitted, during the pendency thereof, to do the very thing which deprives him of that adequate remedy. To preserve the remedy in all its efficiency, pending the litigation in the circuit court, the law requires a bond; to preserve after final hearing in the circuit court, the law requires no bond. That the law ought to require one in the latter case is the force of the argument of the learned counsel for the petitioners; the answer to which is that it does not. That the court might have required one pending the appeal is a question not before us for determination. The appeal-bond given operated as a *supersedeas* only on the process of execution; it suspends the performance of acts commanded to be done. The appeal operates on the judgment as a final determination of the rights of the parties, and suspends its finality. *State v. Lewis*, 76 Mo. 375; *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. Rep. 267. Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the federal courts, and those of the other states; and the overwhelming weight of authority is that an injunction ordered on final hearing on the merits is not vacated by an appeal from that decree. A stay of proceedings, from its nature, operates only on orders and judgments commanding some act to be done, and does not reach injunctions. This was assumed to be the law in *City of St. Louis v. Gas-Light Co.*, 82 Mo. 349, and in *Cohn v. Lehman*, *supra*; and, among the great number of cases that might be cited, the following will be found to be in direct support of this doctrine: *Railroad Co. v. Railroad Co.*, 71 N. Y. 430; *Graves v. Maguire*, 6 Paige, 379; *Power v. Village of Athens*, 19 Hun, 165; *Telephone Co. v. State*, 5 N. E. Rep. 721; *Randles v. Randles*, 67 Ind. 434; *Mining Co. v. Fremont*, 7 Cal. 130; *Swift v. Shepard*, 64 Cal. 423, 1 Pac. Rep. 493; *Robertson v. Davidson*, 14 Minn. 554, (Gil. 422;) *Slaughter-House Cases*, 10 Wall. 273; *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. Rep. 136; *Leonard v. Land Co.*, 115 U. S. 465, 6 Sup. Ct. Rep. 127. In the opinion in this last case, WAITE, C. J., remarks: "It is true that in some of the *Slaughter-House Cases* the appeal was from a decree making perpetual a preliminary injunction which had been granted in an earlier stage of the case; but the fact of the preliminary injunction had nothing to do with the decision, which was 'that neither an injunction, nor a decree dissolving an injunction, is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey v. McDonald*; and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted." It follows from what has been said that the answer to the first question is that the decree of the circuit court of St. Louis, on final hearing in the case stated, was not dissolved on the perfection of the ap-

peal therein, but remained in full restraining force against the defendants therein, and will continue to so remain until that appeal is decided; and, being so in force, the answer to the second is that who so violates it is guilty of a contempt of the court that rendered it, and may be proceeded against in an independent *quasi* criminal proceeding by way of attachment, and punished for such contempt by that court.

The demurrer to the return of the respondent is overruled, writ denied, and judgment for respondent ordered.

All concur, except RAY, J., absent.

TWOHEY v. FRUIN *et al.*

(Supreme Court of Missouri. June 18, 1883.)

NEGLIGENCE—EVIDENCE—CASE FOR THE JURY.

In an action for personal injuries caused by the negligence of defendants' foreman in handling giant powder, there was evidence tending to prove that the foreman placed the can containing the powder, uncovered, over the fire to thaw the powder, in a manner not usually practiced; but whether the can was over the fire at the time of ignition was uncertain, though, if not, it had been removed but five or six feet from the fire for a short time only. *Held*, that the case should have been submitted to the jury; since there was evidence tending to prove that the explosion resulted from placing the can over the fire.

Error to St. Louis circuit court; ELMER B. ADAMS, Judge.

Action for personal injuries arising from negligence, by William Twohey against Jeremiah Fruin, William H. Swift, and Patrick Bambrick. There was a demurrer to the evidence found in favor of the defendants, and judgment accordingly, to which plaintiff brought error.

Edward Cunningham and *Amos R. Taylor*, for plaintiff in error. *H. D. Wood*, for defendant in error.

RAY, J. This is an action to recover damages for personal injuries alleged to have been sustained by plaintiff in consequence of the negligence of defendants. For cause of action the petition alleges that defendants were engaged in the work of excavating a certain cut on the line of the Missouri Pacific Railway, in St. Louis county; that one Alexander White was the agent and foreman of the defendants, having charge of the men in their employ, in digging and blasting earth and stone along the cut; that plaintiff was one of the men working in said cut, and under the control of said foreman; and that while he was working under said White he was injured by the careless, negligent, and reckless act of said White in placing a vessel or can containing blasting powder on and upon a large fire of burning wood, in consequence and by reason whereof said powder took fire and exploded, inflicting upon plaintiff the injury for which he sues.

On the trial, after the close of plaintiff's evidence, the court sustained a demurrer to the evidence, and judgment was rendered for defendants, from which plaintiff has prosecuted his writ of error; and the only question presented by the record is, was there any evidence tending to establish plaintiff's cause of action? The only cause of action alleged is that plaintiff was injured by the negligence of White in placing said vessel containing said powder in and upon said fire, whereby it took fire and exploded and injured him. Three witnesses were examined touching the point, the plaintiff being one of them; and in his evidence he stated whether the cans were over the fire, or close up to the fire, witness could not state. Who put the cans there witness could not state; but witness had seen White putting giant powder into the cans. "I do not know whether the can in which the powder was was on the fire, or close to it. I did not see White put the powder into the can at this time. I saw him put it there at other times." Christopher Donnelly, another witness, testified that when the powder exploded the can containing it was on the ground.

five or six feet away from the fire. He says the can was on the fire a couple of minutes. He does not know who took it off, but supposes White did. Saw him put it on. That "about a half hour after I saw him put it on I saw it standing five or six feet from the fire. When the explosion occurred the can containing the water and the can containing the powder were not on the fire." Elsewhere this witness also said: "I was shoveling into a wagon, and when I raised up the shovel I saw the blaze. It might be a couple of feet high above the can. It was the powder that was blazing up,—giant-powder they call it. I had seen the can there a short time before; exactly how long I cannot say. * * * I had seen giant-powder thawed out before. I saw John Scanlan thaw it out. He boiled the water, took it away from the fire, put the giant-powder into it till it got soft. I never saw anybody but Alexander White set powder on fire. * * * The can of powder, when it was blazing, was not on the fire. * * * The can had been on the fire with another can before it was taken off. How long before that I cannot say. I saw the powder blazing right across from me. The fire was made partly of old railroad ties; some pine to start it with. I cannot say whether the wood was blazing or not. When I saw the blaze it was at the powder can. The powder can was on the ground. I cannot say exactly how far from the fire the can was. I guess about five or six feet. There was not much wind. I did not notice whether the fire was blazing. After seeing the blaze I saw it explode in a short time. * * * The can had been on the fire with another can before it was taken off. How long before that I cannot say." The only other witness was Joseph Doyle, and he testified: "I do not know who put the cans on the fire. I do not know who put the powder on the fire at the time of the explosion. Would not swear positively that the powder was on the fire at the time of the explosion." In answer to the question, "Who put these cans on that fire?" he said: "I don't know, sir, who put them on it. I never seen White put them on, to my knowledge, nor no other body." He was asked, "Do you swear that the powder was over the fire at the time of the explosion?" to which he answered: "That is more than I can tell you; I did not see it on the fire. I seen it blazing pretty close to the fire." He was asked, "Did you not swear that these cans were on the fire at the time the powder was burning?" and answered: "No, sir, I did not." Elsewhere in his testimony this witness uses this language: "The explosion was of No. 1 Atlas powder. The powder was on the fire thawing the frost out. * * * The powder was in a black can. There was another can under it, with boiling water in it, and the steam from the boiling water was to thaw out the giant-powder in the other can on top of the boiling water. There was no top on the top can. The can that had the boiling water in it was set right on the burning coals. I do not know who put the cans on the fire. This was the 10th of January. * * * This giant-powder is put up in sticks about eight inches long and one and a half inches in diameter. It freezes in cold weather, and it is never used when it is frozen. Each one has his own way of thawing out the powder, but it is not customary to thaw it as Mr. White did. I never saw it done that way before. I have seen White thaw it that way before that. Sometimes he would heat the water, remove it from the fire, and set the powder over it, and sometimes he would have the giant-powder right on top of the can of boiling water on top of the fire. He never had it far from the fire. Just how he did it at the time of the explosion I cannot say; but I saw the powder, the boiling water, all on the fire at one time." Elsewhere he said: "I saw the powder when it first blazed up. It exploded about two or three seconds after it blazed up, as near as I can judge."

We have set out at considerable length the substance of the plaintiff's evidence touching this point, and the only question, as before stated, is whether the court erred in sustaining defendants' demurrer to plaintiff's evidence upon the state of the record above set forth. The current of authority in this state

is, we think, abundant to the effect that, if there is any evidence, however slight it may be, and whether direct or influential, it must go to the jury, who are exclusive judges of its weight and sufficiency. Vols. 1 & 2 Patt. Mo. Dig. pars. 77, 78, at page 322, and cases cited; *Charles v. Patch*, 87 Mo. 450, and cases cited. It is conceded that whether there is any evidence, or what its legal effect may be, is to be declared by the court. *Callahan v. Warne*, 40 Mo. 131. In the case of *Buesching v. Gas-Light Co.*, 73 Mo. 231, the court uses this language: "In passing upon a demurrer to the evidence, the court is required to make every inference of fact, in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor; and if, when received in this light, it is insufficient to support a verdict in his favor, the demurrers should be sustained. *Wilson v. Board*, 63 Mo. 137. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of defendants, to countervail or overthrow either presumptions of law or inferences of fact in favor of the plaintiff; that would clearly be usurping the province of the jury." Tried by these authorities, and viewing the evidence presented by the record in the case at bar, we are of opinion that the trial court could not properly tell the jury that there was no evidence tending to support the plaintiff's said cause of action, and, so believing, we think the court erred in sustaining defendants' demurrer to plaintiff's evidence. It may be conceded that the can containing the powder was not sitting on the fire at the time of the explosion; that it had been removed and set on the ground before the explosion, but just how far or how long does not clearly appear. On these points the evidence is somewhat uncertain and conflicting. Just how long the cans were suffered to remain on the burning fire before they were removed does not clearly appear, but it is to be inferred that they remained there a sufficient length of time to bring the water to a boil before they were removed and set on the ground near by; some of the witnesses saying: "I could not swear positively that the powder was on the fire. I saw it blazing on the fire, or pretty close to the fire, but I could not tell which;" another witness saying that "when I saw the blaze it was at the powder can. The powder can was on the ground. I cannot say exactly how far from the fire the can was; I guess about five or six feet." It is in evidence that the powder can had no covering on its top; that it was customary in thawing out frozen giant-powder to place the can containing the water on the fire, and, when it came to a boil, remove it, and place it on the ground, and put the can containing the frozen powder on top of it, so that the steam from the boiling water might thaw out the frozen powder; but that White on this occasion put the can of water on the fire, and set the can of powder on top of it, right over the fire,—the witnesses saying they had seen frozen giant-powder thawed out before, but never saw it done in the manner White did it on this occasion; that White sometimes heated the water and removed the can before putting the powder can on top of it, and at other times did it as on this occasion; that they never saw anybody but White do it that way. Conceding, as before stated, that the powder can was not on the fire at the moment of its explosion, it does not necessarily follow therefrom that its ignition was not caused in consequence and by reason of its having been placed on the fire. Fire may have been communicated to the thawing powder in the open top of the can by means of sparks or otherwise while on the fire, and remained in a dormant state until it was removed and set on the ground near by, and then blazed up as described, causing the explosion and the plaintiff's injury.

Under the evidence and the authorities, we are of opinion, as before stated, that it should have been left for the jury to say whether White was guilty of negligence in the premises causing the plaintiff's injuries complained of. For these reasons the judgment of the trial court is reversed, and the cause remanded, in which the other judges concur.

CUNNINGHAM v. CITY OF ST. LOUIS.

(Supreme Court of Missouri. June 18, 1888.)

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTS IN COURT-HOUSE — CITY OF ST. LOUIS.

Under Const. Mo., art. 9, § 23, which requires the city of St. Louis to collect the state revenue, and "perform all other functions in relation to the state in the same manner as if it were a county," the relation of the city to its court-house is the same as that of the respective counties in the state to their court-houses, and, no action being given by statute against such municipalities for injuries resulting from negligence in relation to their court-houses, an action will not lie against said city by one injured by falling into a pit connected with its court-house.

Appeal from St. Louis circuit court; WILLIAM H. HORNER, Judge.

Action by Arthur I. Cunningham against the city of St. Louis for injuries. Verdict and judgment for plaintiff for \$1,295.83. Defendant appealed.

Leverett Bell, for appellant. *A. R. Taylor*, for appellee.

NORTON, C. J. This is an action to recover damages for personal injuries, in which plaintiff obtained judgment, from which the defendant has appealed. For his cause of action, plaintiff alleges in his petition that the city of St. Louis is a municipal corporation, and, by virtue of the laws of the state, owned and controlled the court-house building and grounds, bounded on the north by Chestnut street, on the west by Fifth street, on the south by Market street, and on the east by Fourth street; that plaintiff, while passing along a passage-way from the court-house entrance next south of that portion known as "Court-Room No. 2," endeavoring to go from said entrance to Fifth street, got out of his path, and fell into an open area or pit adjacent to said passage-way, and received the injury for which he sues. It is averred that said pit or area was, by reason of its proximity to said pathway, dangerous to persons while passing to and from said entrance; that it was unfenced, unguarded, and unlighted. The evidence tended to establish the averments of the petition, and that defendant was injured in the way set forth therein. The evidence also tended to show that the areas or pits, into one of which plaintiff fell had been constructed about 30 years ago for the purpose of furnishing light and ventilation to the basement of that wing of the court-house, and that the basement room of the building could not be utilized without light so furnished by the areas. At the close of the evidence, defendant asked the court to instruct that, under the pleadings and evidence, plaintiff was not entitled to recover. This instruction the court refused, and its action in that respect is assigned for error.

It is very clear that under our rulings in the cases of *Reardon v. St. Louis Co.*, 36 Mo. 555; *Swineford v. Franklin Co.*, 78 Mo. 279; and *Armstrong v. Brunswick*, 79 Mo. 319,—that if the accident in which plaintiff was hurt had occurred anterior to the separation of the city of St. Louis from the county of St. Louis, that no action could have been maintained against the county of St. Louis; it being distinctly held in the first case above cited that counties are quasi corporations, made by the legislature for purposes of public policy, and are not responsible for neglect of duties enjoined upon them unless the action is given by statute. After an elaborate discussion of a similar question in the cases of *Eastman v. Meredith*, 86 N. H. 284; *Hill v. Boston*, 122 Mass. 344; and *Hamilton Co. v. Mighels*, 7 Ohio St. 109,—the same conclusion is arrived at as that announced in the cases above cited from our own reports. It follows, from what has been said, that if the city of St. Louis, after its separation from the county, sustains the same relation to the court-house as the county did before the separation, it is no more liable for damages for such an injury as plaintiff sues for than the county would have been. We think it clear that the relation of the city government to the court-house is the same as that of the county governments with reference to court-houses in the respective counties in the state; and that the court-house is maintained in the city of St.

Louis, not in the exercise of or by virtue of its municipal functions, but in pursuance of section 23, art. 9, of the constitution, which requires the city, among other things, to collect the state revenue, and "perform all other functions in relation to the state, in the same manner as if it were a county." This view of the subject brings us to the conclusion that the court erred in refusing the instruction asked by defendant, and for this error the judgment is reversed.

All concur, except RAY, J., absent.

STATE *ex rel.* CAMPBELL *et al.* v. CRAMER, Mayor, *et al.*

(Supreme Court of Missouri. June 18, 1888.)

MANDAMUS—TO MUNICIPAL BOARDS—FERRY.

In proceedings to obtain *mandamus* to compel a city to grant a ferry license, the return stated that, under the legislative power delegated to it "to regulate, tax, and license all ferries within the limits of the city," defendant had granted exclusive license to another, that public necessity did not require a second ferry, and that once before the city, acting in its discretion, had refused to grant plaintiffs a license. *Held*, on demurrer to the return, that the discretion of the municipal corporation could not be controlled in such case by *mandamus*.

Appeal from circuit court, Cape Girardeau county; JOHN D. FOSTER, Judge.

Proceedings for *mandamus* by the state, *ex rel.* James T. Campbell and Louis Houck, against George H. Cramer, mayor of the city of Cape Girardeau, and William Regenhardt and others, members of the city council of said city. The demurrer to defendants' return to the alternative writ was overruled, and plaintiffs appeal.

R. B. Oliver, for appellants. Wilson Cramer and Sam M. Green, for respondents.

NORTON, C. J. Relators, Campbell and Houck, having been refused a ferry license by the mayor and city council of the city of Cape Girardeau, have instituted this proceeding by *mandamus* to compel them to grant them license. Defendants in their return to the alternative writ set up, among other things, the following: That the city of Cape Girardeau was a municipal corporation. That by the charter the mayor and council were authorized to legislate upon all matters within the city set out in the charter. That, among the subjects of legislation by the mayor and council of the city of Cape Girardeau, the respondents herein, and upon which they may legislate by ordinance, are the following subjects, more fully set out in article 3 of said charter, entitled "Legislative Power." "The improvement of the navigation of the Mississippi river within the corporate limits of the city; to erect, repair, and regulate docks and wharves, and to fix the rate of wharfage thereat; to regulate the stationing, mooring, and anchoring of vessels within the city limits; and to create the office of port-warden, and define the duties thereof; and to have the exclusive power and right to regulate, tax, and license all ferries within the limits of the city." That the exercise of the corporate powers and duties vested in the mayor and board of council by the charter of the city in that behalf is wholly and solely legislative, and all ordinances passed by the mayor and council of said city, when thereunto lawfully assembled, concerning said subjects and matters aforesaid, are within the legislative discretion of said mayor and council, and not otherwise. And defendants, making further return, say that on the ——— day of ———, 1885, one Richard Carroll, a citizen of the city and county of Cape Girardeau, and state of Missouri, appeared in person and by counsel, before the mayor and council of said city of Cape Girardeau, duly assembled as a legislative body, and for the transaction of business, and presented a petition to said mayor and council, asking for a ferry license within the jurisdictional limits of the city, across the Mississippi river, between the city of Cape Girardeau, in the state of Missouri, and East

Cape Girardeau, in the state of Illinois. And in his said petition proposed to put in a new steam ferry-boat of the following dimensions, that is to say: 98 feet long, 26½ feet beam, 34 feet out to out, and a capacity of 12 wagons. Whereupon, in due course of legislation, the mayor and council of said city being assembled according to law, passed an ordinance granting to said Richard Carroll an exclusive license; said ordinance being entitled "An ordinance granting a ferry franchise to Richard Carroll," being ordinance No 411, in words and figures as follows: "Whereas, Richard Carroll, of the city of Cape Girardeau, in the state of Missouri, has proposed that if the city of Cape Girardeau, in said state, will grant him a ferry license across the Mississippi river from Cape Girardeau to the opposite shore, in Illinois, for the term of ten years, he will put in a new steam ferry-boat to run between the aforesaid city of Cape Girardeau, in the state of Missouri, and East Cape Girardeau, in Illinois, of the following dimensions: Ninety-eight (98) feet long, twenty-six and one-half (26½) feet beam, thirty-four (34) feet out to out, and of a capacity of twelve (12) wagons; and has further agreed to pay said city the sum of fifty dollars every six months for a license therefor, and to enter into a good and sufficient bond in the sum of one thousand dollars to said city, conditioned for the faithful performance of the agreements herein, and the requirements of existing ordinances respecting the duties and obligations of ferrymen, equipment of ferry-boats, and other matters touching ferriage. Therefore be it ordained by the mayor and council of the city of Cape Girardeau as follows: Section 1. That, except as hereinafter set out and specially reserved and excepted, an exclusive ferry franchise, for the sole purpose of keeping, running, and maintaining a steam-ferry over and across the Mississippi river, within the jurisdictional limits of the city of Cape Girardeau, and a strip of land on the Illinois shore, opposite said city, and not extending beyond the line of the limits of the city aforesaid, along the bank of the Mississippi river, be, and the same is hereby, granted to Richard Carroll, of the city of Cape Girardeau and state of Missouri, for the term of ten years from the 14th day of September, 1885, said grant being in all things subject to the requirements of this and existing ordinances. Sec. 2. Said ferry-boat shall be new, and of the following dimensions: Ninety-eight (98) feet long, twenty-six and one-half (26½) feet beam, thirty-four (34) feet out to out, of a capacity of twelve (12) wagons, and to be propelled by adequate steam-power. And if at any time the business shall increase so as to require an additional boat or boats, that said Carroll shall furnish such boat or boats as may be necessary to do the business; and in case he shall fail so to do, after having been duly notified, the mayor shall have power to revoke the license of said Carroll. Sec. 3. That said Richard Carroll shall pay to the city of Cape Girardeau the sum of fifty dollars for each period of six months during the existence of said term of ten years, and a license shall be issued in due form, signed by the mayor and countersigned by the city register, for each six months as aforesaid, but no such license shall issue until the bond required by ordinance No. 369, being an ordinance entitled 'An ordinance regulating ferries,' approved April 29, 1882, shall have been approved by the mayor; and the acceptance of the first license herein by said Carroll shall be deemed an acceptance, and an agreement thereto, of all in this ordinance set out and required. Sec. 4. The franchise herein granted and authorized shall not be transferable without the consent of the mayor and council thereto." The return, after setting up that said Carroll had complied with the ordinance, paid his license, and invested his means in putting in such a ferry-boat as was required, and was operating it under his license, then sets up as follows: "And respondents further state that long after the said ferry franchise had been granted to the said Carroll, and he had procured his boat and fully complied with all the requirements of the several ordinances in that behalf, James T. Campbell & Co., of which firm this relator, James T. Campbell, was a mem-

ber, made application to the said mayor and council for a license to run and operate a ferry within the jurisdictional limits of said city aforesaid, but that the said mayor and council acted upon said application, and, in the exercise of their discretion, refused to grant such license to said Campbell & Co.; that the public necessity does not require the establishing of another ferry within the jurisdictional limits of the city, and to grant the prayers of the relators—that is to say, to grant them a license on the same terms, or on any terms whatever—would be in violation of the contract entered into with said Carroll, and in fraud of said franchise so granted to him.”

A demurrer was filed to this return, which being overruled, and judgment being entered, plaintiff has appealed, and insists that the ordinance set up by respondents in their return is unconstitutional and void, in this: that it grants to Carroll an exclusive ferry franchise for 10 years. Waiving the determination of this proposition, the question remains, (conceding, for the purposes of this case, without so deciding, that the exclusive power and right given by the charter to the mayor and council to regulate, tax, and license ferries does not confer the power to grant an exclusive ferry privilege or franchise,) do the other facts stated in the return, and admitted by the demurrer to be true, preclude plaintiffs from the remedy they seek? If the ordinance, in so far as it grants an exclusive franchise for 10 years, is invalid, this would not necessarily make it invalid as to that portion of it which authorizes a license to be issued every six months to Carroll upon his paying the license tax as provided therein. The demurrer admits the payment of this license tax by Carroll, and that he was operating a ferry under the license granted him by the city. It also admits that the public necessity did not require the establishment of another ferry within the jurisdictional limits of the city. It also admits that some time after the ferry was being operated by Carroll the mayor and council, in the exercise of their legislative and discretionary powers, acted upon the application of plaintiffs for a ferry license, and in their discretion refused to grant it. Upon these admitted facts the question arises whether the legislative discretion of the mayor and council can be controlled by *mandamus*. This question is answered in the negative by the following authorities: In 2 Dill. Mun. Corp. (3d Ed.) § 832, it is said “that powers conferred on municipal corporations are mandatory or discretionary. Discretionary powers are not, unless in extraordinary and exceptional cases, to restrain gross abuse, subject to judicial control, but duties imperatively enjoined may be enforced by *mandamus*.” The general rule of law is this: If the inferior tribunal, corporate body, public agent, or officer has a discretion, and acts and exercises it, this discretion cannot be controlled by *mandamus*. But if the inferior tribunal, body, officer, or agent refuse to act in cases where the law requires them to act, and the party has no other legal remedy, and where in justice there ought to be one, a *mandamus* will lie to set them in motion and to compel action; and in proper cases the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body, or officer. So in section 325, High, Extr. Rem. (2d Ed.) it is said: “Courts are somewhat inclined to a liberal exercise of their jurisdiction by *mandamus*, for the purpose of coercing the performance of duties obligatory upon municipal corporations and their officers. They yet refuse to trespass upon the limits of official discretion, and the principle applies with peculiar force to this class of cases, that *mandamus* will not lie to control the decision of officers intrusted with the power of determining any particular matter. Where, therefore, municipal authorities are by law intrusted with jurisdiction over certain matters the decision of which rests in their sound discretion, and requires the exercise of their judgment, *mandamus* will not lie to control or in any manner interfere with their decision, since the courts will not direct in what manner the discretion of inferior tribunals and officers shall be exercised. And in section 327 it is said: “The granting of

licenses, being usually a matter of sound discretion, falls under the operation of the rule above laid down. * * * So, when a board of municipal officers are empowered to grant licenses upon due application to operate ferries, and have acted upon such applications, granting one and refusing another, the writ will not go to require to grant a license to the unsuccessful applicant. Otherwise, however, if the license be refused under a mistaken construction of the law governing the case; and when a board of county supervisors, acting under a mistake as to the law, have refused a ferry license to which the party was clearly entitled, the writ has been allowed." In this case one of the grounds set up by respondents in their return for refusing the license is that the public necessities did not require the establishment of another ferry within the jurisdictional limits of the city, and the demurrer admits this to be true. The judgment is for the right party, and it is hereby affirmed.

All concur, except RAY, J., absent.

FORD v. FELLOWS.

(*Supreme Court of Missouri*. June 18, 1888.)

APPEAL—APPELLATE JURISDICTION—ST. LOUIS COURT OF APPEALS.

An action for forcible entry and detainer, not involving title to land, begun before a justice of the peace for Greene county, and appealed to the circuit court, should, on appeal from that court, go to the St. Louis court of appeals, and not to the supreme court.

Appeal from circuit court, Greene county; W. F. GEIGER, Judge.

Massey & McAfee, for appellant. *Jas. R. Vaughan*, for respondent.

PER CURIAM. This case was commenced before a justice of the peace under the statute concerning forcible entry and detainer, taken by appeal to the Greene circuit court, and that court allowed an appeal to this court. No question of title to real estate is involved in the controversy, and the appeal should have been allowed to the St. Louis court of appeals, to which court the cause is now transferred.

CITY OF ST. LOUIS v. SCHOENBUSCH.

(*Supreme Court of Missouri*. June 18, 1888.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—CRUELTY TO ANIMALS.

Though, by Rev. St. Mo. 1879, §§ 1875, 1609, it is made a misdemeanor to cruelly beat any horse, ox, or domestic animal, municipal corporations are not thereby incapacitated from prohibiting the same act by ordinance, and punishing offenders for violation thereof.

2. SAME.

The city of St. Louis, under the clause in its charter which authorizes the mayor and assembly to pass all such ordinances, not inconsistent with the charter or the state laws, as may be expedient in maintaining the peace and good government, health and welfare, of the city, and to enforce the same by fines and penalties, may pass an ordinance making it a misdemeanor to overdrive, overload, ill-treat, or cruelly beat any dumb animal.

Appeal from St. Louis criminal court; E. A. NOONAN, Judge.

Louis A. Steber, for appellant. *L. Bell and Martin & Fauntleroy*, for respondent.

BLACK, J. The defendant was fined \$20 by a police justice of the city of St. Louis on a charge of unnecessarily and cruelly beating a dumb animal. He appealed to the court of criminal correction, where he was again fined in a like amount; and he then appealed to this court. The prosecution is based on a violation of the following ordinance: "Section 1. Any person who shall, in this city, overdrive, overload, drive when overloaded, ill treat, torment, or unnecessarily or cruelly beat, or needlessly mutilate or kill, * * * any

dumb animal, shall, for every such offense, be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty dollars, nor more than one hundred dollars, for each offense."

At the close of the case for the city, the defendant moved for his discharge, which motion was overruled. The point made in the trial court and pressed here is that the ordinance is void—*First*, because the offense charged is punishable by the general statute laws of the state; and, *second*, because the city has no charter power to pass the ordinance. To cruelly beat any horse, ox, or domestic animal is made a misdemeanor by the general laws of the state (sections 1375, 1609, Rev. St. 1879;) but this does not prevent the city from prohibiting the same act by ordinance, and punishing the offender for a violation thereof. It is the well-settled law of this state that municipal corporations may by ordinance prohibit acts which are made misdemeanors under the general statutes of the state; and, for a violation of such ordinances, the city may maintain a proceeding in its own name to impose and collect a fine. *City of St. Louis v. Bentz*, 11 Mo. 61; *City of St. Louis v. Cafferata*, 24 Mo. 94; *State v. Cowan*, 29 Mo. 330; *City of Independence v. Moore*, 32 Mo. 392; *Ex parte Hollwedell*, 74 Mo. 395. The only debatable question is whether the city has the power to pass the ordinance. After the enumeration of various specific powers, authority is given to the mayor and assembly "to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines and penalties," etc. 2 Rev. St. 1855, par. 14. It cannot be contended that the ordinance in question is inconsistent with other provisions of the city charter; nor is it inconsistent with the constitution, or any statute law of the state. This is true in respect of state statutes, as we have seen, though the same act may be punished either under the statute or ordinance. The ordinance was doubtless designed to reach some cases of ill treatment of animals not embraced in the general statutes. Is the ordinance, therefore, fairly within the power to maintain the peace, good government, and welfare of the city? We think it is. In *City of St. Louis v. Bentz*, 11 Mo. 61, the defendant was fined under an ordinance concerning vagrants. The ordinance had for its authority the power "to regulate the police of the city." This court then said: "Although this is a very vague and indefinite grant of power, yet it must have been intended to confer other powers than those specifically granted; otherwise there existed no propriety in the enactment. When, therefore, it can be seen that the exercise of any jurisdiction by the corporation can be clearly brought within the scope of this grant without a violation of the constitution or a conflict with the laws of the state, there can be no objection to its exercise." In the case of *City of St. Louis v. Cafferata*, 24 Mo. 94, the ordinance made it a misdemeanor for any one to keep open his place of business on Sunday. It was held that the ordinance was a lawful exercise of the power given to the city "to make such rules, regulations, by-laws, and ordinances, for the purpose of maintaining the peace, good government, and order of the city, and the trade, commerce, and manufactures thereof, as they may deem expedient, not repugnant to the constitution and laws of this state." These cases serve to show that general welfare clauses are not useless appendages to the charter powers of municipal corporations. They are designed to confer other powers than those specifically named. The difficulty in making a specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such powers in general terms. Ordinances relating to the comfort, health, good order, convenience, and general welfare of the inhabitants are regarded as the exercise of police regulations. 1 Dill. Mun. Corp. (3d Ed.) § 141. Laws for the prevention of cruelty to animals may well be regarded as an exercise of such police powers. That good govern-

ment calls for the condemnation of such acts as are prohibited by the ordinance ought not to be questioned. The subject is pre-eminently one for local municipal regulation. The judgment is affirmed.

RAY, J., absent. The other judges concur.

KENDALL *et al.* v. POWERS.

(*Supreme Court of Missouri.* June 18, 1888.)

HOMESTEAD—IN LIFE-ESTATE.

Where the title to land occupied as a homestead becomes vested in the wife, and, after her death, the husband continues so to occupy it, being the head of a family of children, his estate by curtesy is not subject to the lien of a judgment obtained against him after the wife's death, homestead rights attaching to a life-estate as well as to a fee.

Appeal from circuit court, Linn county; W. H. BROWNLEE, Judge.

A. W. Mullins, for appellant. John R. Wilcox, for respondent.

BLACK, J. This suit of ejectment was commenced on the 14th November, 1884, to recover the possession of several lots in the town of Linneus, containing in all about an acre and a half of land, and valued at five or six hundred dollars. The facts are these: On the 31st December, 1881, the plaintiffs obtained a judgment against C. G. Cummins for \$787.09, under which the property was sold on execution, and purchased by the plaintiffs on June 12, 1884. At the date of the judgment, Cummins had a wife and six children. He then, and for a long time previous thereto, resided on the property. On the 22d November, 1881, a few days before the date of the judgment, he and his wife conveyed the property to Crampton, who at the same time conveyed it back to Mrs. Cummins, and she died on the same day. In March, 1884, Cummins and his second wife conveyed the property to the defendant, and, at the same time, Cummins, as curator of his children, conveyed, or attempted to convey, their interest in the property to defendant. There is evidence tending to show that these deeds were made as a security for money loaned Cummins. Other evidence is to the effect that the transaction was an out and out sale, with a right on the part of Cummins to repurchase the property if he desired to do so. A few days after the execution of these last-mentioned deeds, Cummins, with his family, went to the state of Kansas, returning in December, 1884. There is evidence that he left with the intention of returning, as he did. He repurchased the property, and took possession after the commencement of this suit. The plaintiffs do not seek to avoid the deeds, or any of them, for fraud or otherwise; but they insist that, after the death of Mrs. Cummins, her husband had an estate by the curtesy in the property, and that the lien of the judgment attached to that estate.

The deed to Crampton, and from him to Mrs. Cummins, simply vested the title in her. Mr. Cummins was all the while the head of a family, and he continued to reside with his family on the property until a few days after the sale to the defendant, and the property was his homestead during all that time. The law exempts from execution and attachment the homestead of every housekeeper or head of a family. The husband, as the head of a family, may have a homestead in a life-estate, or in property the title to which is in the wife. Thomp. Homest. & Ex. § 220. It was the same homestead all the while. The exemption is in no way affected by the fact that, during the time Cummins occupied the property with his family, the title became vested in his wife; nor by the fact that, upon the death of his wife, he became entitled to an estate by the curtesy. Whether the debtor owns the fee, has but a marital interest in the property, or a life-estate, is a matter of no concern to the creditors; the debtor being the head of a family, and the property his

homestead. Be the interest whatever it may, it is exempted from sale under execution. While the property stood exempt from sale under execution, Cummins could sell his interest therein, and the purchaser would take whatever title he had free from any claim of the judgment creditor. *Davis v. Land*, 88 Mo. 436. What has been said disposes of all the questions raised in this court. The judgment is therefore affirmed.

RAY, J., absent. The other judges concur.

STATE *ex rel.* QUINCY, M. & P. R. CO. *v.* HARRIS *et al.*, Judges.

(Supreme Court of Missouri. June 18, 1888.)

RAILROAD COMPANIES—MUNICIPAL AID—VOTE—CONSTITUTIONAL LAW.

Under Const. Mo. 1865, and Gen. St. Mo. 1865, § 17, authorizing county courts to subscribe stock to railroads upon two-thirds of the qualified voters of the county voting therefor, two-thirds of the qualified voters as shown by the registration books is meant, and not two-thirds of those actually voting; and, where two-thirds of the registered voters do not vote in favor of the proposition, the order of the county court subscribing for the stock is without authority.

Error to circuit court, Sullivan county; G. D. BURGESS, Judge.

Proceeding by *mandamus*, by the state *ex rel.* Quincy, Missouri & Pacific Railroad Company, against Anderson W. Harris, George T. Todd, and Thomas Montgomery, judges of the county court of Sullivan county. Judgment for defendants, and plaintiff brings error.

John P. Butler, (Edward McCabe, of counsel,) for plaintiff in error.
A. W. Mullins, for defendants in error.

NORTON, C. J. This is a proceeding by *mandamus* to compel the judges of the county court of Sullivan county to issue \$80,000 of bonds to the Quincy, Missouri & Pacific Railroad Company, upon the trial of which judgment was rendered for defendants, from which plaintiff has prosecuted a writ of error. The record discloses the following facts: That the Quincy, Missouri & Pacific Railroad Company was, on the 29th of June, 1869, duly incorporated, under the laws of this state, for the purpose of building and operating a railroad from West Quincy, on the Mississippi river, in Marion county, to a point on the Missouri river in Atchison county, Mo., opposite the city of Brownsville, Neb.; that on the 22d of December, 1869, the county court of Sullivan county made an order that an election be held at the usual voting places in said county on the 22d of February, 1870, for the purpose of ascertaining whether two-thirds of the qualified voters of said county of Sullivan would assent to a subscription of \$200,000 to the capital stock of said company, subject to certain conditions, among which are the following: "Said railroad to be located and constructed through said Sullivan county from east to west on a line as near through the center of said county as practicable; said subscription to be paid to said company * * * in the bonds of the county at par; * * * and that whenever said railroad company shall have surveyed and permanently located said road continuously through the state of Missouri from West Quincy, in Marion county, * * * to some point on the Missouri river opposite or near Brownsville, in the state of Nebraska, and should have continuously graded, bridged, and tied six miles of said railroad within Sullivan county upon the line * * * designated, then said county of Sullivan, by its county court, would issue and deliver to * * * said railroad company its bonds, in payment of such subscription, to the amount of \$40,000; and, for each additional section of six miles so continuously graded, bridged, and tied within said county of Sullivan, said county would issue and deliver to the company an additional sum of \$40,000 in the bonds of said county, as aforesaid, till the whole subscription of \$200,-

000 should be paid." It further appears that, in pursuance of law, a special registration of the qualified voters of said county who had become such since the last general registration, and subsequent special registrations, of the qualified voters of said county, made prior thereto, was had and held in the various municipal townships of said county prior to the holding of such special election; that at said special election, according to the official canvass thereof, 1,049 votes were cast in favor of the proposed subscription, and 257 votes against it; that the county court of said county, on the day after said election, viz., on February 23, 1870, made an order that, as 1,049 voters of the county had voted for the subscription, and only 257 against it, therefore, the proposition to subscribe for \$200,000 of the stock of said railroad company had carried; and afterwards, in pursuance of an order of said court, the *ex officio* president thereof made a formal entry of such subscription on the books of the company. On the trial, defendants offered in evidence the registration books of Sullivan county, made in 1868, for the general election of that year, and for a special election in 1869, and the special election held on February 22, 1870. These books were identified by James Morris, clerk of the county court of said county. And F. E. Stone, one of the registration officers, testified as follows: "I have recently examined the registration books identified by Mr. Morris. They are the books used for the general election in 1868, and at the special elections in 1869 and 1870. They were prepared and arranged for use by W. B. Taylor, W. H. Custer, and myself, [the then registration officers.] The thirteen books now shown me were used at the special election held February 22, 1870. Mr. Custer made certified copies of the special registration of voters, for the use of the judges of the election, as soon as such registration was completed." The registration books were then offered in evidence, to which objection was made, which, being overruled, thereupon the defendants began to read from the registration book of Polk township, in said county, used at the special election February 22, 1870; but, before completing the reading thereof, counsel for relator conceded that the registration books offered in evidence, counting all those registered for the general election of 1868, and those added in 1869, and those added for special election February 22, 1870, contained the names of 1,940 persons as qualified to vote in said county at said election, and that said names were placed upon said books by the aforesaid registration officers, and their predecessors in office, for use in the general election of 1868, the special election of 1869, and special election held February 22, 1870.

The controlling question arising on the record is as to the propriety of the action of the trial court in admitting in evidence the said registration books. The objection to their admission was based mainly on the ground that after the election of February 22, 1870, the county court held that two-thirds of the qualified voters voting at said election had voted in favor of the subscription, and directed the subscription to be made, which was thereafter made. It is established law in this state that county courts are only the agents of the county, with no powers except what are granted, defined, and limited by law; and, like all other agents, they must pursue their authority, and act within the scope of their powers. *Wolcott v. Lawrence Co.*, 26 Mo. 272; *Book v. Earl*, 87 Mo. 246; *Sturgeon v. Hampton*, 88 Mo. 203. The power of the county court to subscribe to the stock of a railroad company was made by the constitution of 1865, and section 17, Gen. St. 1865, p. 338, to depend upon the fact that two-thirds of the qualified voters of the county, at a regular or special election held therein, should assent thereto. In the case of *State v. Brassfield*, 67 Mo. 331, this statutory provision, and the provision of the constitution of 1865 which gave origin to the statute, for the first time came before this court for construction, and it is there distinctly held that, under these provisions, the fact that a majority of voters voting at an election held for the purpose of determining whether or not a subscription should be

made to the stock of a railroad company voted in favor of the subscription, was not sufficient to confer upon the county court the power to subscribe; but that, in order to the exercise of the power, it must appear that two-thirds of the qualified voters assented to the subscription by voting in favor of it, and that the mere inaction of such voters, by failing to vote, did not express such assent, within the meaning of section 14, art. 11, Const. 1865. So it was also held in the case of *Webb v. La Fayette Co.*, 67 Mo. 353; *Ranney v. Bader*, Id. 476; *State v. Walker*, 85 Mo. 41. It is also held in the case of *State v. Brassfield*, *supra*, and *Ranney v. Bader*, *supra*, that the registration books may be properly received in evidence for the purpose of establishing the number of qualified voters in the determination of the question whether or not, at the election, two-thirds of the qualified voters, as ascertained by the registration, assented to the subscription by voting for it. Taking, in this case, the admission that the registration books offered in evidence contained the names of 1,940 persons as qualified to vote in said county at said election, it is evident that two-thirds of the qualified voters of the county of Sullivan did not assent to said subscription, as only 1,049 of said voters voted in favor of the subscription. Besides this, while there was evidence tending to show that the railroad company has complied with the conditions of the subscription, there was also evidence to show that it had not complied, and the trial court might, on this ground, have well denied the relief asked. The judgment, for the reasons given, is hereby affirmed; with the concurrence of BRACE and SHERWOOD, JJ., BLACK, J., concurring in the result, and RAY, J., absent.

NAVE v. SMITH.

(Supreme Court of Missouri. June 18, 1888.)

ESTOPPEL—IN PAIS—LACHES.

K. and B. were tenants in common, and in 1859 made a parol partition, each taking possession of his own portion. February 19, 1861, creditors of B. attached his interest in the whole tract. February 25, 1861, K. executed a mortgage at B.'s request of a one-half interest in B.'s portion of the land. The mortgage was foreclosed, and plaintiff became purchaser. The defendant claims, by sale under the attachment, the whole of B.'s portion, relying upon the parol partition. Held that, it being recited in a deed of record by B., dated February 15, 1861, that K. is the owner of an undivided one-half of B.'s portion, and plaintiff having been treated by the attaching creditors as owner of one-half thereof by being called on to pay one-half of the taxes, and the attaching creditors having claimed for 14 years in disregard of the parol partition, they cannot now affirm the same, and defeat plaintiff's mortgage.

Appeal from circuit court, Livingston county; J. M. DAVIS, Judge.

Ejectment by Abraham Nave, claiming under a mortgage foreclosure, against Robert H. Smith, claiming under sale under an attachment prior to the mortgage. Judgment was entered for plaintiff, and defendant appeals.

C. T. Garner, Sr., and J. R. Hamilton, for appellant. Ramey & Brown, for respondent.

BLACK, J. The defendant appealed from a judgment in favor of the plaintiff in an action of ejectment for the undivided one-half of 85 acres of land in De Kalb county. While this case is, in many respects, like that of *Nave v. Todd*, 83 Mo. 601, still there is some difference in the evidence, and this case is presented on a somewhat different theory, so that it will be considered on its own facts. Prior to 1859, Henry C. Kerr and John C. Breckenridge owned two farms in De Kalb county as tenants in common, and they were also the joint owners of certain personal property. The defendant's evidence shows that in February of that year Kerr and Breckenridge divided their personal property, and also made a parol division of the land. The land was surveyed, and Kerr took 440 acres, being the improved portion of what is called the

"Canfield Farm," and upon which he then and previously resided. Breckenridge took the residue of the Canfield farm, and what is called the "Breckenridge Home Farm," and upon which he resided. Kerr resided upon his portion until 1861, and it was in the possession of his tenant from that date to 1865 or 1866, while he was in the army. Breckenridge, by himself or tenants, occupied his portion until 1868. No deeds were made in 1859, and from the records of the county they appeared to be tenants in common, each owning an undivided half of the two farms. On the 5th March, 1866, they executed and recorded a partition deed in conformity to the previous parol division. Previous to this last-named date, and on the 19th February, 1861, various creditors of Breckenridge attached his interest in both farms. On the 25th of the same month, Kerr made a mortgage to Nave, the present plaintiff, upon the undivided one-half of the Breckenridge farm, to secure his note of that date to Nave for about \$1,900, due in 60 days. This mortgage was made with the knowledge and at the request of Breckenridge. This note was given in lieu of one held by Nave against Breckenridge, then past due. There is evidence to the effect that Kerr was also bound on the old note. The attaching creditors prosecuted their suits to judgments, and the interest of Breckenridge in both farms was sold thereunder and purchased by Saunders, who took the title in trust for the attaching creditors, the sheriff's deed to him being dated in 1868, the date of the sale. Nave foreclosed his mortgage on the undivided half of the Breckenridge farm, and became the purchaser of that interest at a sale under his judgment in 1865, and this is his title. There was a subsequent suit between the attaching creditors and Saunders, which resulted in a decree for the sale of all of the property purchased by Saunders; and, at a sale under that decree, the defendant in this suit purchased the property in question and other property, and received a sheriff's deed, dated 7th October, 1875. The evidence shows that Saunders had possession of all of the property from 1868 to 1875. That he acted as the agent for the creditors of Breckenridge, and also for Nave. Nave, through Saunders, paid his share of the taxes on the Breckenridge farm for several years. The land was sold for delinquent taxes for 1861, 1863, and 1864, and by Saunders purchased in the names of Nave and King; the latter being one of the attaching creditors. The other facts deemed material will be noticed hereafter.

Defendant's position is that, by reason of a parol partition between Kerr and Breckenridge, in 1859, the latter acquired the legal, as well as equitable, title to the land in suit, and that this title passed to him. It is certainly the law of this state that a parol partition between tenants in common, followed by possession, will be sufficient to sever the possession. *Bompart v. Roderman*, 24 Mo. 398. But in the subsequent case of *Hazen v. Barnett*, 50 Mo. 506, it was held that while a parol partition followed by possession was good as between the parties, yet the equitable title only passed, which by adverse possession may ripen into a legal title. It was also held that a party to such parol partition has the right to have the same confirmed by a decree vesting in him the legal title. There is a diversity of opinion in the books upon the subject as to whether the legal, or simply the equitable, title passes in such cases. It is certainly the policy of our statute that titles to real estate be made matter of record. Under the doctrine of the case last cited, the party taking possession of the part allotted to him will be able to defend his possession, control the legal title, and compel its transfer to him. We shall not depart from the rule of that case, as applied to like cases. The rights of Kerr and Breckenridge arising from the parol partition must be treated as equitable, not legal. The evidence produced by the defendant shows a parol partition between Kerr and Breckenridge in 1859, followed by possession; or, rather, each continued in the possession of the part allotted to him. But it also appears that on the 15th February, 1861, Breckenridge conveyed the undivided

half of the Breckenridge farm to Andy and Adam A. Breckenridge. We infer this deed was made as a security for certain debts, but it recites that Kerr is the owner of the other undivided half, thus showing that at that time he disregarded the parol partition. On the 25th of the same month Kerr made the mortgage to Nave on the undivided one-half of the same land, and this mortgage was made at the request of Breckenridge. As between Nave on the one hand, and Kerr and Breckenridge on the other, the latter could not successfully set up a parol partition; for, if there had been one, the execution of the mortgage by Kerr, with the consent of Breckenridge, would operate as a revocation of it. Under such circumstances, Breckenridge could not, as against Nave, claim with success the whole of the Breckenridge farm. The recital in the deed to Andy and the mortgage to Nave are inconsistent with full ownership of the Breckenridge farm by Breckenridge. But it is urged that whatever interest Breckenridge had, whether legal or equitable, became subject to the attachments; and as they were levied on the 19th February, 1861, the rights of the attaching creditors could not be affected by the Nave mortgage, made on the 25th of the same month. In other words, the subsequent acts of Kerr and Breckenridge and Nave could not prejudice the rights of the attaching creditors. All this would be true but for the course pursued by the attaching creditors. They, too, disregarded the alleged parol partition; for they prosecuted their suits, from 1861 to 1868, against the interest of Breckenridge in both farms, and purchased that interest in the name of Saunders, and the suit between them and Saunders proceeds upon the theory that they had acquired an interest in both farms. Not only this, but Saunders treated Nave as the owner of the undivided half of the Breckenridge farm by calling upon him for one-half of the taxes which Nave paid, believing he had acquired the one-half interest. Kerr says he told Nave about the parol partition when the mortgage was made, but Nave says he had no knowledge that a partition had been made, and we conclude proof of notice to him of such a partition is not made out. We do not say that the want of notice of itself on the part of Nave would defeat the attachments on the equitable interest of Breckenridge. Whatever there was of this parol partition was known to some of the attaching creditors. Their continued claim to an interest in the Kerr farm was a denial of a parol partition. It is plain to be seen that Kerr and Breckenridge, in making the mortgage to Nave, acted upon the title as it appeared of record; that Nave has always claimed title according to the recorded deeds; and that the attaching creditors, through a series of years from 1861 to 1875, have disclaimed any binding parol partition by claiming the undivided one-half of both farms. It is now too late for them, or those claiming under them, to turn around and say they got no interest in the Kerr farm, but got the whole of the Breckenridge farm. They cannot at this late day make their election to affirm the parol partition, and thereby defeat the plaintiff's mortgage. We are constrained to say there is no equity in the defense.

As to the statute of limitations, it is sufficient to say there is no evidence in the case upon which to base such a defense. Saunders was in possession from 1868 to 1875, and he recognized and treated Nave as a co-tenant, so that there was no adverse possession then. This suit was commenced in 1879. The judgment in this case was entered up for the whole of the described land, whereas it should have been for the undivided one-half only. The plaintiff offers to remit one-half of the damages recovered and the undivided one-half of the land. The *remittitur* will be allowed, and the judgment for the undivided half of the land and one-half of the damages recovered affirmed, but the costs of this appeal must be taxed to the plaintiff.

RAY, J., absent. The other judges concur.

NAVE v. HAMILTON.

(Supreme Court of Missouri. June 18, 1888.)

Appeal from circuit court, Livingston county; J. M. DAVIS, Judge.
C. T. Garner, Sr., and J. R. Hamilton, for appellant. Ramey & Brown, for respondent.

BLACK, J. This case is in all substantial respects like that of *Nave v. Smith*, ante, 796, (just decided.) The judgment in that case disposes of this one. The plaintiff offers to remit the undivided one-half of the land recovered, and the whole of the described one-half acre off of the S. E. corner of the N. E. $\frac{1}{4}$ of section 11, township 57, range 32, and \$1,074.80 of the damages recovered. The *remitter* will be allowed, and the judgment affirmed for the residue. Costs of this appeal will be taxed to respondent.

RAY, J., absent. The other judges concur.

STATE v. NORTH.

(Supreme Court of Missouri. June 18, 1888.)

BURGLARY—POSSESSION OF STOLEN GOODS—INSTRUCTIONS.

Upon trial for burglary and larceny, where it was shown that some of the stolen property was found in defendant's possession the day after the burglary, and he introduced evidence tending to show an *alibi*, an instruction that where stolen property is so found, if the possessor fails to account for his possession in a manner consistent with his innocence, he is presumed to be a thief, is erroneous, because it excludes the evidence of an *alibi* from the consideration of the jury.¹

Appeal from St. Louis criminal court; JAMES C. NORMILE, Judge.

Indictment of George North for burglary and larceny. Judgment of conviction, and defendant appeals.

Thos. B. Harvey and Thos. B. Estep, for appellant. B. G. Boone, Atty. Gen., for the State.

NORTON, C. J. Defendant was indicted in the criminal court of the city of St. Louis, and charged with burglary and larceny, and on trial was convicted of both burglary and larceny, and his punishment assessed at imprisonment in the penitentiary for five years. The evidence on the part of the state tended to show that on the same day the offense charged was committed, and the day after it was committed, defendant was found in possession of goods stolen at the time the burglary was committed, and that he admitted he took them. The evidence of defendant himself, and that of another witness, tended to show an *alibi* at the time the burglary and larceny were committed. On this state of the evidence, the court gave the following instruction: "And where property has been stolen by means of a burglary, proven beyond a reasonable doubt, and recently thereafter the same or any part thereof is found in possession of another, if he fails to account for such possession in a manner consistent with his innocence, such person is presumed to be a thief, and is also presumed to have used all means necessary to have secured access to such property; so that, from such recent possession, you are authorized to presume such person guilty of the burglary as well as the larceny." It is contended that, inasmuch as there was evidence tending to show an *alibi*, the above instruction is erroneous, in this: that the evidence to rebut the presumption of guilt, arising from the possession of stolen property soon after it was stolen, is limited to such evidence as tends to account for such possession in a manner consistent with innocence. This contention is fully supported by the case of *State v. Sidney*, 74 Mo. 390, where, after reaffirming the rule laid down in the case of *State v. Kelly*, 73 Mo. 608, and approving an instruction like the one in this case, and after saying that, if the element

¹ As to the presumption arising from the possession of property taken at the time of the commission of a burglary, see *Morgan v. State*, (Tex.) ante, 487, and note.

of recent possession were the only one in the case, we would not hesitate to approve the action of the trial court, it is then said, in effect, that where there is evidence either of good character, or evidence tending to establish an *alibi*, such an instruction as the one in question would not be comprehensive enough, for the reason that, while good character or an *alibi* would tend to rebut the presumption of guilt arising from the possession of stolen property recently after the theft, neither of these things would account for or explain such possession. Upon the authority of the case above cited, the judgment in this case is hereby reversed, and cause remanded for error committed in giving said instruction in the form it was given. See *State v. Jennings*, 81 Mo. 188.

All concur, except RAY, J., absent.

Ex parte JACKSON.

(Supreme Court of Missouri. June 18, 1888.)

1. CRIMINAL LAW—SENTENCE—CUMULATIVE IMPRISONMENT.

Where petitioner was convicted at the same term on three indictments for felony; and, on a subsequent day of that term, was sentenced to imprisonment for a term commencing from date, on the third conviction; and, on the following day, was sentenced to imprisonment on the first and second convictions, respectively,—each term to commence at the expiration of the one preceding it,—there was no such irregularity in the proceedings as would avoid the imprisonment, under Rev. St. Mo. § 1659, providing: "When any person is convicted of two or more offenses before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction."

2. SAME—REVERSAL OF ONE OF THE JUDGMENTS—EFFECT ON SUBSEQUENT SENTENCE.

Where a prisoner was sentenced, at the same term of court, to three successive terms of imprisonment, the reversal of the judgment upon which he was sentenced to the second term of imprisonment does not entitle him to a discharge upon expiration of his first term, but the third term will begin immediately after the first has expired.

Original proceedings in *habeas corpus*.

F. E. Luckett and *Ed. Silber*, for petitioner. *The Attorney General*, for the State.

SHERWOOD, J. In case No. 1,305, Jackson was on October 15th found guilty of forgery. In case No. 1,306, he was also found guilty of forgery on November 5, 1885. In case No. 1,307, he entered a plea of guilty of forgery on November 6, 1885. Subsequently sentences of imprisonment in the penitentiary were entered against him, as follows: In 1,307, imprisonment in the penitentiary for three years, commencing from date of sentence, November 6, 1885. On November 7, 1885, in case No. 1,305, imprisonment in the penitentiary for three years, commencing from expiration of sentence in the previous case. In case 1,306, on the same day, November 7th, imprisonment for three years from expiration of sentence in case No. 1,305. In the last-named case, Jackson appealed to this court, and such proceedings were had as caused a reversal of the judgment. Under the operation of the three-fourths rule, he has served out his term of imprisonment in case No. 1,307, and now is held by the warden by virtue of the sentence in case, 1,306, the last of the sentences imposed; and claims that, by virtue of the foregoing facts, he is entitled to his discharge. The section of the statute applicable to this case is as follows: "When any person is convicted of two or more offenses before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction." Rev. St. § 1659.

While it is true that the sentences imposed upon the petitioner might all have been pronounced against him upon the same day, it does not thence follow that there was anything either irregular or erroneous in imposing the respective sentences on him on two different days of the same term. The statute evidently contemplates that all the convictions of a prisoner at any one term of court shall precede his being sentenced in any one case; but that where this course is pursued, and sentence pronounced upon him for one offense, that then sentences for other offenses shall follow in regular order,—each term commencing at the termination of the term of imprisonment to which he shall have been just previously adjudged. Regularly, the first term of imprisonment should be pronounced against a prisoner on his first conviction, and so on; but irregularity or erroneousness of procedure afford no basis for relief in instances like the present. *Church, Hab. Corp.* §§ 297, 304, 348, 363. This case does not resemble that of *Ex parte Meyers*, 44 Mo. 279, in any particular, and counsel have grossly misconceived that case. There the statute now under consideration was construed precisely as in the foregoing remarks; but the prisoner, having been convicted and sentenced at the March term, 1866, to imprisonment for two years, was retained in jail until the following May term, when he was tried on another indictment, and sentenced to imprisonment for three years in the penitentiary, and sent there accordingly; and, having served his first term, was discharged, because the court had no authority, under the statute, to retain him in prison after sentencing him at one term, and then at a subsequent term, to try him for another offense, and again sentence him therefor to another term in the penitentiary. That this is the correct view to take of that case is shown by the subsequent cases of *Ex parte Brunding*, 47 Mo. loc. cit. 256; *State v. Connell*, 49 Mo. loc. cit. 288,—where mention of that case is made. The statute already quoted is but declaratory of the rule prevalent at common law. *Rex v. Wilkes*, 4 Burrows, 2574–2577; *Kite v. Com.*, 11 Metc. 581; *Com. v. Leath*, 1 Va. Cas. 151.

The only point, therefore, left for discussion is this: Whether the prisoner, having been sentenced at the same term of court to three successive terms of imprisonment in the penitentiary, having reversed the judgment and sentence of imprisonment pronounced against him as to the second or middle term, and served out his sentence as to the first term, is entitled to be discharged from serving out his third or last term. To this point the response must be in the negative, and for these reasons: The judgment upon which the prisoner's second term of imprisonment was dependent having been reversed, the case stands here precisely as if he had served out his said second term, or had been pardoned as to the offense for which that sentence was imposed, and so his third term or sentence lawfully began upon the expiration of his first term. There is abundant authority for this view. *Kite v. Com.*, 11 Metc. 581; *Brown v. Com.*, 4 Rawle, 259; *Ex parte Roberts*, 9 Nev. 44; 1 Bish. Crim. Law, § 953; *Ex parte Turner*, 45 Mo. 331. But, furthermore, even if the action of the lower court was as unwarranted as counsel claim, still the petitioner could not be discharged, because, under the provisions of section 2688, it would be the duty of this court to sentence him according to law if the proper sentence had not been previously pronounced against him. *Ex parte Bethurum*, 66 Mo. 545. The petitioner will be remanded into the custody of the warden.

All concur, except RAY, J., absent.

JONES v. STATE.

(Court of Appeals of Texas. June 13, 1888.)

LARCENY—INDICTMENT—ERROR IN SPELLING.

An indictment for theft charging the taking of certain property with the intent to deprive the owner of the value thereof, and "appropriate" the same to the use and benefit of the defendant, is fatally defective, on motion to quash, in not alleging an intent to "appropriate" the property alleged to have been stolen.

Appeal from district court, Burnet county; A. S. FISHER, Special Judge. *Matthews & Wood*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This was a conviction for theft of a gelding. Defendant moved to quash the indictment upon the ground that "it does not charge any intent on the part of defendant to appropriate the property alleged to have been stolen to his own use." This motion was overruled, and the question of the correctness of the ruling is presented to us for decision. Instead of the essential statutory word "appropriate," the pleader has used the unmeaning word "appriate," and charges that the property was taken "with intent then and there to deprive the said owner of the value of said property, and appriate the same to the use and benefit," etc. We know of no such word in the English language as "appriate," and as spelt the word is not *idem sonans* with "appropriate." An indictment for theft "must charge explicitly all that is essential to constitute the offense, and cannot be aided by intendment." *Williams v. State*, 12 Tex. App. 395; *Jones v. State*, Id. 424; *Tallant v. State*, 14 Tex. App. 234; *Peralto v. State*, 17 Tex. App. 578; *State v. Sherlock*, 26 Tex. 106; *Ridgeway v. State*, 41 Tex. 231. The intent to appropriate is as essential and material, under our statutory definition of theft, as any other element of the offense; and we have an express rule of pleading as to the intent, which declares that, "where a particular intent is a material fact in description of the offense, it must be stated in the indictment. Code Crim. Proc. art. 423. The assistant attorney general, in support of the ruling, has called our attention to the case of *State v. Williamson*, 43 Tex. 500, wherein an indictment was held good that charged that defendant did take, steal, and carry away from the "possession" of the owner, without the consent of the owner, and with intent, etc. As we understand that case, the decision was solely to the effect that the objection to the indictment for the defect insisted upon could not be taken on a motion in arrest of judgment, but should have been interposed before the trial. In this case the objection was raised by motion to quash the indictment before trial. We are of opinion that the court erred in overruling the motion, and that the indictment is fatally defective; wherefore the judgment is reversed, and the prosecution dismissed.

WOODALL v. STATE.

(Court of Appeals of Texas. June 13, 1888.)

CRIMINAL LAW—ARRAIGNMENT—SERVICE OF COPY OF INDICTMENT.

Under Code Crim. Proc. Tex. arts. 504, 505, providing that, where the accused is in custody, as soon as the indictment is presented a certified copy shall be made out and served upon him; and under article 532, providing that, in cases where defendant is entitled to be served with a copy of the indictment, he shall be allowed two days' time after service to plead,—where a defendant, when his case is called for trial, answers that he is not ready, because he has been in custody, and has never been served with a copy of the indictment, and thereupon demands such copy and a postponement for two days, it is error to refuse such demand.

Appeal from district court, Knox county; J. V. COCKRELL, Judge.

Indictment of J. M. Woodall for larceny of a horse. Judgment of conviction, and defendant appeals.

W. L. Davidson, Asst. Atty. Gen., for the State.

WHITE, P. J. On this appeal the assistant attorney general, on the part of the state, confesses error. Appellant was indicted for horse theft. When the case was called for trial, the state announced ready, and defendant answered not ready, because he had been in custody since his arrest, and had never been served with a copy of the indictment preferred against him. He demanded a copy of the indictment against him, and a postponement of the trial for two days after service thereof. A postponement was refused by the court, who

ordered a copy of the indictment to be prepared and served *instantly*, which was done, and then, over objections of defendant, ordered him to announce, and proceeded with the trial. It is provided by statute that in every case of felony, when the accused is in custody, as soon as the indictment against him is presented a certified copy of the same shall be made out and served upon him. Code Crim. Proc. arts. 504, 505. And it is further expressly provided that, "in cases where the defendant is entitled to be served with a copy of the indictment, he shall be allowed two days' time to file written pleadings after such service. Id. art. 532. Because the court erred in refusing to postpone the trial for two days after service of the indictment, at the request of defendant, the judgment is reversed, and the cause remanded.

LACEY v. STATE.

(Court of Appeals of Texas. June 18, 1888.)

LARCENY—EVIDENCE.

Defendant was convicted of theft of a calf. It was found in a pen near where he lived, with the original brand barred out, and another brand, consisting of the first three letters of defendant's given name, placed on it. The marks in the ears had also been changed. There was evidence that defendant had formerly claimed a horse which had the same brand as that which had been placed on the calf, but defendant proved that such altered brand and mark were recorded as that of a brother of his, who lived near by. *Held*, that the evidence was not sufficiently clear to sustain a conviction.

Appeal from district court, Kerr county; T. M. PASCHAL, Judge.

Indictment of Tobe Lacey for theft of a calf. Judgment of conviction, and defendant appeals.

W. L. Davidson, Asst. Atty. Gen., for the State.

WHITE, P. J. This appeal is from a conviction of theft of one head of neat cattle. The assistant attorney general does not ask an affirmance, but simply submits the case upon the record for our decision. The inculpatory evidence against the defendant is that the calf was found in a pen near the place where he lived, on the West Frio river, in Edwards county, with the original brand barred out, and the "T. O. B." brand placed on it, and the marks in the ears changed. There is also evidence that the defendant at one time claimed a horse in the "T. O. B." brand. Defendant proved that the altered mark, and the brand "T. O. B.," were recorded in Kerr county as the mark and brand of Jake Lacey, and that Jake Lacey was a brother of his, and lived, with his mother, at West Frio, in Edwards county. We are of opinion that the evidence is too unsatisfactory, inconclusive, and insufficient to warrant the conviction, and the judgment is reversed, and the cause is remanded.

HOOKS v. STATE.

(Court of Appeals of Texas. June 18, 1888.)

FENCES—PULLING DOWN—CRIMINAL LAW.

A tenant who, against the consent of the landlord, removes a panel from a fence separating the leased premises from the farm of a third person, for the purpose of obtaining a more convenient passage-way, such passage-way not exposing the growing crops of another to depredation, cannot be convicted under Pen. Code Tex. art. 684, providing that any person who shall break, pull down, or injure the fence of another without his consent, shall be fined.

Appeal from county court, McLennan county; W. W. EVANS, Judge.

Prosecution against J. R. Hooks under Pen. Code, art. 684, providing that "if any person shall break, pull down, or injure the fence of another without his consent, or shall willfully, and without the consent of the owner thereof, open and leave open any gate leading into the inclosure of another, or shall

knowingly cause any hogs, cattle, mules, horses, or other stock to go within the inclosed lands of another without his consent, * * * he shall be fined," etc. Defendant was convicted, and appeals.

J. W. Taylor, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Defendant rented from Mrs. Cagle her farm for the year 1887. There was a fence dividing said farm from one owned by another person. The house in which defendant lived on Mrs. Cagle's farm was inside said farm inclosure. During his tenancy, he pulled down one panel of said dividing fence, for the purpose of affording him a passway more convenient than the one with which the farm was provided. He pulled down this panel of fence without the consent of Mrs. Cagle, and against her express protest. Upon this state of facts, he has been prosecuted to conviction under article 684 of the Penal Code. As we view the law, the conviction is erroneous. A tenant in possession of leased premises is the owner thereof until the expiration of his lease. *Brumley v. State*, 12 Tex. App. 609; *Zallner v. State*, 15 Tex. App. 23. He has the right, during said time, to make any reasonably legitimate use of the premises; such as opening a convenient passway in a fence, when such passway does not expose the growing crops of the owner of such fence to depredation of stock. *Cleveland v. State*, 8 Tex. App. 44; *Jones v. State*, 18 Tex. App. 366; *Woodyard v. State*, 19 Tex. App. 516. The judgment is reversed, and the cause is remanded.

KEMP v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

1. ASSAULT AND BATTERY—AGGRAVATED ASSAULT—INFORMATION.

An information charging that defendant, a female, in connection with an adult male, committed an aggravated assault and battery upon a female, is good, under Pen. Code Tex. art. 493 providing that "an assault and battery becomes aggravated * * * when committed by an adult male upon the person of a female;" as in assaults all present and participating are principals, and therefore a female acting with an adult male in an assault upon a female is guilty of an aggravated assault.

2. SAME—EVIDENCE.

Under such information, unless the proof shows that one of the participating parties was an adult male, the case is not an aggravated assault.

3. SAME.

Defendant, a woman, being engaged in an assault upon another woman, a man, without solicitation, encouragement, or preconcert with defendant, joined in the assault. Held that, although the person joining in the assault was an adult male, defendant was guilty of a simple assault only, under said statute.

Appeal from Robertson county court; C. S. BRIGANCE, Judge.

Indictment against Lou Kemp and others for an aggravated assault. Defendant was convicted, and appealed. Pen. Code Tex. art. 496, provides that "an assault and battery becomes aggravated when committed under any of the following circumstances: * * * When committed by an adult male upon the person of a female or child."

John E. Crawford, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

WILLSON, J. This conviction is for an aggravated assault and battery under an information which charges as follows: "Phil Davis, Linda McIntosh, (or McIntyre,) Lou Kemp, Sarah Lorne, and Emma Massengil, late of the county of Robertson, on the 28th day of March, A. D. 1887, with force and arms, in the county of Robertson and state of Texas, then and there acting together, in and upon the person of Susan Garrett did then and there commit an aggravated assault and battery by then and there striking and beating said Susan Garrett with their hands and fists, and by then and there pulling and tearing the clothes off of the person of said Susan Garrett, with intent to

injure her; the said Phil Davis then and there being an adult male person, and the said Susan Garrett then and there being a female person," etc.

Defendant made a motion in arrest of judgment, one of the grounds of which is as follows: "Because the affidavit and information are insufficient to charge this defendant, Lou Kemp, with any higher grade of offense than a simple assault and battery, because said affidavit and information do not charge any circumstance or means of aggravation against this defendant, as mentioned and defined in article 496 of the Penal Code." Said motion was overruled, and counsel for defendant has ingeniously and ably presented this ground of objection before this court, insisting that the mere fact that a woman joins an adult male person in the commission of an assault upon a female does not render the assault, as to the woman joining in its commission, guilty of an aggravated assault; that she would only be guilty of a simple assault, while the adult male would be guilty of an aggravated assault. When considered with reference to the sufficiency of the information, we do not agree to the proposition stated. All who are present and participating in an assault are principals, and a blow by one is a blow by each and all of them. It is alleged in the information that the defendants acted together in the commission of an aggravated assault upon the woman; one of said defendants being an adult male person. If, under any state of facts, the acting together with the adult male in the commission of the assault would make the woman guilty of an aggravated assault, then the information is sufficient, and the question of her guilt of aggravated assault becomes one of proof, and not of pleading. Now, suppose the defendant, knowing that Phil Davis was an adult male person, confederated with him to make an assault upon the injured woman, and, in pursuance of such conspiracy, they together made the assault, or Phil Davis made the assault in fact, and the defendant was present, instigating, encouraging, or in any way aiding him in the commission of such assault, would she not be equally guilty with Phil Davis? We think she would; and such was the view entertained by this court in the somewhat similar case of *Dunman v. State*, 1 Tex. App. 593. So we think if a woman, however feeble she might be, should act together with a person of robust health and strength in the commission of an assault upon one who is aged or decrepit, she might be guilty of an aggravated assault, although the assault was in fact committed by her co-wrong-doer. So, if one in disguise should commit an assault, and another not in disguise should act together with the disguised person in committing the offense, knowing of such disguise, both would be guilty of an aggravated assault. We hold, therefore, that the information charges an aggravated assault and battery against the defendant Lou Kemp, and that the motion in arrest was properly overruled.

We are of the opinion, however, that the evidence does not sustain the conviction of aggravated assault and battery. In the *first* place, it was not proved that Phil Davis was, at the time of the alleged assault, an adult male person. It was proved that he was a male person, but there was not a particle of evidence in the record before us that he was an adult male. His age was not shown by either direct or circumstantial evidence. *Secondly*, the facts do not show that the defendant acted together with Phil Davis in the commission of the alleged assault. Phil Davis interfered in the *melée* of his own accord, without being invited to do so by the defendant; and, so far as his acts are concerned, they seem to have been in no way encouraged, agreed to, or participated in by the defendant. A woman is in the act of committing a simple assault and battery upon another female. An adult male person, without solicitation on the part of the assaulted woman, without, perhaps, her knowledge, intrudes himself into the difficulty, and joins in the assault. In such case the assaulting woman certainly cannot be held answerable for the acts of the adult male in which she does not concur. Her liability as a principal in such case is determined, not by the acts of the adult male, but

by her own act and intent. *Guffee v. State*, 8 Tex. App. 187. In this case, the evidence, at most, shows that defendant was guilty of a simple assault and battery, and was not responsible for the acts of Phil Davis. Such being the case, the defendant's plea of former conviction for such simple assault and battery was sustained by the evidence, and should have prevailed, and the defendant should have been acquitted. Without noticing other matters assigned as error, judgment is reversed, and the cause is remanded, because the conviction is contrary to the law and the evidence.

TOLLIVER v. STATE.

(Court of Appeals of Texas. June 13, 1888.)

RECEIVING STOLEN GOODS—EVIDENCE.

Proof of defendant's possession of property 13 months after it was stolen will not sustain a conviction for receiving stolen property, where there is no evidence that defendant knew it to have been stolen.

Appeal from Falls county court; JOHN N. WHARTON, Judge.

P. P. Norwood, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for receiving an overcoat knowing the same to have been stolen. There is no evidence before us to sustain the conviction. Defendant was found in possession of an old, ragged overcoat, which the prosecuting witness identified as an overcoat which had been stolen from him 12 or 13 months prior to defendant being found in possession thereof. There is not a particle of evidence showing, or tending to show, that defendant at any time knew that the coat had been stolen. His possession of the coat, even if it was the stolen coat, 12 or 13 months after the same had been stolen, cannot be considered as the possession of recently stolen property, and raises no presumption of guilt against him. In our opinion, the conviction is without any evidence to warrant it, and the judgment is therefore reversed, and the cause remanded.

HOWARD v. STATE.

(Court of Appeals of Texas. June 13, 1888.)

LARCENY—FRAUDULENT INTENT—EVIDENCE.

Defendant sold a horse which, according to the state's evidence, was a bay, and according to defendant's evidence, a gray. Failing to find the horse, the vendee agreed to take in lieu thereof a gray horse, which, according to the state's evidence, defendant afterwards took and sold. Defendant's evidence tended to show that the horse taken by him was the one originally sold, and that defendant believed it to be such. *Held*, that a conviction for theft could not be sustained; the evidence not establishing a fraudulent intent.¹

Appeal from district court, Llano county; A. W. MOURSUND, Judge.

Prosecution for theft of a horse. Before the alleged theft, the defendant traded to Bayley a horse, giving him range possession. According to the evidence for the state the horse was a bay, and according to the defense a gray, animal. Bayley, failing to find the horse, agreed to take another in lieu of it, which, according to all of the evidence, was a gray. The state's evidence showed that defendant took and sold the gray horse he had substituted for the one originally traded. The evidence for the defense tended to show that the horse taken, and openly used by the defendant, was the horse origi-

¹Where possession of property is obtained lawfully, the subsequent appropriation of the same, *animo furandi*, to the taker's use, does not constitute larceny. *Hill v. State*, (Wis.) 15 N. W. Rep. 445; *Mayes v. State*, (Tenn.) 4 S. W. Rep. 659; *Guest v. State*, (Tex.) 5 S. W. Rep. 840; *Stokely v. State*, (Tex.) 6 S. W. Rep. 538; *Willis v. State*, Id. 856, 857. See, also, as to what constitutes larceny, *Com. v. Eichelberger*, (Pa.) 13 Atl. Rep. 433.

nally traded, or, if not, that defendant believed him to be that horse. Defendant was convicted, and appeals.

Sneed, Pendexter & Burleson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We find no material error in the charge of the court, and there is no bill of exceptions in the record specifying any errors in the charge. As presented in the record, the evidence does not, in our opinion, sustain the conviction. It is sufficient to establish that the defendant took a horse belonging to Bayley, as charged in the indictment; but it does not establish that such taking was accompanied by a fraudulent intent on the part of defendant. As we view the evidence, it rebuts the allegation of fraudulent intent. The judgment is reversed, and the cause remanded.

RUSHING v. STATE.

(Court of Appeals of Texas. June 13, 1888.)

1. CRIMINAL LAW—EVIDENCE—HEARSAY.

It is error to admit evidence of a statement, made in the absence of accused by his brother to the sheriff, that accused would plead guilty, though the county attorney stated that he expected to prove facts which would render the testimony admissible.

2. SAME—SUPPORTING REPUTATION OF WITNESS FOR VERACITY.

Evidence is not admissible to prove that the general reputation of a prosecuting witness for veracity is good, where his veracity has not been directly assailed, but there is simply a conflict between his testimony and that of witnesses for the defense.

3. BILL OF EXCEPTIONS—REFUSAL TO SIGN.

A paper which the trial judge states to be incorrect, and which he refuses to allow, will not be considered as a bill of exceptions.

Appeal from Wise county court; **W. H. BULLOCK**, Judge.

T. A. Fuller, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. On the morning after the alleged assault, Press Rushing, the brother of defendant, stated to Mann, the sheriff, that his brother, the defendant, would plead guilty, and wanted the matter settled up as cheaply as possible. Defendant was not present when this statement was made, and there is no proof that he authorized his brother to make any such statement. When this evidence was offered the defendant objected to it upon the ground that it was hearsay; whereupon the county attorney stated that he expected to prove facts which would render said testimony legal, but declined to inform the court, when interrogated, what such facts were. The said testimony was admitted by the court, and the defendant reserved his exceptions by bill. The assistant attorney general confesses that this action of the court was erroneous, and we agree with him. We are further of the opinion that such illegal testimony was calculated to injure the rights of the defendant. It should not have been admitted, in the first instance, upon the equivocal and uncertain statement of the county attorney that he expected to show its admissibility; and, having been admitted erroneously, the error was repeated, and made more prejudicial, by the failure of the court to exclude such testimony from the jury. *Fore v. State*, 5 Tex. App. 253; *Phillips' Case*, 22 Tex. App. 139, 2 S. W. Rep. 601. Over the defendant's objection, the state was permitted to introduce evidence proving that the general reputation of the prosecuting witness, Miller, for truth and veracity, was good. No evidence had been introduced by the defendant which directly assailed the veracity of the witness Miller further than that which contradicted his statements with relation to the main issue. There was simply a conflict between his testimony and that of the witnesses for the defense in regard to the alleged assault,—such a conflict as is of common occurrence in cases of this character.

No particular discrediting facts had been developed against said witness, and he was not a stranger in the county, but a resident there. We do not think it was proper to admit such testimony, as the facts do not bring the case within any exception to the general rule, which excludes testimony as to the good character of a witness, unless the veracity of such witness has been directly assailed. *Phillips v. State*, 19 Tex. App. 158. In the brief of counsel for defendant several objections are urged to the charge of the court, and objection is also made to the refusal of the court to give special instructions requested by defendant. We have examined the charge, and we do not find it free from errors; but the errors, we think, are of a character which do not, in the absence of proper bills of exception, require notice, as they are not fundamental, and on another trial may not occur. There is in the record a paper which counsel for the appellant refers to as a bill of exception to the charge of the court, but upon inspection we find that the trial judge refused to allow and approve said bill, but states that it is incorrect. We cannot consider it as a bill of exceptions. Because of the errors committed in the admission of testimony which have been mentioned, the judgment is reversed, and the cause remanded.

STOUT *et al.* v. ENNIS NAT. BANK.

(*Supreme Court of Texas. December 9, 1887.*)

1. USURY—PENALTY—NATIONAL BANKS.

Under the act of congress prescribing the rate of interest national banks may charge, and subjecting them to penalties for receiving usury, the offense of taking usury is consummated when a payment is made and appropriated to usurious interest, and the right to the penalty is then fixed, and it may be recovered by the person by whom the usury was paid, though the entire debt has not been paid.

2. PARTNERSHIP—POWER OF PARTNER TO BIND FIRM—RELEASE.

A release executed by one partner for and in the name of his firm, discharging a bank from liability for a penalty recoverable from it by the firm under act of congress prescribing the rate of interest national banks may charge, and subjecting them to penalties for receiving usury, is binding on the firm, though the other members were not willing that a settlement should be made, provided the bank had no notice that the action of the partner was fraudulent.

3. SAME—CONSIDERATION.

Where a release of the legal right of a firm to recover a penalty for usury paid by it is in discharge of its moral obligation to pay the debt on which the usury was paid, such release will not be deemed fraudulent because executed by one of three members of the firm in opposition to the desires of the others, though their opposition was known to the creditor at the time the release was given.

Appeal from district court, Ellis county.

STAYTON, J. The appellants, Stout, Goldsborough & Perry, bring this suit, as partners, to recover from the Ennis National Bank a penalty based on a claim that they paid to the bank usurious interest. The action is brought under an act of congress prescribing the rate of interest that national banks may charge, and giving penalties against them for taking, receiving, or charging interest greater than the law permits. Under that act, such banks may, in this state, take, receive, or charge interest not greater than 12 per cent. per annum. So much of the act as provides penalties is as follows: "The taking, receiving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which have been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: provided, such action is commenced within two years from the time the usurious transaction occurred." The cause was tried without a jury; and

so much of the findings of fact as bear upon the question whether the acts of the bank were such as entitled the appellants to the penalty of twice the amount of interest paid, are as follows: (1) On July 6, 1883, Stout, Goldsborough & Perry executed their note for \$10,000, payable to the Ennis National Bank 10 months after date, with interest at the rate of 12 per cent. per annum after maturity. The bank loaned plaintiffs \$8,750, and took this note at the rate of 15 per cent. per annum; and the amount of the note, less the discount, \$1,250, to-wit, \$8,750, was placed to the credit of Stout, Goldsborough & Perry on the books of the bank, and was by them drawn out in a few days, and used in a partnership business. (2) Nothing was ever paid on this note, and on April 29, 1884, it was renewed by the plaintiffs executing to J. Baldridge a note for \$10,000 due 12 months after date, with interest at the rate of 12 per cent. per annum from maturity. Baldridge immediately indorsed the note, and delivered it to the bank. Baldridge was president of the bank, and the reason the note was made payable to him was because he doubted the power of the bank to take mortgages upon personal property to secure loans made. Upon this last note, interest was charged at 15 per cent. per annum; and for the interest plaintiffs executed their note, due at 90 days, for \$1,545,—the \$45 being the interest on the \$1,500 for the 90 days which the note had to run. (3) On this note for \$1,545, given for the interest on the \$10,000 note last mentioned, plaintiffs made payment as follows: January 10, 1885, \$921.20; April 24, 1885, \$64.60; June 27, 1885, \$243.05; total payments, \$1,228.50. (4) On June 27th, the \$10,000 note last above mentioned was extended to May 1, 1886, by an indorsement on the back of the note, and the interest marked paid to May 1, 1886. (5) The interest was not paid in money, but by a note dated June 27, 1885, due August 1, 1885, for \$2,065.30, (which included balance on note for \$1,545;) and upon this note was paid the sum of \$2,000 on March 3, 1886. The evidence leaves no doubt that the notes referred to in the third and fifth findings were given for interest charged at the rate of 15 per cent., and that the payments thereon credited were made by the appellants, and received by the appellee, as interest. The appellee denies that these facts fixed its liability to pay to the appellants double the amount of the interest paid; and it further insists, if such a liability existed, that this failed by reason of certain matters which occurred on October 14, 1886, which are those stated in the findings of fact. (6) On October 14, 1886, Stout, Goldsborough & Perry had a settlement with the bank of all matters between them growing out of the original loan to plaintiffs on July 6, 1883. From the date of the settlement was three years, three months and eight days. In the settlement the accounts were completely restated, and interest calculated upon the sum actually received by the plaintiffs on July 6, 1883, to-wit, \$8,750, at 12 per cent. interest from the date of the loan to October 14, 1886; and interest was computed upon the several payments hereinbefore mentioned at the same rate, and were deducted from the principal sum loaned, and left a balance due the bank \$8,424.40. Plaintiffs executed their note to the bank, due January 15, 1887, and upon the execution of this last-mentioned note the bank surrendered to the plaintiffs all the notes given for the principal as well as the interest upon said loan. The amount of the notes given for the interest, which were then surrendered, amounted to something more than \$2,000. (7) By the terms of said compromise and settlement, the plaintiffs renounce and relinquish all claims and demands against the bank for taking, on said loan, interest at a rate greater than 12 per cent., and acknowledge full satisfaction of the same, the consideration for which was the extension of time granted to the plaintiffs for the payment of said loan. (8) This settlement was made by Goldsborough in the name of the firm of Stout, Goldsborough & Perry. Neither Stout nor Perry were present when the settlement was made, nor did they know of said settlement until some time afterwards. (9) December 20, 1886, Stout, Goldsborough & Perry paid to the bank the sum of \$2,000, which

was credited on the note for \$8,424.40. When this payment was made, both Goldsborough and Perry were present, but nothing was said how the payment should be applied." Nothing more has ever been paid on the note mentioned in the ninth finding. The first two notes were secured by mortgages on cattle, and the last by mortgage on the same cattle, and their increase. The court further found that prior to October 14, 1886, Stout and Perry had determined between themselves not to secure the note dated April 29, 1884, for \$10,000; but that of this the bank had no notice. There was evidence, however, tending to show that the president of the bank had reason to believe that Stout and Perry did not intend to pay the usurious interest, or that they intended to assert the claim in this case insisted upon, and it further tended to show that Goldsborough was advised of their intention. The court further found that, by the settlement of October 14, 1886, the transaction was purged of all usury, and that such was the purpose of the parties. As conclusions of law, the court found as follows: "(1) That the original contract between plaintiffs and defendant was usurious. (2) That by the settlement made October 14, 1886, in which the new note for \$8,424.40 was given, the contract was purged of usury, and the plaintiffs are thereby precluded from recovering the penalty sued for. (3) That the partnership of Stout, Goldsborough & Perry existed at the time of said settlement, and Goldsborough, as one of the firm, was authorized to make such settlement, and the same is binding upon the firm. Judgment is therefore rendered for the defendants."

The appellee insists that the right to the penalty could not attach until the entire debt was paid, and that until this occurred it had the power and right to abandon its claim for the usurious interest, and thus defeat the appellants' right to the penalty. There is no doubt that there are decisions so holding in cases in which the contracts were usurious. But those were cases in which money was paid on such contracts without one appropriation by the parties, of the payment, to the usurious interest, and in such cases the law would appropriate the payment to that part of the demand which was legal; for neither the party making nor receiving the payment would be presumed to have intended that it should be appropriated to the payment of usurious interest. The rule is thus well stated by the supreme court of Massachusetts in the case of *Stevens v. Lincoln*, 7 Metc. 528: "While the usurious interest is unpaid, there remains the *locus penitentiae*. That party may relinquish it, and recover for the balance of his debt; the contract not being rendered void by the statute. And, in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to a valid demand, rather than to the illegal one; and the balance which remains unpaid, if it exceed the usury agreed to be paid, includes the usury; so that, on the one side, the debtor shall not recover back any part of that which he honestly owned, by the allegations on his part that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the benefit of his illegal contract, when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due." When, however, the parties, as they did in this case, appropriate, and intend to appropriate, the payment to usurious interest, the *locus penitentiae* can no longer exist; for the offense has been consummated, "the greater rate of interest has been paid," and the right to the penalty is fixed. The interest contracted for being usurious, the act of congress declared it all forfeited, and there was no legal claim for interest on which the payments could have been appropriated. The right to the penalty attached, and was measured by the payments of interest made, before the settlement made October 14, 1886.

The remaining question is, did that settlement, and the release executed by Goldsborough, relieve the appellee from liability for the penalty? After reciting that it was in consideration of the extension of time given by the

note of date October 14, 1886, and other considerations, that instrument declared that "we do renounce and declare to be fully satisfied any and all rights, rights of action, claim, or demand that we may have or be entitled to, under any law of the United States, to recover any sum of money from said Ennis National Bank by reason of us having paid heretofore to said bank any interest at greater rate than twelve per cent. per annum. *This, the 14th day of October, 1886.* [Signed] STOUT, GOLDSBOROUGH & PERRY." It is claimed that the partnership was dissolved at the time Goldsborough executed that instrument, and that for this reason he had no power to execute it. The court found that the partnership had not been dissolved, and so upon evidence that justified the finding. Stout, Goldsborough & Perry brought this action, and in their petition allege "that plaintiffs are, and have been since the spring of 1883, a firm under the firm name of Stout, Goldsborough & Perry;" and, in this right throughout, they prosecute. The case, then, is one in which a partner for and in the name of his firm executed a release, and it is unnecessary to inquire what would have been Goldsborough's power had he executed the release after the firm was dissolved. The consideration on which the release was executed, was sufficient. That one partner has power to release a debt or claim due to the partnership to which he is a member is well settled. 1 Lindl. Partn. 178, 298; Story, Partn. §§ 115, 252; Colly. Partn. §§ 468, 636; Pars. Partn. 325. The adjustment or settlement of any claim held by or against the partnership was within the power of any member of the firm, and the action of Goldsborough in its exercise must be held binding on the plaintiffs unless his action was fraudulent, and so known to be by the appellee at the time the settlement was made. "Every contract in the name of a firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligation and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm." Story, Partn. § 128; Bigelow, Fraud, 372. Although, as before said, there was some evidence tending to show that Stout and Perry were not willing that a settlement should be made through which the penalty claimed in this case should be released, and tending also to show that the president of the bank may have known of their indisposition to make such a settlement, yet there was evidence tending to a contrary conclusion on both these points; and, so standing the evidence, the court, in effect, found that the bank had no notice of the wish of Stout and Perry. On the finding, if it be conceded that the act of Goldsborough was fraudulent as to his partners, it must be held that his act, done within the scope of his powers, is binding on the firm of which he was a member. 3 Kent, Comm. 48. It is shown that the appellants transacted much business with the bank other than that out of which grows this litigation, and this was mainly done through Goldsborough, who from time to time signed the firm name, as he had the right to do, to all necessary papers.

It is claimed, however, that the finding of the court is not sustained by the evidence, and that the act of Goldsborough was fraudulent, and known to be so by the president of the bank, and we will therefore consider the power of Goldsborough, and the right of the bank, under the most favorable construction that can be placed on the facts for the appellants. Releases executed by one partner have been sustained in many cases under circumstances which would more clearly show a disregard of the rights of a firm than are those attending the execution of the release signed by Goldsborough. In the case of *Furnival v. Weston*, 7 Moore, 356, it appeared that partners had instituted an action for libel, in which they instructed their attorney to proceed to trial, but a few days before the trial one of the partners executed a release to the defendant, which seems to have been done without the consent of the other partner, or the attorney, who had paid the greater part of the costs, and it was

claimed that the release was a fraud on the other partner as well as the attorney. The court, however, held the release valid, and refused to impute fraud from the fact that the release was executed by one partner without the consent of the other. The instruction of both partners to the attorney to prosecute the action to judgment clearly indicated the wish of the partner who did not execute the release that the claim should be enforced. In the case of *Arton v. Booth*, 4 Moore, 192, a release of a partnership debt was executed by one partner, after dissolution, without the consent of the other, and it appeared that the debtor had notice that the partner who did not execute the release was entitled to the money due. This release was executed pending a suit brought in the name of both partners, and the court refused to set aside the release, or to hold that the facts showed such fraud as would be sufficient to invalidate it. In that case the debt was paid to the partner not entitled to it. The court said: "There seems to be neither fraud nor collusion between Dawson [the partner executing the release] and the defendant, nor is there any reason to say that any fraud existed between Dawson and his partner. Though his giving the release might be improper, still it is not fraudulent." From these and like cases, it seems that the mere fact that one partner has executed a release without the consent, or even in opposition to the wish, of another partner, is not sufficient, even if this be known to the creditor released, to justify a holding that the release was fraudulent on the part of the partner or creditor, and that other proof must be made showing that the partner was not acting in good faith towards his firm in executing the release, and the creditor not so acting in signing it. Goldsborough was not acting in violation of his obligation and duties to his copartners if he believed, in view of all the facts, that the course pursued by him was for the best interest of the firm, although by his act he surrendered a legal right, while complying with a strong moral obligation resting upon him and his copartners, alike by reason of a contract they had all entered into, as well as by the further fact that they had received and used the money of the bank. It would be difficult to predicate a charge of fraud upon an act done in the discharge of a moral obligation, such as rested upon the appellants. To render the act of one partner invalid because it may accomplish a purpose disapproved of by the firm, it would seem that the purposes so disapproved should be one that the firm is under neither a legal nor a moral obligation to accomplish. Two members of a firm composed of three might disapprove of a purpose of a third to pay a just debt of the firm; but this would not make the payment by him invalid, or subject him to any liability to the unwilling partners; for the firm would be under a legal as well as a moral obligation to pay it, and notice of the unwillingness of all the other members of the firm would not affect the creditor's right. If, during the existence of a partnership, a debt owed by it should become barred by the statute of limitation, no one would doubt that the act of one partner renewing it by a new promise would bind the firm; and power to pay such a debt stands on the same ground as does his right and power to renew it when barred. If one partner in a firm composed of three or more members should do either of those acts in opposition to the will of the others, even if such opposition was known to the creditor at the time the new promise or payment was made, we apprehend that the promise or payment would bind the firm; and, so, for the reason that the one partner had given effect to the moral obligation of the firm to pay the debt, which could not have been enforced but for his act. A new promise to pay such a debt, or an acknowledgment of its justice, such as will relieve it from the bar of the statute, is as much a release of a legal right as was the release executed by Goldsborough. Whether such an act, done by one partner in opposition to an expressed wish of others, would raise rights as between themselves, we need not inquire. The law encourages the discharge of a mere moral obligation, and the act through which this is done cannot be fraudulent as to one or more who are

burdened with it. Goldsborough may have believed that the extension of time given by the settlement, and the moral effect of the firm's recognition of and payment of the debt due to the bank, with legal interest on it, would be of greater pecuniary advantage to the firm than the penalty which they now seek to enforce; or he may have deemed the legal questions involved of such doubt as to render it to the interest of the firm to make the settlement made, and to release the claim for the penalty. Having executed the release upon valuable consideration, and the appellee having no knowledge of any fraudulent intent on the part of Goldsborough, the appellants must be held bound by it, even had it appeared that Goldsborough executed it with a fraudulent intent. The difficulty which would attend the maintenance of this action by the firm of which Goldsborough was a member, when the release as to him would at all events be binding, we have not deemed it necessary to consider. *Pars. Partn.* 353. There is no error in the judgment and it will be affirmed.

TUCKER v. STATE.

(*Court of Appeals of Texas.* June 16, 1888.)

1. GAMING—EVIDENCE—SUFFICIENCY TO SUSTAIN CONVICTION.

Where the only evidence in support of a prosecution for playing cards at a house for retailing spirituous liquors is the testimony of one witness, who looked through a key-hole 70 feet from the place where certain parties were confessedly playing, at 11 o'clock at night, and who states that he does not think he could be mistaken as to defendant's identity, and where two persons who participated in the game testify that defendant was not present, but that one whose face and hat resembled those of defendant was present, a conviction cannot be sustained.

2. SAME—FAILURE TO PROVE VENUE.

A conviction for playing cards at a house for retailing spirituous liquors cannot be sustained where the venue is not proved.

Appeal from Milam county court; E. Y. TERRAL, Judge.

R. I. McCalla, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This conviction is for playing cards at a house for retailing spirituous liquors. The judgment must be reversed, because the venue is not proved. J. H. Bicket, the only witness for the state, testified that on the night of March 23, 1887, he saw the defendant and H. F. Iglehart, Bud Robinson, and W. W. Chambers playing cards in the back of Iglehart's saloon. The parties were sitting around a low table or box. Witness looked through the key-hole at the front door, which is about 70 or 80 feet from the place where the parties were playing. This was about 11 o'clock at night. He did not think he could be mistaken as to the identity of Tucker,—he looked carefully. Iglehart, Robinson, and Chambers were at the saloon at the time stated by the witness, and played at the game of cards. They pleaded guilty, and Iglehart and Robinson were introduced as witnesses for defendant. They each admit their presence and participation in the game at the time and place stated by Bicket, but they each swear most positively that Tucker was not present; that the fourth man was a Mr. Shinn; that, while Shinn is larger and taller than Tucker, they have the same shaped face,—both red-faced,—and both have long red moustaches, and wore black hats. Now, while we are satisfied that Mr. Bicket honestly believed that Tucker was one of the party engaged in the game of cards, yet it is very clear to us that he took Shinn for Tucker, and was honestly laboring under a mistake. We believe the verdict against the evidence, the weight of the evidence, and the clear preponderance of the evidence; and, to reach this conclusion, it is not at all necessary to question the veracity of Mr. Bicket. The judgment is reversed, and the cause remanded.

CUDD v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

LARCENY—EVIDENCE—SUFFICIENCY TO SUSTAIN CONVICTION.

On an indictment for theft of a horse, defendant proved that he had obtained possession by purchase, and exhibited a duly authenticated and recorded bill of sale therefor, and also established a good character for honesty in the community where he lived. The state failed to show bad faith in the purchase, or disprove this explanation of his possession. *Held* insufficient to support a conviction.

Appeal from district court, McCulloch county; J. C. RANDOLPH, Judge.

Indictment of D. P. Cudd for the theft of Turner's horse. Defendant appeals from a judgment of conviction, and sentence of 10 years in the penitentiary. The state proved the disappearance of the horse from its range, and traced it to the possession of defendant. Defendant claimed that he purchased the animal, and exhibited a duly authenticated and recorded bill of sale therefor.

W. J. Baker and *Fly & Davidson*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We cannot reconcile it to our sense of right, and to our view of the law, to permit this conviction to stand. We do not think that the evidence, as it is presented to us, supports the conviction. Defendant proved that he purchased the horse from one Cooper, and produced on the trial a duly authenticated bill of sale from said Cooper. While there are some circumstances in proof which throw some suspicion upon the *bona fides* of said purchase, they are of slight weight, and do not, we think, disprove the purchase, or the good faith of the defendant in the transaction. These suspicious circumstances are all consistent with the defendant's innocence. In addition to proving that he purchased the horse, he established a good character for honesty in the community in which he lived for a number of years. It does not appear that the facts of the case were as fully developed upon the trial as they might have been, and can yet be, both on the part of the state and the defendant. We think the ends of justice may be subserved by remanding the case for another trial. We deem it unnecessary to notice other questions raised in the record, as they are of a character which may not arise on another trial. The judgment is reversed, and the cause remanded.

TRUMBULL v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

1. HOMICIDE—MURDER—INSTRUCTIONS—DEGREES OF GUILT.

Where the evidence tends to establish only the offense of murder in the first degree, the court may properly refuse to charge as to the inferior grades of homicide or self-defense.

2. SAME—SELF-DEFENSE—REBUTTING TESTIMONY.

On trial for murder, the threats of deceased to take the life of defendant having been proven, it was not error to permit the state to show that, at the very time of the homicide, deceased was preparing to remove from the neighborhood where they both lived, as proof of his abandonment of any such design.

Appeal from district court, Jones county; J. V. COCKRELL, Judge.

Indictment of W. E. Trumbull for the murder of J. C. Abbott. From a conviction of murder in the first degree, and sentence for a life term in the penitentiary, defendant appeals. The evidence showed that, for some time prior to the homicide, the feeling existing between defendant and deceased was of an extremely hostile nature. They had at least two serious difficulties before the killing, in one of which shots were fired by each at the other. The parties lived within three or four hundred yards of each other, and used a

public spring situated about midway between their houses. On the afternoon of the fatal day, the deceased, with his infant in his arms, and a bucket in his hand, went to the spring to get some water. About the time that he should have reached the spring, the defendant was seen going towards his own house from the direction of the spring. He went into the house, and soon came out armed with a gun. He then went to a point within 25 yards of the spring, and fired upon the deceased, who was stooping at the spring, filling his bucket with water, (his back being towards defendant,) and continued to fire until he killed the deceased. He then went back to the house where he lived, mounted his horse, and rode off. The defense proved previous threats by deceased to kill defendant, and that defendant was apprised of those threats. The state then proved that, at the time of the killing, the deceased was preparing to remove from the neighborhood, in order to get away from the defendant, and that, at the very time of the killing, his horses were being hunted to enable him to leave.

J. M. Standlee and Cockrell & Cockrell, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We have given this case a careful consideration in the light of the able argument of counsel for the appellant. There is no doubt but that the legal propositions insisted upon by counsel for defendant are abstractly correct; but, in our opinion, none of them are applicable to the facts of this case. When we look to the evidence, there is but one reasonable conclusion that can be deduced from it, and that is that the homicide was an assassination,—a deliberate killing, actuated by malice express. There is no evidence even tending to show the existence of facts which would reduce the homicide to murder in the second degree or manslaughter. At the time deceased was shot he was stooping down, dipping water from a spring. He was unarmed, and in his shirt-sleeves. He had his child with him. Defendant was 25 yards distant from him, and his presence was evidently not known to the deceased. Such was the position and condition of the parties at the time the defendant commenced firing the fatal shots, as described by the only eye-witness of the tragedy, and whose testimony is conclusively corroborated by the physical facts and circumstances testified to by other witnesses. As we view the evidence, it rebuts the theories of a sudden, unexpected meeting between the parties, of sudden passion on the part of defendant, of self-defense, so ingeniously presented by his counsel. There was no sudden meeting,—no meeting at all in fact, for the defendant began firing upon deceased at a distance of 25 yards. There was no sudden passion excited in the mind of the defendant. His deliberate conduct at the time of and immediately after the shooting shows that he acted calmly, with a sedate mind, and a formed design to kill. His aim was true, and he continued firing until he knew that his victim had been mortally wounded. There is certainly no evidence which tends to show that he acted in self-defense. As to that part of the theory of self-defense predicated upon the acts of the deceased's brother, the evidence very satisfactorily shows that the defendant, at the time he opened fire upon the deceased, had not seen the brother of deceased, and did not know that he was in the immediate vicinity. As we understand the topography of the locality, he could not have seen the deceased's brother until the latter reached the brow of a hill, and at that instant the defendant was in the very act of shooting the deceased, and did shoot him before deceased's brother could fire upon defendant in defense of deceased. We are of the opinion that the evidence neither demanded nor warranted instructions upon the law of murder of the second degree, manslaughter, or self-defense. We see no error in the charge as given to the jury. It enunciates the law of the case fully and clearly, and it would have been error to have supplemented it with the special instructions, or any of them, which were requested by the defendant.

With respect to the testimony of the witness McGauhey, we are of the opinion that no material error, if error at all, was committed. Defendant had proved that deceased had threatened to kill him, and was seeking, upon such threats, to predicate self-defense. It was competent for the state, we think, in rebuttal of such defensive theory, to prove that deceased was preparing to move away from that neighborhood, and to argue from such proof that, if he had previously intended to kill defendant, he had abandoned such intention, and was seeking to get from his vicinity. It tended to show, though remotely, that deceased, at the time he was killed, was making no effort to carry such threats into execution. But, although this testimony may have been inadmissible, we cannot perceive, in view of the other evidence in the case, how it could injuriously have affected the rights of defendant, as there was no evidence raising the issue of self-defense, or of any grade of homicide but that of murder in the first degree.

We have given attention to other errors complained of; but considering the questions presented as unimportant, and as not involving any material error at all, we deem it unnecessary to discuss them. As the case is presented to us in the record, we think the conviction is legal, and we therefore affirm the judgment.

CROELL v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

ELECTIONS—KEEPING OPEN SALOON ON ELECTION DAY.

On a trial for opening and keeping open a bar-room on election day, an instruction that, if defendant went into his saloon for any other purpose than that of business connected with the saloon, the jury would find him not guilty, is properly refused where there is no evidence tending to show that defendant opened his saloon for any other than that connected with the saloon business.

Appeal from Robertson county court; S. C. BRIGANCE, Judge.

Prosecution for opening and keeping open a bar-room on an election day. Defendant was convicted, and appealed.

Simmons & Crawford, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This is a conviction for opening and keeping open a bar-room on a day an election was held in or at appellant's voting place. Pen. Code, art. 178. The evidence was that appellant's bar-room was opened, and kept open several minutes, at Bremond, on the day of an election at that place, and that appellant was aware of the opening and keeping open of his saloon, etc. Counsel for appellant requested the following charge, which was refused, and a bill of exceptions was reserved: "If you believe from the evidence that defendant went into his saloon for any other purpose than that of business connected with his saloon, you must find him not guilty." There was no error in refusing this charge—*First*, because there was no evidence tending, in the slightest manner, to show that defendant opened the saloon for any other purpose than that connected with the saloon business; *second*, it is not necessary to show that the accused sold or gave away malt or intoxicating liquors, because, if this is shown, he would be guilty of violating the law, whether the saloon was opened or not. If, in a case of necessity, the saloon man should desire ice, lemons, or other articles for his family, or any other purpose, and entered for this purpose of procuring the same, by making proof of these facts the court would be required to instruct the jury thereon. But, in the absence of such facts, the court is not required to charge upon imaginary theories, abstract propositions, with no basis in the evidence. The judgment is affirmed.

POOL v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

LARCENY—EVIDENCE—ACCOMPLICES.

On a trial for theft, where the only evidence against defendant is that given by a witness whose testimony raises a strong presumption that he was an accomplice, a conviction cannot be sustained.¹

Appeal from district court, McCulloch county; J. C. RANDOLPH, Judge.

Indictment of John Pool for the larceny of a horse. Defendant was convicted, and sentenced to the penitentiary for seven years, and appeals.

Thomas & Burton, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. The only inculpatory evidence against the defendant on the trial in the court below was that of the witness Horace Hunter, and his testimony raises a strong presumption that he was an accomplice or *particeps criminis* in the theft of the horse. If so, then we look in vain for any corroboration of his testimony. If he did in fact give the defendant a saddle in part payment for the horse when he purchased him, doubtless the fact that defendant had such a saddle might at least have been proved by some one else. We are of opinion that the evidence, as disclosed by this record, is insufficient to support this conviction, and the judgment is therefore reversed, and the cause remanded.

WATSON v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

HIGHWAYS—OBSTRUCTION—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.

Where G. extended the fences of land leased from defendant so as to include a public road, evidence of defendant's statements that he had nothing to do with the road; that he had leased the land to G., and had directed G. to fence the land, but not the road, and had paid him for it; and evidence that witness had seen a check with which defendant paid G. for fencing the land, and that defendant lived 15 miles from the road,—is insufficient to sustain a conviction for obstructing the road.

Appeal from Falls county court; J. N. WHARTON, Judge.

The information charged the appellant as an accomplice with one Gassaway with the obstruction of a public road. Gassaway owned the Gillmore survey, and had had it fenced for years. He subsequently leased from Watson the Jordan survey, and fenced it. The south line of Gassaway's pasture fence was about 30 feet north of where the jury of view laid their new road. Gassaway afterwards extended his fencing on the Jordan survey south, and took in the ground designated for the road. But at the time he so extended his fence there were no marks on the ground to indicate the road except a stake or two, which a part of the hands of Gassaway took to be land corners, and they say they did not know of the road.

Goodrich & Clarkson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. Appellant was convicted for obstructing a public road. The state seeks to establish guilt by proving that one Gassaway obstructed the road, and that Watson advised and encouraged him to commit the offense. There is no proof that Watson willfully advised or commanded Gassaway to

¹ Concerning the necessity of corroborating the testimony of an accomplice, in order to sustain a conviction, and the extent of such corroboration, see *People v. Elliott*, (N. Y.) 12 N. E. Rep. 602, and note; *People v. Kunz*, (Cal.) 14 Pac. Rep. 836; *Patterson v. Com.*, (Ky.) 5 S. W. 387; *People v. Clough*, (Cal.) 15 Pac. Rep. 5; *State v. Dana*, (Vt.) 10 Atl. Rep. 727; *Dodson v. State*, (Tex.) 6 S. W. Rep. 548; *Boyd v. State*, Id. 853; *Wisdom v. People*, (Colo.) 17 Pac. Rep. 519.

obstruct the road, or that he had any criminal connection whatever with the commission of the offense, if any offense was committed by Gassaway. The evidence by which it is sought to connect Watson with Gassaway's act is this: A witness says he saw Watson, and asked him about it, and Watson said he had nothing to do with it, and did not care where the road was; that he had leased the land to Gassaway, and paid him for putting his fence out; that the witness had seen a bank-check with which Watson had paid Gassaway for fencing the land; that Watson told him that he had ordered or directed Gassaway to fence the land, but did not order him to fence the road; that Watson lives in Marlin, 15 miles from the road. It is not necessary to decide the question as to whether the road was shown to have been legally established when obstructed, (which is quite doubtful.) The evidence being insufficient to support the verdict, the judgment is reversed, and the cause remanded.

MATLOCK v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

LARCENY—SUFFICIENCY OF EVIDENCE—POSSESSION OF STOLEN GOODS.

Evidence that defendant was found in possession of property two years after it was stolen will not sustain a conviction for theft, especially where he accounted for his possession by stating that he bought the property of a negro man, S., and by showing a bill of sale for it, and no contradictory evidence is offered except evidence tending to show flight.¹

Appeal from district court, McLennan county; EUGENE WILLIAMS, Judge. *Harrie & Saunders*, and *Clark, Dyer & Bolinger*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This conviction is for theft of a cow. Webb, the owner, lost the cow from the range about October 1, 1881. Crippen bought the cow from appellant and Jeff Matlock about October 1, 1883, at his butcher pen in East Waco, and paid \$20 for her. He put her in his pen, and on the next day Webb came, claimed, and took her away. He (Crippen) sent word to appellant and Jeff Matlock, and they came in, and refunded the \$20, stating that they had bought the cow from a negro by the name of Smith on the Rose farm in McLennan county. This farm is five or six miles above Waco. They showed him (Crippen) a little piece of paper on which a bill of sale was written. It seemed to have been torn out of a book. The Matlocks drove the cow along a public road to East Waco, and sold it to Crippen. While on the way, when asked where they got the cow, they said "from a negro man." On or about October 1, 1883, the Matlocks drove the cow to, and penned her at, S. Matlock's; stating that they had bought her from a negro man named Smith, appellant stating that he had given a pistol and three dollars for the cow, and he exhibited a bill of sale for the cow, the bill being written in a small book.

If the accused is found in possession of stolen property, and is called upon to explain, but fails to do so, it may be inferred that he was the taker. But the possession must not be too remote; and, if remote, the party in possession is not bound to explain at all, the rule being that the possession must be recent. And, by all the opinions, (says Mr. Bishop,) the presumption that the party in possession was the taker diminishes in strength as the time increases between the theft and the possession. If the possession is very remote, (yet how remote must depend upon the special nature of the particular case,) the judge, in his discretion, will exclude it, as having no sufficient tendency to

¹On the general subject of the presumption of guilt arising from the possession of recently stolen property, sufficiency of evidence, etc., see *Young v. State*, (Fla.) 3 South. Rep. 881, and note; *Andrews v. State*, (Tex.) 8 S. W. Rep. 828; *Romero v. State*, (Tex.) id. 641; *State v. Manley*, (Iowa,) 88 N. W. Rep. 415; *Tarin v. State*, (Tex.) 8 S. W. Rep. 473.

prove anything. Its remoteness depends upon the nature of the thing stolen. Is it such property as passes readily from hand to hand, or not? If, from the nature of the property, it would pass readily from one person to another, the possession, to have convictive strength, must be more recent than the possession of property which does not so pass. 2 Bish. Crim. Proc. §§ 739-745. Applying these rules to the case in hand, we are of the opinion that the possession of the animal charged to have been stolen is too remote to call upon appellant for an explanation. Bearing upon this question, what are the facts? The cow was stolen about October 1, 1881. She was found in possession of appellant about October 1, 1883. Two years after the theft, the animal is found in possession of the appellant. Was this possession sufficiently recent to call for an explanation? We think not, nor do we think an authority can be found holding to the contrary. *Willis v. State*, 24 Tex. App. 586, 6 S. W. Rep. 857. But suppose we err in this conclusion. Appellant gave a reasonable and consistent account of his possession, which was not attempted to be contradicted or disproved by the state except by evidence tending to show flight by appellant and Jeff Matlock. We are of opinion that the evidence is not sufficient to support this conviction; for which reason the judgment is reversed, and the cause remanded.

DRUM v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

CRIMINAL LAW—DISMISSAL OF APPEAL—INSUFFICIENCY OF BOND TO COVER SUBSEQUENT COSTS.

On conviction and fine in the recorder's court, defendant appealed to the county court, and filed his appeal-bond in a penalty sufficient to cover the fine and all costs then accrued. *Held*, that a dismissal of the appeal, because of the insufficiency of the bond to cover subsequent costs for the transcript and for receiving and paying over the fine and costs is error.

Appeal from Tarrant county court; S. FURMAN, Judge.

James Drum was convicted and fined in the recorder's court for fighting. He appealed to the county court, filing a bond in the penalty of \$30. Subsequently a cost-bill was taxed against him, which with the fine amounted to \$17.50, but this included \$3.05 costs, which had not accrued at the time of giving the bond. From an order dismissing the appeal he appealed to this court.

B. G. Johnson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The appeal from the recorder's court to the county court was dismissed because the appeal-bond was insufficient in amount. The supposed insufficiency is occasioned by two items in the bill of costs made after the execution of the bond; one being for the transcript on the appeal, and the other for recovering and paying over the fine and costs. It seems that the fine and costs had never been paid, received, and paid over, and the object of the appeal was to get rid of the judgment entirely. This item was not due and payable as part of the costs. As to the other, the transcript had not been made out when the bond was executed, and it is but reasonable to presume that the bond would have covered that amount (\$1.50) had the recorder put it in the estimate of the probable costs; and it is also reasonable to presume that the bond, when executed and approved, was in conformity with the estimates of that officer. If he deemed it insufficient in amount, he should not have approved it. We are of opinion that the bond was sufficient under the circumstances of the case, and that it was error to dismiss the appeal. The judgment is reversed, and the cause remanded.

DAWSON v. STATE.

(Court of Appeals of Texas. June 20, 1888.)

1. INTOXICATING LIQUORS—LOCAL OPTION LAWS—ELECTIONS UNDER.

The act of July 4, 1887, (Sayles, Civil St. art. 3237 *et seq.*) providing that a second election under the local option law shall not be held in less than two years after the first election, and amending Rev. St. Tex. tit. 63, art. 3236, permitting it in one year thereafter, applies only to those localities thereafter adopting the law, and does not nullify a county election repealing the law, held one year after its adoption, which occurred before the passage of this act.

2. SAME—LOCAL OPTION LAW—REPEAL PENDING TRIAL.

The repeal of the local option law, pending an appeal from a conviction for its violation while in force, nullifies the conviction.

Appeal from Erath county court; W. W. MOORES, Judge.

Information against W. A. Dawson for violation of the local option law, in force in Erath county. From a judgment of conviction defendant appeals.

Frank & Devine, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. On the 9th day of December, 1886, what is commonly known as the "Local Option Law" was adopted in Erath county, at an election held for the purpose of determining whether or not said law should be adopted in said county. On the 12th day of September, 1887, information was presented in the county court, charging the defendant with violating said law on or about June 24, 1887. On the day that the information was presented the cause was tried, and the conviction from which this appeal is prosecuted was had. On March 12, 1888, pending this appeal, a second election was held in said county for the same purpose as the first election was held, and which resulted in a majority "against prohibition," and such result was duly declared by the commissioners' court. Upon this state of facts the defendant bases his motion to set aside the conviction and dismiss the prosecution, because, as he contends, the law under which he was convicted has been repealed by the result of the second election, and therefore the judgment rendered against him cannot be enforced. To this proposition the assistant attorney general replies that the second election was a nullity, because held before the expiration of two years after the holding of the first election, and therefore did not have the effect to repeal local option in Erath county. This issue requires a consideration and determination of the effect of the amendatory act of July 4, 1887, (Acts 20th Leg. p. 96; Sayles, Civil St. art. 3227 *et seq.*) upon the statute as it was at the time of the adoption of local option in Erath county, on December 9, 1886. By the statute in force at said last date, it was permissible to hold a second election after the expiration of 12 months from the date of the first election. Rev. St. art. 3236. But that provision, as amended by the act of July 4, 1887, *supra*, provides that a second election shall not be held in less than two years after the first election. Sayles, Civil St. art. 3236. Does the provision, as thus amended, deprive a locality, which adopted local option under the old law, of the right which they had under that law of holding another election upon the issue at the expiration of 12 months from the time of the first election? or, is not the operation and effect of the amendatory act confined to localities which might thereafter adopt said local option law? is not the amendatory act applicable only to elections held after it went into effect? Section 20 of article 16 of the constitution provides as follows: "The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." What is the extent of the power conferred upon the legislature by the foregoing provision? Simply to enact a law enabling the qualified voters of the localities designated to determine, in accordance with such law, whether the sale of intoxicating liquors shall be

prohibited within specified limits. No power was conferred upon the legislature to prohibit the sale of intoxicating liquors, but such power was vested alone in the qualified voters of the localities named; such power to be exercised by them in the manner to be provided by the legislature. It is only by a majority vote of the qualified voters of a locality that the sale of intoxicating liquors within the limits of said locality can be prohibited. Hence is derived the common name of the law upon the subject; that is, the "local option law." While it is a general law in the sense that it may be adopted in any portion of the state, it is nevertheless, in its effect and operation, when adopted, essentially local, deriving its force directly and entirely from the will of the qualified voters of the locality in which it is adopted, and continues in force in such locality until it is abrogated by the will of said voters declared in the manner provided by law. This will, this power on the subject, is absolute and exclusive in the qualified voters of the locality, to be declared and exercised by them in accordance with the law enacted in pursuance of the provision of the constitution we have quoted.

Now, when the qualified voters of Erath county adopted the local option law, it was with the full knowledge that, at the expiration of 12 months from the time they voted upon the issue, another election might be held in said county, whereat, if they were dissatisfied with the operation of the law, they would be afforded the opportunity of ridding themselves of it. They were not required, as the law then was, to adopt the law for a longer time than 12 months, but for that period of time they did adopt it, and were bound by it, and were likewise bound by it until, by the declared will of a majority, in the mode prescribed by law, they might repeal it. If the issue had been submitted to them whether or not they would adopt the law for the period of two years, or any other time than one year, they might not have adopted it. They voted upon no such issue. Their will was not declared except for the period of one year. They were willing to try the law for that period, and as much longer as a majority of them might allow the law to stand. Now, the will of the qualified voters having been ascertained and duly and legally declared, what power has the legislature to interfere with that will,—to substitute in its place its own will, materially variant from that expressed by the voters in adopting the law? If the power exists in the legislature to deprive the locality of the right to have another election for the period of two years, the same power exists to deprive them of such right for ten, twenty, or other number of years; and thus the legislature would fasten upon the locality a law which they adopted merely as an experiment for a short period of time, and from the practical operation of which, during that period, they may have become convinced should be repealed,—never imagining, when they voted upon the issue, that the legislature would or could continue the law in operation in opposition to the will of a majority of the qualified voters of the locality. They (the qualified voters) enacted the law. It is their creature, called into existence by their direct agency, and they alone have the supreme and exclusive power, by a majority vote, to repeal it. It is not within the power of the legislature to add to or take from, or even, in our opinion, to repeal it, in that particular locality. Whenever the law has been legally adopted by any locality, the subject has passed beyond the domain of legislative action, so that a different law cannot, without the sanction of the qualified voters of that locality, given in a legal manner, be imposed upon such locality. Our view is that the amendatory act of July 4, 1887, in each and all of its provisions, was intended to and does operate only in localities in which it has since gone into effect, or which may hereafter adopt local option in accordance therewith; and that said provisions cannot, and do not, and were not intended to, operate in localities which, prior to their going into effect, had voted upon and adopted the law as it was prior to such amendatory provisions. Any other view, it seems to us, would invade the constitutional

rights of the people of such localities, and foist upon them a law which, perhaps, they never would have adopted,—a law with respect to which their “option” had never been consulted or ascertained; a law enacted, not by them, but by the legislature, without constitutional right. If we are correct in this view, the position urged by the assistant attorney general, that the amendatory act in question is merely remedial, having reference to procedure only, and that therefore the legislature had power to enact it, is not maintainable, though in the abstract the principle is correct. We do not think the principle can be applied to the subject involved. But, conceding that the rule contended for could be applied to said act, then we are clearly of the opinion that the provision which we have been discussing, as well as some other provisions contained in said act, are not merely remedial provisions, or provisions pertaining only to procedure, but are provisions affecting the subject-matter, and changing materially the very substance of the law; substituting an essentially different law from the one adopted by the people. We have not had the benefit of any authorities bearing upon the question we have discussed. Counsel have cited us to none, and we presume there are none, at least none in point, as we are not aware of any other state having a constitutional provision or statutes similar to ours upon the subject of local option. Our conclusions are derived solely from a consideration of what we understand to be the meaning of the constitutional provision which we have quoted; that is, that the legislature has no power whatever, with respect to local option in localities in which the qualified voters have exercised their constitutional right, to pass upon the subject, in accordance with the law then existing. We hold, therefore, that the people of Erath county had the right to repeal the local option law in that county at the time and in the manner they did; and therefore, there being now no law in force under which the judgment in this case can be enforced, said judgment is reversed, and this prosecution is dismissed. *Mulkey v. State*, 16 Tex. App. 53.

CHAMBERS v. STATE.

(*Supreme Court of Arkansas. June 9, 1888.*)

CRIMINAL LAW—SPECIAL VENIRE—FAILURE TO MOVE FOR NEW TRIAL—WAIVER OF OBJECTIONS.

Where the regular panel of jurors was discharged, and a special venire ordered to try defendant for assault with attempt to kill, and he was tried by the special jury, against his objection, and convicted, such conviction will not be set aside where the bill of exceptions does not show that a motion for a new trial was made, as a failure to file a motion for a new trial is a waiver of exceptions taken on the trial.

Appeal from circuit court, Conway county; G. S. CUNNINGHAM, Judge.

E. B. Henry and *W. L. Moose*, for appellant. *D. W. Jones*, Atty. Gen., for the State.

COCKRILL, C. J. The appellant was tried for assault with attempt to kill. There was a mistrial. The court, laboring under the misapprehension that it was agreed that the cause should be tried before a special jury summoned for the purpose, discharged the regular panel from further service for the term, and thereafter ordered a special venire to try the appellant. He objected to being tried by a special jury, and asked a continuance of the cause to the next term, because the regular panel of jurors, some of whom were not disqualified to sit in his cause, had been discharged. The motion was denied, and the appellant was tried and convicted. His bill of exceptions contains no mention of a motion for a new trial. Such a motion becomes a part of the record, and can be brought to our attention, only through the medium of a bill of exceptions. *Johnson v. State*, 43 Ark. 391. A failure to file a motion for a new trial is a waiver of exceptions taken on the trial. As there is no such motion of record, there is nothing presented for our consideration. The appel-

lant may have been severely punished for the offense proved against him, but we could not have interfered in any event for that reason, as the evidence sustains the verdict. His exceptions do not go to the merits, and, where one resorts to technicalities to avoid punishment, he must see to it that he omits none. Affirmed.

MABRY v. STATE.

(*Supreme Court of Arkansas. June 9, 1888.*)

1. CRIMINAL LAW—ORDER BEFORE TRIAL TO SUMMON TALESMEN—VALIDITY.

An order made by the court several days before a criminal cause was set for trial, directing the sheriff to summon talesmen, in anticipation that the regular panel would be exhausted without obtaining a jury, is not premature.

2. SAME—ORDER TO SUMMON TALESMEN—ABSENCE OF DEFENDANT.

The practice of summoning a special jury in each case having been abolished, it is no objection to an order directing the sheriff to summon talesmen that it was made in the absence of the accused, he having had the full benefit of his right to peremptory challenges.

3. SAME—SUMMONS OF TALESMEN—PREJUDICE OF SHERIFF.

Talesmen summoned by a sheriff cannot be objected to on the ground of the sheriff's bias, where the only evidence of prejudice is that the prisoner, having been arrested for an assault, was in the custody of the sheriff, who upon the death of the person assaulted made the affidavit upon which the prisoner was held for murder.

Appeal from circuit court, Faulkner county; J. W. MARTIN, Judge.

Bruce & Bolton, W. S. McCain, and C. W. Cox, for appellant. D. W. Jones, Atty. Gen., for the State.

COCKRILL, C. J. The appellant was indicted and tried for murder in the second degree, was convicted, and sentenced to five years' imprisonment in the penitentiary. Several days before the cause was set for trial the judge, at the request of the state's attorney, ordered the sheriff to summon 30 tales jurors to be present on the day of trial ready for service, as necessity might require. The defendant was absent on bail when the order was made. His counsel was present, and raised no objection. The bill of exceptions assigns, as a reason for making the order, the belief that the regular panel would be exhausted without obtaining a jury, and that delay would be avoided by the course pursued. When the cause was reached for trial, the defendant filed a motion to set aside the array of talesmen brought in by the sheriff, assigning as grounds for his motion, (1) that the order directing the jurors to be summoned was made prematurely; (2) that it was made when defendant was not present; and (3) that the sheriff who executed the order was biased against the prisoner. The court heard testimony on the questions presented, and overruled the motion. The regular panel, upon being called, was found to consist of 18 jurors, instead of 24, as the statute requires. The court directed the sheriff to summon six jurors from the by-standers to complete the panel, and, over defendant's objection, he was permitted to call them from the list of talesmen already returned by him. The names of the jurors thus obtained were put into the jury-box with the 18 of the regular panel, and the parties proceeded to impanel a jury. Six jurors were obtained from the twenty-four,—three from the original, and three from the recruits brought in by the sheriff,—all being of the regular panel, as the record recites. As jurors were thereafter needed to complete the trial jury, the sheriff was directed to summon by-standers; "the court each time," according to the bill of exceptions, "over the defendant's objection, permitting the sheriff to call, from his list containing the names of the special venire, names to complete the panel to try this case," until a jury was obtained,—exceptions being saved in every instance.

It is urged that the jury was illegally impaneled, and that the judgment should be reversed for that reason. The record shows that the defendant

was accorded the statutory right of drawing his jurors from the regular panel assembled for the term. It had become depleted, and was refilled before the trial, by the sheriff, under the direction of the court, in the manner pointed out by the statute. *Mansf. Dig. § 4008*. The record does not show that the jurors thus summoned were sworn as petit jurors for the term, but that is immaterial to the prisoner, as the oath administered to the panel binds the jurors in civil cases only. *Id. § 4007*. In every criminal prosecution the jury is specially sworn as provided in *Id. § 2248*, even though composed of the regular panel. *Chiles v. State*, 45 Ark. 143. They were properly sworn in this case. The defendant's exceptions to the jury go only to this, viz., that nine jurors were taken from the list returned by the sheriff in obedience to the order of the court above set forth. The first objection is that the order was prematurely made. The supreme court of Louisiana, in disposing of an objection to the practice of bringing in talesmen before it is known that they will be required to complete the jury, say: "The complaint of the accused is not that jurymen *de talibus* were imposed on him before the regular panel was exhausted. Had the jury been completed from the regular panel, the order would have had no effect. As the panel was exhausted, the order simply served to secure the presence of by-standers, from whom the jury was lawfully completed. We think the action of the court was proper, under the circumstances, and fail to perceive any injury or abridgement of his legal rights resulting to the defendant." *State v. Moncla*, 2 South. Rep. 814. It is necessary that the trial court should be possessed of a large measure of discretion in such matters, in order that business may be dispatched expeditiously, and we will not interfere with its action where it is not in violation of some mandatory provision of the law, unless it is shown to operate to the prejudice of the party complaining. The case of *Dupont v. McAdow*, (Mont.) 9 Pac. Rep. 925, relied upon by the appellant, is not in point. There by-standers were imposed upon the defendant as jurors when the statute gave him the right to draw from a reserved force of jurors previously selected by the jury commissioners.

But it is argued that the order by means of which nine jurors were brought before the court is erroneous, because it was made in the defendant's absence. Before the adoption of the Code of Procedure, the statute required that there should be ordered for the trial of each criminal cause a number of qualified jurors equal to the number of peremptory challenges allowed and 12 in addition. *Gould, Dig. c. 52, § 155*. The order for the venire was regarded as a material step in the progress of the trial, and it was adjudged to be error to make the order when the defendant was absent. *Brown v. State*, 24 Ark. 620; *Osborn v. State*, *Id.* 629. But the practice of summoning a special jury for each case has been abolished. A panel of 24 jurors, selected by jury commissioners before the term of court at which they are to serve, is provided for the trial of all causes, criminal and civil alike. *Mansf. Dig. §§ 4004, 4005*. The statute does not contemplate that a defendant shall be present when the commissioners are selected by the court, or when the jurors are selected by the commissioners. The offense may be committed and the indictment found after they have performed their duties. If the commissioners fail to act, or if the panel they have selected becomes incomplete for any cause, the sheriff, or, if he be disqualified, some other person designated in his place, under the direction of the court, performs the duty of selecting or completing the panel. *Id. §§ 4003, 4008*. The court's order in such a case cannot be regarded as a step in the trial of any cause such as entitles a defendant under indictment for a felony to demand the right to be present. The order is the first step in the organization of an arm of the court upon which it must lean for aid in the trial of all criminal causes at that term. A defendant could as well claim the right to be present at the election of the sheriff who is to summon the jury, or the judge who is to try the cause, as at the order for the panel. The causes of exception to the decision of the court, upon challenges

to the panel, are limited by statute, and no cause for challenge can be assigned as error here which does not deny the party complaining the exercise of a natural or constitutional right. Mansf. Dig. § 2305; *People v. Southwell*, 46 Cal. 141; *People v. Ah Chung*, 54 Cal. 398; *People v. Darr*, 61 Cal. 554; *People v. Welch*, 49 Cal. 174; *Palmore v. State*, 29 Ark. 248; *Wallace v. State*, 28 Ark. 547. The right to be present when the order to summon a part of the whole of a panel is made, is not proof against legislative action, and its denial is not the subject of exception. Authorities *supra*. The defendant cannot, therefore, be heard to complain that the order bringing jurors to complete the term jury was made in his absence. The presence of a defendant when an order is made directing the summoning of a part of the jury to try his cause, is not more important than his presence when an order is made which serves only to secure the presence of by-standers, from whom jurymen may be called under the direction of the court in his presence. Three of the jurors who acted in this cause were taken from the by-standers who are now objected to. But as they were enlisted in the regular panel, the objection that the order for their presence was made in the defendant's absence fails. It would be a strange anomaly that the statute should contemplate that a part of the jurors can be legally summoned by the sheriff from the by-standers under an order made in the defendant's absence, but that the court could not make preparation to bring in others to be called afterwards in his presence; in other words, that of nine equally competent jurors, summoned at one time under the same authority, three could be legally taken as jurors, and six could not. We cannot give the statute that construction. But if it was erroneous, in the defendant's absence, to make the order to assemble suitable persons for use as talesmen, we think the appellant is not in a position to complain. The only probability of prejudice to his cause was that, by reason of his absence, something had been done which might have imposed a biased or incompetent jury upon him. This could not have happened so long as his right of peremptory challenge remained. If this objection, urged against the jury, does not go to the panel within the meaning of section 2305 of the statute cited above, then it is to the poll; that is, to persons offered to complete the partially impaneled jury. When such objection is made, and the record fails, as in this case, to show that the defendant exhausted his peremptory challenges, it is unavailing in the appellate court, because the failure to challenge is an implied admission that the jurors are unobjectionable. *Polk v. State*, 45 Ark. 165, *McKinney v. State*, 8 Tex. App. 637; *Cock v. State*, Id. 669; *State v. Jones*, 97 N. C. 469, 1 S. E. Rep. 680; *State v. Anderson*, 26 S. C. 599; *Curran v. Percival*, 21 Neb. 434; *Palmer v. People*, 4 Neb. 68; *State v. Elliott*, 45 Iowa. 486; *Preswood v. State*, 3 Heisk. 468; *Railway Co. v. Lux*, 63 Ill. 523. The right of peremptory challenges is conferred as a means to reject, not to select, jurors. The object of the law is to obtain a jury impartial to the prisoner and the state alike. Neither has a right to the services of any particular juror. *Hurley v. State*, 29 Ark. 22. If all the talesmen who were not excused had been challenged by him, and he had then been forced to accept a juror without the privilege of exercising his right of peremptory challenge, he would have cause to complain. But he has voluntarily taken his chance of acquittal at the hands of jurors whom he might have rejected, and he must abide the issue. We do not depart from the rule that the probability of prejudice by an order made in the absence of a defendant prosecuted for a felony is all that need be shown to reverse a judgment of conviction, (*Bearden v. State*, 44 Ark. 331, and cases cited,) but adhere to its corollary, that we will not reverse for that cause when it is plain the defendant has lost no advantage by his absence. *Polk v. State*, 45 Ark. 165. The appellant cannot be said to have lost an advantage when the power to repair be-

yond peradventure the possibility of any prejudice his cause may have suffered, by his absence, was voluntarily abandoned.

The third ground of objection to the jury is that the sheriff was prejudiced against the defendant, and so disqualified to act in summoning talesmen. The evidence relied upon as a disqualification was the fact that the sheriff had made the affidavit upon which the defendant was held for murder. It appears that the defendant was first arrested upon a charge of assault with intent to murder, and was in the sheriff's custody awaiting examination, when the person whom he was charged to have assaulted died of the wound. Thereupon the sheriff caused the charge to be changed to murder. He took no other part in the prosecution. The issue as to the officer's prejudice was tried by the court upon oral evidence and the admission of the facts stated, and was determined against the defendant. We think the evidence sustains the finding. The attention of the committing magistrate should have been called to the fact that the victim of the prisoner's assault had died of his wounds after the charge had been made, and a disqualifying bias or prejudice could not be imputed to the officer who had the prisoner in custody merely from the fact that he caused the charge to be changed to the higher grade of the offense.

A new trial was urged upon the ground that a juror disqualified to serve in the cause from actual bias was taken upon the jury without laches on the part of the defendant. Oral evidence was adduced before the court to establish this objection to the verdict. We have examined the testimony with care as the bill of exceptions presents it, and we are unable to say that the disqualification was established. We cannot, therefore, hold that the discretion which is vested in the trial court in disposing of such applications has been abused. *Meyer v. State*, 19 Ark. 165; *Wright v. State*, 35 Ark. 645. We decline to interfere with the ruling.

The evidence was ample to sustain the verdict. It would serve no useful purpose to detail the circumstances of the killing. The court charged the jury fully and fairly, rejecting no request made by the appellant. No objection was made to the charge in the lower court, either by exception at the time or motion for a new trial. It is now urged only that it does not sufficiently define the grades of homicide. If the question could be raised here for the first time, we should say that the charge is not open to the objection made. The court instructed the jury that the defendant might be convicted of any grade of homicide less than murder in the first degree, and read to them from the statutes the definition of the several offenses. That was sufficient, as was decided in *Palmore v. State*, 29 Ark. 248; *Carroll v. State*, 45 Ark. 539.

We have not overlooked the appellant's erudite argument upon the supposed errors of the court in reference to the examination of the child, Emily Hendricks, as a witness. It is not based upon the facts as presented by the record, however, and it would be useless to consider the questions discussed. The absence of the jury which is complained of, when the witness was placed upon her *voir dire*, was brought about by the special request of the defendant's counsel, and it is not, therefore, the subject of exception. If the witness was coached, as the appellant alleges in his argument, it was a matter to go to her credibility only. To what extent her memory was refreshed, or what she had previously sworn, we have no means of ascertaining. The record is silent. It discloses no error. Let the judgment be affirmed.

WELLS v. STATE.

(Supreme Court of Arkansas. June 9, 1898.)

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES—DISCRETION OF TRIAL COURT.

It is not an abuse of discretion in the trial court to refuse to grant a continuance, in a criminal case, because of the absence of two witnesses, where it is not shown

that any subpoena was issued for these witnesses before the first day of the term at which the prisoner was tried, and nearly a year after he was indicted, and no facts showing due diligence appear in the affidavit for continuance.

2. SAME—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be granted, in a criminal case, on the ground of newly-discovered evidence, where a part of the evidence relates solely to the impeachment of a witness, affidavits of none of the new witnesses are produced, no diligence is shown to have been exercised, and all the evidence, except that for the impeachment of the witness, is merely cumulative.¹

Appeal from circuit court, Lincoln county; JOHN A. WILLIAMS, Judge.
F. M. McGeehee, for appellant. *Dan. W. Jones*, Atty. Gen., for the State.

BATTLE, J. On the 8th of March, 1887, Wells was indicted by the grand jury of Lincoln county for murder in the first degree. On the 5th of March, 1888, he filed a motion for continuance, which was denied. He was tried and convicted. He then filed a motion for a new trial, which was refused, and he appealed. The first ground for a new trial is, the court erred in refusing to grant the continuance. The continuance was asked for because of the absence of two witnesses. The record here does not show that any subpoena was issued for these witnesses before the 5th of March, 1888, the first day of the term of the court at which he was tried, and nearly one year after he was indicted. The record here shows that the subpoena was returned, "Not served." The motion for continuance, or the affidavit accompanying it, does not show that appellant used any diligence to secure the attendance of the absent witnesses, or their testimony. He contents himself with alleging that he used due diligence; but does not state in what way or to what extent he did so. He had ample time in which to have had them summoned. Why he did not, is not stated. He should have shown the diligence used. The granting of the motion was within the sound legal discretion of the court. We cannot see that it abused this discretion in refusing the continuance. *Golden v. State*, 19 Ark. 590. The second and third grounds of the motion for a new trial are, the verdict of the jury is contrary to the law and evidence. There is no complaint that the instructions given by the court to the jury were erroneous. There was sufficient evidence to sustain the verdict. The evidence, however, was conflicting. But it was in the exclusive province of the jury to decide which was true. The fourth and last ground of new trial is, the defendant has discovered new evidence since the trial. A part of this evidence relates solely to the impeachment of a witness. The affidavits of none of the witnesses by whom it is alleged the new facts can be proven were produced. No diligence was shown to have been used in procuring this evidence. He is therefore not entitled to a new trial on account of it. *McPherson v. State*, 29 Ark. 225; *Wallace v. State*, 28 Ark. 531; *Redman v. State*, 40 Ark. 447. "It is well settled," says Chief Justice ENGLISH, in *Anderson v. State*, 41 Ark. 231, "that motions for new trials on the ground of surprise or newly-discovered evidence are addressed to the sound discretion of the presiding judge, and it is only in cases where there appears to have been an abuse of that discretion, or that injustice may have been done, that this court interferes." Except as to so much of the newly-discovered evidence which could only be used to impeach a witness, witnesses testified in the trial to the same effect as appellant alleges, in his motion for a new trial, the newly-discovered witnesses can. The newly-discovered evidence is cumulative. One of the witnesses he professes to have recently discovered, testified in his trial in his behalf. He also introduced witnesses who testified as he alleges, in his motion for a continuance, absent witnesses would testify if present. We see

¹ As to when a new trial will be granted on the ground of newly-discovered evidence, see *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758, and note; *State v. Woodward*, (Mo.) 8 S. W. Rep. 220, and note; *Grady v. People*, (Ill.) 16 N. E. Rep. 654; *Bean v. People*, Id. 656; *Fogarty v. State*, (Ga.) 5 S. E. Rep. 782; *Parker v. State*, (Ga.) 6 S. E. Rep. 600.

no abuse of the discretion of the court in refusing to grant a new trial, or errors in the proceeding of the court prejudicial to appellant. Judgment affirmed.

YOUNG v. STATE.

(*Supreme Court of Arkansas.* June 9, 1888.)

1. ROBBERY—INDICTMENT.

It is not essential to the validity of an indictment for robbery, which charges the robbery to have been done by force, that it should also state that the person robbed "was put in fear."

2. SAME—EVIDENCE.

On trial for robbery, a witness testified that, the next morning after the robbery, an officer told him that "he was onto the fellows that committed the robbery; and, if they didn't whack up with him some of the money they had, he would pull the whole party;" that the officer did not give the names of the persons suspected; that, on the same morning, defendant and several others were at witness' house, and he repeated to them what the officer had said; that, on the night following, defendant and two others went to his house, called him out, and gave him eight dollars, and requested him to give it to the officer "to hush the robbery up." *Held*, that this testimony was admissible.

3. CRIMINAL LAW—EVIDENCE—CONFESSION.

The officer in question testified that, when he arrested defendant, he asked him who helped him to commit the robbery, and he replied, "Will Allen and Alf. McNair;" that defendant then said "he would like to pay a fine, and get out of it." *Held* admissible; the officer having made no threats or promises to defendant to induce him to make the confession.¹

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

F. T. Vaughan, for appellant. *D. W. Jones*, *Atty. Gen.*, for the State.

BATTLE, J. Young was indicted by the grand jury of Pulaski county for robbery. It is alleged in the indictment that he and two others, on the 1st day of July, 1887, in and upon one Aaron Elmore willfully and feloniously did make an assault; and fifty-eight dollars, describing it, and one hat, of the value of one dollar, and two pocket-knives, worth one dollar, of the goods and chattels of said Aaron Elmore, from the person of said Elmore, "by force and against his will, feloniously, forcibly, and violently, did rob, steal, take, and carry away, against the peace and dignity of the state of Arkansas." Young was convicted in the manner and form charged in the indictment. He moved for arrest of judgment, and for a new trial, both of which were denied, and he appealed.

It is urged that the indictment is insufficient because it is not alleged therein that Aaron Elmore "was put in fear." But this was not necessary, as held by this court in *Clary v. State*, 33 Ark. 561. To constitute robbery, the taking may be by force, or a previous putting in fear; and it is sufficient to charge it in either form.

Elmore was robbed in the night, between 1 and 2 o'clock, by three persons. It was dark. He did not know their names, and was unable to recognize any of them, except Young, when they were afterwards arrested. Immediately after he was robbed, he informed one Paine, an officer, of what had occurred. One Tony Anthony testified, on the trial, that, on the next morning after the robbery was committed, Paine told him that "he was onto the fellows that committed the robbery; and, if they didn't put up or whack up with him some of the money they had, he would pull the whole party;" that Paine did not give the names of the persons suspected; that, on the same morning, Young and several others were at his (Anthony's) house, and he repeated to

¹ As to when a confession is admissible in evidence, see *Mitchell v. State*, (Ga.) 5 S. E. Rep. 180, and note; *Corley v. State*, (Ark.) 7 S. W. Rep. 255, and note; *Amos v. State*, (Ala.) 8 South. Rep. 749; *Jackson v. State*, Id. 847; *Steele v. State*, Id. 547; *People v. Deacons*, (N. Y.) 18 N. E. Rep. 676; *State v. Rush*, (Mo.) *ante*, 221.

them what Paine had said; that on the night following, about half past 11 o'clock, Young and two others, who had heard him repeat what Paine said, went to his house, and called him out, and gave him eight dollars, and requested him to give it to Paine "to hush the robbery up," which he did, and told Paine who gave it to him. Appellant moved to exclude this testimony, which the court refused to do. Paine testified that, when he arrested Young, he asked him who helped him to rob Elmore, and he replied, "Will Allen and Alf. McNair;" that Young then said "he would like to pay a fine, and get out of it;" and that he (Paine) made no threats or promises, and offered no inducements to Young to make any confession or admission. Appellant moved to exclude this testimony, and the court denied his motion. Appellant now contends that the court erred in refusing to exclude the testimony of Anthony and Paine, because it relates to involuntary confessions, and is inadmissible. The well-established rule is "that confessions of guilt, to be admissible, must be free from the taint of official inducement, proceeding either from the flattery of hope or the torture of fear." The object of this rule is not to conceal crime, but to protect the accused from the effects of a false confession induced by the hope of gaining thereby relief, or some temporal advantage. A confession made, in the absence of any threat of temporal injury, or promise of a temporal reward or advantage, in respect to the charge against him,—in the absence of such influences as might swerve him from the truth,—would be voluntary, and admissible as evidence against the accused. Under such circumstances it would be unreasonable for him to make admissions calculated to bring upon himself the consequences of crime unless they were true. Whart. Crim. Ev. §§ 623, 674, and cases cited. In this case it appears that Young was at large. He was not suspected, so far as the evidence disclosed, of being concerned in the robbery of Elmore. There was no necessity for his making any confession. He could gain nothing thereby, except make his guilt known, and cause his arrest. If innocent, there could be no inducement in what was said to Anthony to cause him to make a false confession,—to swerve him from the truth. There was no threat to arrest or prosecute any one except the guilty; no one was charged with the robbery; no one except the guilty had cause to fear arrest, and the only reason they had was their own sense of guilt. We can see no reason why the testimony of Anthony should have been excluded. When Young was arrested by Paine, all hope of advantage or relief in what was said to Anthony vanished. If he had been led to believe that Paine would not arrest or prosecute him because of the money paid, that illusion had been dispelled by his arrest. Anything said by him to Paine by way of confession is not referable to what Paine said to Anthony, and was voluntary, and admissible against him. In explanation of his paying money to Anthony for Paine, appellant testified that Anthony told him that Paine said he knew who committed the robbery, and that, if he and others "did not put up," Paine would arrest all of them for gambling, and that they would have to employ an attorney to defend them. He further testified he did not say what Paine testified he said to him. Apart from so much of the testimony of Paine and Anthony as we have stated, there was evidence sufficient to sustain the verdict of the jury. There is no complaint here that the instructions of the court to the jury were erroneous. Judgment affirmed.

FAGG v. STATE.

(Supreme Court of Arkansas. June 16, 1888.)

HOMICIDE—TRIAL—VERDICT AND JUDGMENT.

On a trial for murder, the jury found defendant "guilty of manslaughter," without fixing the punishment. The evidence warranted a conviction for murder in the first degree, but not for involuntary manslaughter; and the jury had not been

charged as to the latter offense, but only as to murder and voluntary manslaughter. *Held*, that judgment and sentence for voluntary manslaughter was properly entered on the verdict.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

Indictment for murder. Defendant appeals from a verdict and sentence for voluntary manslaughter.

Thomas Marcum and Duval & Cravens, for appellant. *The Attorney General*, for the State.

COCKRILL, C. J. The defendant was indicted and tried for murder. The jury returned the following verdict, viz.: "We, the jury, find the defendant guilty of manslaughter, but cannot agree upon the punishment." The court sentenced him to three years and six months' imprisonment in the penitentiary. Several grounds for a new trial, assigned in the motion filed for that purpose, find no support in the bill of exceptions, and need not be noticed. Among these is the overruling of the motion for a continuance which is argued by counsel. It is contended by the appellant that the evidence adduced at the trial leads to but one of two conclusions,—that is, that the killing was murder in the first degree, or justifiable homicide; and therefore that the jury could not legally return a verdict of manslaughter. Conceding the premises to be correct, the conclusion does not follow. Where the evidence and the instructions of the court demand a verdict of murder, but the jury finds manslaughter, there is no alternative but to sentence the prisoner accordingly. 2 Bish. Crim. Proc. § 642. Such is the effect of the judgments in *Allen v. State*, 37 Ark. 485, and *Green v. State*, 38 Ark. 810. The principle of those cases is that the court cannot withhold from the jury the power to return a verdict according to their will for any grade of the offense charged against a defendant. The courts can only instruct juries as to their duty, giving them in charge the law applicable to the facts, and no other. If there is no evidence whatever tending to establish a lower grade of homicide than murder, in one instance, or voluntary manslaughter in another, the court should decline to give to the jury directions as to any lower grade of homicide, (*Benton v. State*, 30 Ark. 328; *Allen v. State*, *supra*;) and it is the jury's duty to take the court's exposition of the law as that applicable to the case. But the court cannot direct a verdict for the higher offense, nor restrain the jury from returning it for the lower grade. *Flynn v. State*, 43 Ark. 289; *Adams v. State*, 29 Ohio St. 412. In this case the court, in the course of the charge, read to the jury the statute defining voluntary manslaughter, but said nothing about the lower grade of the offense. There was no exception to the charge upon this score, and no request to charge otherwise. There was not a *scintilla* of evidence tending to show that the offense of involuntary manslaughter had been committed. It would have been inappropriate, therefore, to have charged the jury upon that offense. It is argued that it was error to charge as to manslaughter at all. The appellant acquiesced in that part of the charge at a time when it seemed favorable to him, and he cannot be heard to complain now. But it is said the court erred in passing sentence on the defendant as for voluntary manslaughter. The verdict did not designate the degree of manslaughter, or assess the punishment. The duty of fixing the penalty devolved, therefore, upon the court. Mansf. Dig. § 2308. On conviction of murder, the statute requires the degree of the offense to be found by the jury. *Id.* § 2284; *Thompson v. State*, 26 Ark. 323; *Ford v. State*, 34 Ark. 652. It is not so as to manslaughter; it is only necessary that the court should have a certain guide to the intention of the jury. Verdicts receive a reasonable construction, in order to reach the jury's meaning, and when that is found they are enforced as though the intention was express. *Straton v. State*, 14 Ark. 549. Viewing the verdict in this case in the light of the evidence and the court's charge, the conclusion is reasonable, if not irresistible,

that the jury intended a conviction of voluntary manslaughter. The court had charged them specifically upon that offense, and had made no mention of involuntary manslaughter, and it is not probable that they knew there was a second grade of the offense; or, if so, that the defendant could be convicted of it in this prosecution. A verdict of involuntary manslaughter would have been inappropriate to and unwarranted by the evidence, and the jury would have been unmindful of their duty to have returned such a verdict. In the absence of an expression to the contrary, a presumption of an intention to violate a duty is not indulged against a juror more than any other officer. The evidence certainly warranted a verdict of murder in the first degree. That the jury did not intend to acquit is shown by the verdict. If it be conceded that the verdict ought not properly to have been for voluntary manslaughter, that affords no reason for indulging the presumption that the jury intended a greater wrong than they have expressed. In the cases of *McPherson v. State*, 29 Ark. 225, *Winkler v. State*, 32 Ark. 552, and *Brown v. State*, 34 Ark. 232, verdicts of manslaughter were returned without the degree of the offense being specified. In each case it was ruled that, if the intention of the jury was manifest, a sentence of voluntary manslaughter would be sustained. In the first case the intention was held to be manifested by two facts: (1) That the evidence did not tend to prove the second degree of the offense; and (2) by the period of imprisonment fixed by the verdict. The sentence for voluntary manslaughter was approved, and the judgment affirmed. In *Winkler's Case* the verdict fixed the punishment above the maximum for involuntary manslaughter, and the court said: "The penalty clearly indicates the purpose" to convict of voluntary manslaughter. The judgment was reversed for other reasons. In *Brown's Case* these decisions were approved. The judgment was reversed because the court did not inform the jury that the prisoner might be convicted of involuntary manslaughter when the evidence made a case for such action. In the case of *Welch v. State*, 50 Ga. 128, a sentence for voluntary manslaughter upon a verdict of "guilty of manslaughter" generally was sustained, the court holding that on a trial for murder, if the jury intend to find the killing involuntary, or without the intention to kill, the presumption is they would say so; and that "guilty of manslaughter" means guilty of voluntary manslaughter. See *Conkey v. People*, 1 Abb. Dec. 418; *Curtis v. State*, 26 Ark. 439; *Proff. Jury*, § 427. We think the intention of the jury to return a verdict of voluntary manslaughter is manifested in this case, within the principle of the three Arkansas cases above cited. It is the better practice, in every case, where the verdict is not complete on its face, for the judge to point out its defects before receiving it, to inquire of the jury what their intention is, and show them how to perfect it. *Ford v. State, supra*; 1 Bish. Crim. Proc. § 1004. The defendant has not been prejudiced in this case, and the judgment is affirmed.

COCKRILL v. SANDERS.

(Supreme Court of Arkansas. June 16, 1888.)

1. SPECIFIC PERFORMANCE—WHEN DECREED—AGREEMENT TO GIVE ATTORNEYS INTEREST IN LAND RECOVERED.

Defendant was the owner of certain lands which were in litigation, growing out of the fact that part of them had been sold for taxes, and part under execution, and deeds therefor executed. He agreed with plaintiff's firm (attorneys) that when they "shall have relieved said lands, or any part thereof, from the cloud of title that hangs over them by reason of said tax deeds and sheriff's deeds, or shall have prosecuted the suits involved by said deeds to final judgment, then their services as such attorneys shall be at an end." In consideration of the attorneys' services, defendant obligated himself to execute to them a deed to one-third of all the land recovered "in said litigation." Held, that the attorneys were entitled to specific performance of the contract after relieving the lands from the tax and execution sales, though this was done through negotiations, without the necessity of litigation.

2. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Where the testimony is conflicting as to whether a written contract contains the whole agreement of the parties, the decree of the lower court, finding that their full intention was expressed therein, will not be disturbed.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

This was a suit in equity to obtain specific performance of a contract to convey a certain proportion of lands in consideration for services in removing clouds upon the title thereto. There was a decree for petitioner, and defendant appeals.

J. W. House, for appellant. *U. M. & G. B. Rose* and *J. A. Watkins*, for appellee.

BLACKWOOD, Special Judge.¹ The appellee, George B. Sanders, about the 27th day of July, 1882, filed his bill in equity against J. R. Cockrill, in which he alleges, in substance, that on the 15th day of March, 1879, he and one J. W. Couch were partners in the practice of law, and that on that day James R. Cockrill desiring to secure the services of said Sanders & Couch in some litigation in which he was involved concerning certain lands, and on said day they made a certain contract with said Cockrill, as follows: "This agreement made and entered into this the 15th day of March, 1879, by and between J. R. Cockrill, of Nashville, Tenn., and Sanders & Couch, attorneys at law, Forrest City, Ark., witnesseth that whereas, the following described lands, to-wit, N. W. section 6, T. 5 N., R. 3 east, and lots 1 and 2 in the north-east section 6, T. 5 N., R. 3 east, containing in all 480 acres, in litigation, has grown out of the fact that a part of said lands have been forfeited for taxes, and purchased by individuals, and deeds therefor been executed, and a part having been sold under execution sale, and deeds therefor executed; and whereas, the said Sanders & Couch have undertaken to prosecute and defend for said J. R. Cockrill, the owner of the above-described lands to final judgment, said suits involving said lands. Now, therefore, it is agreed between the parties hereto that when the said Sanders & Couch shall have relieved said lands, or any part thereof, from the cloud of title that hangs over them by reason of said tax deeds and sheriff's deeds, or shall have prosecuted the suits involved by said deeds to final judgment, then their services as such attorneys shall be at an end. Now, it is further agreed and distinctly understood by the parties hereto that, for and in consideration of the services rendered by said Sanders & Couch in said litigation, the said J. R. Cockrill hereby pledges and obligates himself to make and execute to said Sanders & Couch a good and perfect title to one-third of all the land they may recover in said litigation for said J. R. Cockrill; and, if the amount of land recovered shall be four hundred and eighty acres, one-third thereof; and, if the amount recovered shall be less, then one-third of the amount so recovered, said one-third to be determined by valuation. And it is further agreed and understood that, should the said Sanders & Couch fail to recover any land in said litigation, then and in that instance they will make no charge whatever for services, provided they be allowed to prosecute said litigation to final judgment. In either case, whether or not there be a recovery, the said J. R. Cockrill obligates himself to pay all cost of suit, and to pay off all taxes due and all just debts against said lands. [Signed] JAMES R. COCKRILL. SANDERS & COUCH." He further alleges that, under said contract, Sanders & Couch proceeded to perform the services therein undertaken, and that they succeeded, through negotiations, without the necessity of litigation, in relieving said lands from tax and execution sales; that the firm of Sanders & Couch had some time since been dissolved, and the said Couch had conveyed his interest in said contract to plaintiff; and prayed specific performance of

¹COCKRILL, C. J., disqualified.

the contract. To which the defendant answered, in substance, as follows: That it was true that there was an agreement between him and Sanders & Couch respecting certain lands, and the title thereto; that it was partially reduced to writing on the day stated in the complaint, but that the agreement, as reduced to writing, was not the agreement made between the parties; that, by accident or mistake, certain recitals in the agreement as written were misstated; and that as they are stated they are false, and that a material part of the agreement was entirely omitted. He denies that any of his lands were in litigation. He admits that Sanders & Couch were to receive one-third of the lands recovered, or from which a cloud upon the title may have been removed in any litigation or suit wherein he may have been a party, either as plaintiff or defendant, subsequent to the making of the agreement. He states the following portion of the agreement, as it was made between them, by accident or mistake, was not reduced to writing, to-wit: "That he (James R. Cockrill) should make an effort to compromise the claims of the purchasers of his lands, and that he should notify Sanders & Couch of the result; and that, in the event he succeeded, they were to take no action whatever; but, in the event of his failure to settle with the purchasers by compromise, the said Sanders & Couch should take such legal steps as should be necessary to perfect his rights." He denies that Sanders & Couch ever prosecuted or defended any suits in court, or performed any services of any considerable value; but, being unwilling that any one should work for him without pay, he tenders the sum of \$25, which he submits is a just and ample compensation for the services performed. The chancellor found that the testimony failed to establish a contemporaneous oral agreement such as was alleged by defendant, and that the written contract contained the whole agreement between the parties; that it had been fully performed by Sanders & Couch; and decreed specific performance. From which decree the defendant appealed.

The testimony is conflicting as to whether the writing contained the full agreement. It appears from the evidence that the agreement was reduced to writing at the special instance and request of the appellant. He remarked that he had formerly had trouble with oral contracts, and wanted this one reduced to writing. It was written out, and read over to appellant, and signed in duplicate. One of the witnesses testifies that appellant held and read one of the copies. The testimony is not sufficiently clear and satisfactory to justify us in deciding that the written contract, deliberately entered into by the parties, did not express their full intention, and contain their whole contract.

The only other question raised by the multiplicity of briefs filed in this case, which it is necessary for us to consider, is, was the contract sufficiently performed on the part of Sanders & Couch to entitle appellee to specific performance? When the contract was entered into, appellant's land was, part of it, forfeited and sold for taxes, and the time for redemption had expired. Another portion of it had been attached, but not sold under the attachment, and still another part had been sold under execution sale. Appellant expressed some doubts about getting it back, and also stated that he did not want to pay out any more money, but wanted to arrange with the attorneys to take their compensation out of the lands; and, in case they should not succeed, they were to have nothing for their services. The written contract, above copied, was then signed in duplicate, and delivered,—one to each party. Appellee then told appellant that he would first try to compromise with the various claimants. Appellant, soon after, left for his home in Tennessee. Sanders & Couch proceeded to investigate the records in reference to the tax titles and the attachment suit, and advised Cockrill that they thought they could recover the lands. They proceeded to carry on negotiations, in person and by letter, with the claimants, and succeeded, directly and indirectly, in relieving all of said lands from the clouds upon the title. Our construction

of the contract, under the testimony, is that if said Sanders & Couch should relieve said lands from the clouds upon the title, or should, if necessary, prosecute or defend suits in court to final judgment, then, in either event, their services were to be at an end, and they were entitled to one-third of the land thus relieved. It did not become necessary to go into court. The ends and objects of the contract were attained without litigation, and the contract was as much performed as if they had recovered the lands after a long and bitter litigation. We find no error in the decree of the court below, and it is accordingly affirmed.

HILLIAN v. STATE.

(Supreme Court of Arkansas. June 28, 1888.)

1. RESCUE—WHAT CONSTITUTES—PRISONER IN JAIL.

Act Ark. Dec. 17, 1888, (Mansf. Dig. § 1768,) which provides for the punishment of any one who shall by force or menaces of bodily harm, or by any other unlawful means, set any one at liberty who is in lawful custody after a lawful arrest, either before or after conviction, applies as well to the rescue of a prisoner confined in jail, by whatever means, as to a rescue from the actual custody of an officer accompanied by personal violence.

2. CRIMINAL LAW—EVIDENCE—ACCOMPLICE.

A prisoner who assisted defendants in liberating prisoners confined in jail, and who himself escaped, though his escape was not contemplated by the original plan, is, under said section 1768, and Mansf. Dig. § 1508, which provides that all persons present, aiding and abetting the commission of a felony, are principals therein, an accomplice in the crime of rescue; and, under Mansf. Dig. § 2259, providing that the testimony of an accomplice, uncorroborated by other evidence tending to connect the accused, shall be insufficient to convict of felony, the testimony of such accomplice alone will not support a verdict of guilty.¹

Appeal from circuit court, Logan county; J. F. READ, Special Judge.
Indictment for rescue. Defendants were convicted, and appealed.
Appellants, *pro se*. D. W. Jones, Atty. Gen., for the State.

COOKRILL, C. J. The appellants were indicted for the rescue of Harvey Hillian and Eli Vonconnon, who were prisoners lawfully confined in the Logan county jail on the charge of burglary. They were convicted mainly on the evidence of the witness Stephens, who was a prisoner confined with the parties named at the time of the rescue. It was not supposed that the original object of the rescuers was to release him, but he was liberated along with the others. The three prisoners first undertook to make their escape through the ceiling of the room in which they were confined by tearing down a brick flue, but the hole made for its accommodation in the ceiling was still obstructed by the masonry above, and their exit was prevented. Stephens aided in this work, which was done several days prior to the rescue, and apparently without the knowledge of the rescuers. According to Stephens' account of the subsequent occurrences, he was awakened the second night after the flue was torn down by a noise in the room, and upon arising discovered his two fellow-prisoners holding a bed-quilt under the hole in the ceiling to prevent a noise being made by the falling of bricks and mortar from above, where persons were at work to remove the obstruction to their release. It became necessary to enlarge the opening to enable the prisoners to escape. The rescuers used a light to work by, and passed it down through the opening to the prisoners, who held it overhead to aid in the work above. Stephens took his turn at holding the light.

¹Concerning the necessity of corroborating the testimony of an accomplice, in order to sustain a conviction, and the extent of such corroboration, see *People v. Elliott*, (N. Y.) 12 N. E. Rep. 602, and note; *People v. Kunz*, (Cal.) 14 Pac. Rep. 836; *Patterson v. Com.*, (Ky.) 5 S. W. Rep. 837; *People v. Clough*, (Cal.) 15 Pac. Rep. 5; *State v. Dana*, (Vt.) 10 Atl. Rep. 727; *Dodson v. State*, (Tex.) 6 S. W. Rep. 548; *Boyd v. State*, *Id.* 835; *Wisdom v. People*, (Colo.) 17 Pac. Rep. 519. As to who is an accomplice within the rule, see *Smith v. State*, (Tex.) 5 S. W. Rep. 219, and note.

When everything was ready for the escape, Stephens stood in the stead of a ladder, the others mounted upon his shoulders, and by the aid of their friends above made their exit, after which Stephens was helped out. The latter, after a promise of immunity, or leniency in the prosecution of the offense for which he was confined, testified as above detailed, and identified the appellants as of the party of the rescuers. There was no other direct testimony connecting them with the offense. On the trial they requested the court to give the following declaration in charge to the jury: "An accomplice is one who aids, assists, or participates in the commission of an unlawful act; and if you find from the testimony that Stephens, the prosecuting witness, took part and aided in the escape of Eli Vonnannon and Harvey Hillian on the night of their escape, then he is an accomplice; and before you can convict you must find that the prosecuting witness is corroborated by other testimony as to the connection of the defendant with the offense charged." The court refused to so charge, and gave no instruction on the subject covered by the request. The defendants excepted, and asked a new trial upon this among other grounds. Our statute provides that a conviction cannot be had in a prosecution for felony upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Mansf. Dig. § 2259. If the evidence tended to show that Stephens was an accomplice, that fact, together with the consideration whether his testimony was properly corroborated, should have been submitted to the jury. *Polk v. State*, 36 Ark. 117; *Melton v. State*, 43 Ark. 367; *Carroll v. State*, 45 Ark. 539. The statute creating the offense for which the appellants were prosecuted was enacted as section 10 of the act of December 17, 1838, (Mansf. Dig. § 1768.) Immediately following the clause prescribing the punishment for the offense, and as a part of the same section, is this further provision: "All persons being present, aiding and abetting or ready and consenting to aid and abet, in any of the foregoing offenses, shall be deemed principal offenders and indicted and punished as such." See Id. § 1508. Could Stephens have been prosecuted for the crime of rescue under this statute? If so, he was an accomplice. In treating of the crime of rescue, Mr. Bishop says: "If the imprisoned person and the rescuer act together, rendering mutual aid, they are principals in one crime." 2 Bish. Crim. Law, § 1087. See 2 Whart. Crim. Law, § 1677. In the case of *Ash v. State*, 81 Ala. 76, 1 South. Rep. 558, it was ruled that a prisoner under indictment for a felony, who procured another person to furnish him an instrument to facilitate his escape from jail, is not an accomplice in the statutory offense of furnishing a prisoner an instrument with which to effect his escape, because the statute was designed to punish the individual who aided in the escape of another, not that of himself. Whether a similar construction would be placed on the statute under consideration when the prisoner aids the rescuers in the effort to compass only his own escape is not material in this case. Here, according to the testimony, he undertook to aid the rescuers in releasing other prisoners, and, if this is true, he thereby brought himself within the letter and spirit of the statute. It has been so ruled in *People v. Rose*, 12 Johns. 339, and in *Luke v. State*, 49 Ala. 30. It was the duty of the court, therefore, to instruct the jury substantially as requested. The request for the charge was not technically accurate, in that it confounds the substantive offenses of rescue and escape. It was aid to the rescuers, and not to the prisoners, that would render the witness an accomplice in the offense of rescue. But escape is essential to the consummated offense of rescue, and as the request to instruct, when read in the light of the evidence, limited the inquiry as to the assistance rendered by the witness to the prisoners to acts which were in aid of the rescuers, it would not have misled the jury, and should not have been refused for that reason. That reason has not been suggested, in argument, as a ground for sustaining the court's refusal.

2. The appellants argue that section 1768 does not cover the case of a res-

cue from a jail or other prison, but that it is applicable only to the rescue of prisoners accomplished by personal violence to an officer. The statute, in terms, applies to every one "who shall, by force or menaces of bodily harm, or by other unlawful means, set any one at liberty who is in custody, after a lawful arrest either before or after conviction for a felony." One who is in jail is in custody within the meaning of the statute. If the appellants are guilty as charged, they should be punished as prescribed in the section referred to. For the error indicated the judgment is reversed. The cause will be remanded for a new trial.

FOX v. STATE.

(*Supreme Court of Arkansas. June 28, 1888.*)

CRIMINAL LAW—ACQUITTAL ON CHARGE OF ROBBERY—WHEN BAR TO PROSECUTION FOR FALSE IMPRISONMENT.

An acquittal upon an indictment for robbery is a bar to a prosecution for the same act under an indictment for false imprisonment, when an assault constitutes an ingredient of the transaction.

Appeal from circuit court, Marion county; R. H. POWELL, Judge.

W. F. Pace, for appellant. D. W. Jones, Atty. Gen., for the State.

COCKRILL, C. J. Fox was indicted for robbing one Everedge, and was acquitted. He was then indicted for the false imprisonment of Everedge. He pleaded the acquittal of the first charge in bar of the prosecution of the second, alleging that the transaction and the offense in the two cases were the same. The court sustained a demurrer to the plea. The defendant was tried and convicted, and appeals. The question is, does the acquittal of the charge of robbery bar the subsequent prosecution for false imprisonment? Each indictment charges that Fox assaulted Everedge, and sets forth the circumstances of the assault. The demurrer to the plea admits that there was but one assault; that is, that each indictment refers to the same assault. Now, an assault is an essential ingredient in every robbery, and, perhaps, in every offense of false imprisonment. False imprisonment is classified as a species of aggravated assault, (2 Bish. Crim. Law, § 747;) and the circumstances of the offense charged in this case would certainly assign it to that classification. If there was no assault committed, Fox was not guilty of the offense of false imprisonment, because, if innocent of simple assault, he could not be guilty of the aggravated offense. Under the indictment for robbery, he might have been convicted of a simple assault. *Davis v. State*, 45 Ark. 464; *Hall v. State*, 50 Ark. —, 6 S. W. Rep. 20. The verdict of not guilty on the trial under the indictment for robbery was an acquittal of all the minor offenses charged in the indictment. It was therefore an acquittal of the simple assault. If it is true, as the demurrer admits, that the same assault is charged in the second indictment, then Fox stands acquitted of the assault, and therefore cannot be convicted of the offense of false imprisonment, of which the assault is a necessary element. "According to the general and better doctrine," says Bishop, "a conviction or an acquittal of a common assault will bar proceedings for an assault to do great bodily harm, and other assaults aggravated in like manner." 1 Crim. Law, § 1058. The case of *State v. Nichols*, 38 Ark. 550, is not in conflict with, but is a limitation upon, this doctrine. In that case the offense charged in the indictment was maiming, which is a felony. The defendant pleaded a conviction of assault and battery before a justice of the peace for the acts which resulted in the maiming, but the court disallowed the plea. The limitation made by that case upon the doctrine announced by Mr. Bishop, as explained in *Southworth v. State*, 42 Ark. 270, is that a conviction of a misdemeanor before a justice of the peace, punishable by fine only, is no bar to a prosecution for a grade of the offense amounting to felony, of which the justice had no jurisdiction. To the same

effect, see *Prine v. State*, 41 Tex. 300; *Com. v. Curtis*, 11 Pick. 134; *State v. Foster*, 33 Iowa, 525; *Freeland v. People*, 16 Ill. 380. The qualification does not affect this case. If it is true, as admitted by the demurrer, that Fox was acquitted in the circuit court, on the former trial, of the essential ingredients of the offense now charged against him, this prosecution cannot proceed. Whart. Crim. Pl. §§ 467, 471; 1 Bish. Crim. Law, § 1057; *State v. Smith*, 43 Vt. 324; *State v. Mikesell*, 70 Iowa, 176, 30 N. W. Rep. 474; *U. S. v. Harmison*, 3 Sawy. 556; *Reg. v. Gould*, 9 Car. & P. 364, 38 E. C. L. 217; *Reg. v. Eltrington*, 9 Cox, Crim. Cas. 86. Where one unlawful act operates on several objects, there may be several offenses committed, and so several prosecutions for the same criminal transaction; and an acquittal or conviction for one such offense will not bar a prosecution for the other. Whart. Crim. Pl. § 468; *State v. Nash*, 26 Alb. Law J. 324; *People v. Majors*, 65 Cal. 138, 3 Pac. Rep. 597; *State v. Nash*, 86 N. C. 650; *State v. Faulkner*, (Ia.) 2 South. Rep. 539; *Phillips v. State*, (Tenn.) 3 S. W. Rep. 434. But where there is but one object, and each offense charged is a degree, or an essential ingredient, of the other, as in this case, there can be but one prosecution. *Hall v. State*, *supra*; *State v. Clark*, 32 Ark. 231.

The demurrer should have been overruled. The judgment must be reversed, and the cause remanded, with instructions to overrule the demurrer.

MCLEOD *et al.* v. GRIFFIS.

(Supreme Court of Arkansas. June 23, 1883.)

EQUITY—JURISDICTION—BILL TO SURCHARGE AND FALSIFY.

On a bill to surcharge and falsify an administrator's accounts, as settled in the probate court, the chancery court has no jurisdiction to go further than to inquire into specific charges of fraud, accident, or mistake, and is limited to such items as are affected thereby; and its jurisdiction does not embrace matters passed upon by the probate court, which may be reviewed on appeal; and such jurisdiction cannot be enlarged by the administrator's answer admitting mutual mistakes, and asking that the report as a whole be set aside.

Appeal from circuit court, Lee county; M. T. SANDERS, Judge.

This is a proceeding in chancery by R. T. Griffis, guardian to Kate and Manie McLeod, heirs at law, to surcharge and falsify the settlement accounts of the appellant, G. W. McLeod, against him and the sureties on his bond, as administrator of the estate of Bernard McLeod, deceased. The case was formerly before this court on appeal; and the decree of the circuit court was reversed, upon a hearing, upon the original pleadings and proofs, and other proceedings had thereon,—referring the case to a master to take an account; and, upon his report and statement of the accounts, the case was remanded to the circuit court, with instructions to again refer it to a master to state an account upon the principles announced in our opinion, using for that purpose the pleadings, exhibits, and proofs in the record, charging the administrator with such losses to the estate as the proofs should show to be the result of intentional or legal fraud, or as occurred through accident or mistake, and crediting him with such mistakes or errors as are shown to be in his favor, and charging him with legal interest on any balance from the date of his final settlement with the probate court. 45 Ark. 505. On the case being remanded, the circuit court again referred it to a special master, Greenfield Quarles, with instructions as follows: "(1) Charge the defendant with all such losses sustained by the estate as are shown by the proofs to have been the result of intentional or legal fraud, or as occurred through accident or mistake of the administrator. (2) Charge the defendant with any loss sustained by the estate by reason of the purchase by the administrator of the stock of merchandise belonging to the estate. (3) Credit the defendant with the errors and mistakes shown to be in favor of the administrator. (4) Charge defendant with 6 per cent. per annum interest on any balance against him from the date of his final settlement in the probate court. (5) If the master finds that the said administrator has

been guilty of any fraud in concealing assets of the estate, and failed to account for them, deduct all commissions allowed him for his services as such administrator, and charge them to him in the account." The master has divided his report into six paragraphs. In the first he states "that, owing to interlineations, erasures, etc., in the exhibits, he found it necessary to make an examination of the books of account kept by B. McLeod, in his life-time, and by G. W. McLeod, as the administrator of the estate;" stating the accounts covering the whole administration on the theory adopted by the former master. He then states an account accordingly, covering the whole proceedings of the administration, making the sum of the debits \$52,155.88, and the sum of the credits \$46,239.18; leaving in the hands of the administrator at date of his last settlement, January 7, 1879, the sum of \$5,916.66, to which adding legal interest to October 25, 1886, makes \$8,681.68. (2) In the second paragraph he states the account differently, leaving out of the credits the administrator's commissions, on the theory that he had forfeited commissions on account of his frauds, and makes the amount due, including interest, October 25, 1886, \$10,663.86. (3) In the third paragraph he states no account, but alleges there was some evidence that the administrator bought timber out of which lumber was manufactured for the estate, but, as the value or amounts were not given, no credit could be allowed. (4) In the fourth paragraph, after stating that "charging the defendant with the amounts which came into his hands and which he failed to account for, and with such losses to the estate as the proofs show to be the result of negligence, accident, or mistake, and crediting him with such mistakes or errors as are shown to be in favor of the administrator, he proceeds to state an account accordingly." As the fourth and fifth paragraphs were affirmed by the court below, we will here state the items of this account:

To amount of notes not accounted for, - - -	\$1,551 06
To lumber, etc., not accounted for, - - -	4,795 38
To error in Bush note, - - -	333 74
To shingles, - - -	50 00
To error as to voucher 58, first settlement account, - -	210 00
To interest on notes, - - -	265 69
To error in claim paid Jarrot and Rodgers, - - -	50 00
To check given, - - -	100 00
To error in Allison draft, - - -	407 31
To overcharge in building gin, - - -	196 00
To error in amount paid Allison, Smith & Johnson, - -	72 00
Total amount of débits, - - -	\$8,031 18
<i>Contra:</i>	
By remnant corn, timber, etc., - - -	\$ 496 86
By amount paid Hewitt, \$414.77, less \$100, - - -	314 77
By amount to E. L. Black, - - -	100 78
By repairs and miscellaneous expenses, - - -	647 79
By J. A. Bush, - - -	580 00
By James Torlin, - - -	35 00
By additional mill expenses, - - -	21 00
Total credits, - - -	\$2,196 20
To amount January 7, 1879, - - -	\$5,834 98
To interest for 7 yrs. 9 mo. 16 days, - - -	2,727 87
Amount due October 25, 1886, - - -	\$8,562 85

(5) The master in the fifth paragraph states: "From the proofs before the master, he finds it impossible to state from what source some of the items with which the administrator charges himself in the first settlement come;

but by charging him with the open book-accounts, which came to his hands, the merchandise bought and paid for with the moneys of the estate, the probable profits made in the mercantile business while carried on by the administrator for the benefit of the estate, the amounts would be about the same. The master has therefore balanced those items, and made no charge, nor allowed any credits for these items. (6) In the sixth paragraph the master finds that "the manner in which the administrator conducted the estate, his failure to keep proper books of account, and to charge himself with the assets with which he is legally chargeable, deprives him of any right to commissions;" and thereupon he deducts the commissions allowed in his accounts, \$1,666.25, with interest, \$778.82, making \$2,446.06, from his accounts as allowed him by the probate court, and, adding it to the aforesaid balance of \$3,562.85, charges the administrator as due the estate the sum of \$11,007.91. To this report the defendants except as follows: *First.* To the first paragraph, because the master therein disregards the settlement accounts of the administrator by the probate court, and restates the accounts covering the whole of the administration on the theory of the former master, J. M. Parrott, in contravention of the former decision of this court. *Second.* To the second paragraph for the same causes contained in his exception to the first paragraph, and because, by the finding of the master, the administrator is deprived of commissions allowed by the probate court, unjustified by anything in the pleadings or proofs or the former decision of the supreme court. *Third.* To the fourth paragraph he excepts to the items \$1,551.06, amount of notes not accounted for, and \$4,794.38 for lumber not accounted for, amounting to \$6,346.44, for the following reasons: (1) These charges are not itemized; (2) there is nothing to show that they are not embraced in the administrator's accounts, as confirmed in the probate court; (3) there is nothing to show that they were collected or collectible; (4) there is nothing to show that, if omitted from the probated settlements, it was through any fraud, accident, or mistake of the administrator. *Fourth Exception.* To the sixth paragraph, on the same grounds set out in his exception to the second paragraph above. *Fifth Exception.* And the defendants except to the whole report because it is stated in the alternative. *Sixth Exception.* Because it ignores the judgment of the probate court in confirming the administrator's several settlement accounts, and the directions of the supreme court, and without finding or specifying that the administrator was guilty of any fraud, actual or legal, or that said judgments resulted from accident or mistake; and because the report states the account on the theory that the administrator is chargeable with neglect. *Seventh Exception.* Because the administrator is charged with various sums in addition to those in his settlement accounts, unsupported by any testimony that such omissions were the result of fraud, accident, or mistake, or that the estate suffered any loss therefrom. The court, in its decree, overruled the third, fifth, sixth, and seventh of defendants' exceptions, and sustained the first, second, and fourth, especially confirming and approving the fourth and fifth paragraphs of the master's report, finding that the administrator had in his hands the sum of \$5,834.98 on the 7th day of January, 1879, unaccounted for, and decreed so much money, with interest thereon to date of decree, May 5, 1887, \$2,917.50; making, in the aggregate, \$8,752.48 to be paid, with accruing interest, to the widow and heirs of Bernard McLeod, deceased. The defendants excepted, and appealed.

Tappan & Horner, for appellants. *Stephenson & Trieber*, for appellee.

CLARK, Special Judge,¹ (after stating the facts.) It seems, as the court sustained all the exceptions of the defendants to the master's report, except what is contained in the fourth and fifth paragraphs, and the plaintiffs have

¹ COCKRILL, J., disqualified.

not appealed, that the questions here are narrowed down to the inquiry whether the court erred in overruling the exceptions to those paragraphs, and in rendering its decree based upon the one account therein contained. In remanding the case in our former decision for further reference to a master, we expressly directed that the account should be taken in accordance with the principles announced in our opinion. In that opinion we think it was clearly laid down that the settlement accounts of an administrator, when confirmed by the probate court, are judgments of that court, which is a court having competent jurisdiction over the subject; that ample provision has been made for a review of the proceedings of that court on appeal; that in collateral proceedings in the chancery court, to surcharge and falsify such accounts of the administrator, the court can go no further than to inquire into the charges of fraud, accident, or mistake. This inquiry will necessarily be limited to such items of the settlement as are affected by such charges or proof, and the burden of proof is on the plaintiff. All other parts or items of the accounts should be left to stand as they are. On further submitting the case to a master, the chancellor has, inadvertently no doubt, left the question as to this limited jurisdiction of the court to the uncontrolled discretion of the master, and the master has evidently regarded the entire settlement accounts in the probate court as subject to review and restatement, and he has in the first paragraph of his report proceeded to review and restate them, avowedly covering the whole administration, upon the theory set out in the statement by the former master, J. M. Parrott. It was expressly upon the ground of this theory that we held that statement erroneous. The new account is based upon the same pleadings and evidence as the old one, no change in the pleadings having been made, and no new evidence taken, and we must determine the question here by the same record. True, the court sustained exceptions to the general restatement in the first and second paragraphs, and ruled it out, as it did the paragraph depriving the administrator of his commissions. Manifestly and expressly, however, the account set out in the fourth paragraph is based upon the same view. It consists of such items selected from the whole record wherein the parties on either side are conceived to have suffered loss. It is manifestly an effort to correct the errors in the administrator's accounts without regard to whether such errors were fraudulent, or the result of accident or mistake, or were errors of the court and parties which could be corrected only by appeal. We are aware that to draw this distinction in all cases is exceedingly difficult, and this difficulty has been the source of much litigation in the courts. In our former opinion we stated that "it may be, and often is, no doubt, a matter of great difficulty for the chancellor, upon the charges and evidence before him, to distinguish in a matter of complicated accounts what is fraudulent, or the result of accident or mistake, from what is mere error remediable only by appeal." "But this is a difficulty inherent in the subject, and must be met by the patient exercise of the discriminating power of the chancellor." The distinction is, however, all-important, as it constitutes the boundary of the court's jurisdiction or its judicial power, and must be maintained. It is plain, however, that whatever matter the probate court has passed upon cannot be assigned in the chancery court as fraudulent, or as the result of accident or mistake, unless upon the statement of some fact or circumstance not considered by that court. The identical issues decided by the probate court cannot be retried and reversed by the chancery court in this proceeding, and, where this is manifest, the court should refuse to take jurisdiction. The difficulty is almost peculiar to judgments confirming administrator's accounts. Those settlements are necessarily divided into numerous items of debit and credit, and the items have no necessary connection with each other; but an examination and confirmation of the settlement is the judgment of the probate court as to each separate item as much as it is to the settlement as a whole. We are not prepared to say that the chancery court would

not have jurisdiction to set aside as a whole the settlement accounts of an administrator, but it would be only upon an impeachment of the settlements as a whole. It must be upon fraud or accident going to or affecting the entire action of the probate court, and in which the court has been the victim of the fraud or the accident. "It must affect all the items of the account." This is the rule even as to stated mutual accounts between parties *in pais*. See *Branger v. Chevalier*, 9 Cal. 353; *Bruen v. Hone*, 2 Barb. 586; *Gover v. Hall*, 3 Har. & J. 43; *Bullock v. Boyd*, 2 Edw. Ch. 298; *Farnam v. Brooks*, 9 Pick. 212; *Roberts v. Totten*, 18 Ark. 609. And see the doctrine laid down in 1 Wait, Act. & Def. 192 *et seq.* It is true that in the equitable action of account the court will in some cases reopen the whole statement for the correction of errors affecting the balance by consent of parties, but this is because the jurisdiction of the court over the subject is plenary. It has in that case jurisdiction of errors as well as frauds. See cases above, and *Floyd v. Priester*, 8 Rich. Eq. 248; *Troup v. Haight*, Hopk. Ch. 289. In our former decision, we held that the consent of the defendants could not enlarge the jurisdiction so as to admit a general review of the administrator's accounts, or to correct any errors properly correctible on appeal, but that it would authorize an inquiry as to such frauds, accidents, or mistakes as the proof should show to be such, without reference to whether specific charges to that effect had been made. It was not intended that such proof should be otherwise than such as would sustain specific charges, if made. The rule laid down by Justice EAKIN in the case of *Reinhardt v. Gartrell*, 33 Ark. 727, is the true one: "That the chancellor should confine the reference to the correction of the settlement as to those points where the errors originally occurred, and where they entered into subsequent statements; and this finding should be itself always upon the allegations of the bill pointing out the fraud, and not upon vague and general charges." "General assertions of fraudulent intent add nothing to the strength of a bill unless made applicable to specific acts or declarations." We cannot agree that general charges of fraud, accident, or mistake in an administrator's settlement accounts, without such specifications as show in what the fraud or mistake consists, can constitute a cause of action in this collateral proceeding. The court will not compel a discovery from the administrator to find out whether it has jurisdiction. Jurisdictional facts must be charged. In the language of ancient jurisprudence, "the court of chancery will not entertain a fishing bill." In the original complaint the plaintiff, after numerous charges of frauds connected with the separate items of the settlements, proceeds to state, in effect, that other frauds and mistakes existed in the accounts unknown to the plaintiffs, but which would appear upon an inspection of the books, and a discovery from the administrator, and prayed such discovery, and that the settlements might be opened, and the administrator's accounts restated. The defendants, in their answer and cross-bill, admitting errors and mistakes, denying any intentional frauds, claim that such errors and mistakes were principally against the administrator, and consent to setting aside the settlements, and restating the accounts over the whole administration. The court proceeded accordingly to set aside the settlements, and to restate the accounts. We are of opinion that these proceedings were erroneous and *coram non iudice*, except so far as they contain evidence of the specific charges in the pleadings, or such proofs of fraud, accident, or mistake in the several items of the settlements as when properly charged would give a right of action. We are not able to see how we can affirm the decree without sanctioning these proceedings,—without setting a precedent inconsistent with many former decisions of this court, and with our former opinion in this case; for there is nothing in the report of the master or the decree to show that the jurisdictional distinction referred to has been considered in reference to the items of this account upon which the decree is based,—whether they are charged or proved to be fraudulent, or the result of accident or mistake.

The master has acted upon the principle that fraud or mistake in any one particular authorized him to review the whole proceeding, and to correct any errors he might find prejudicial to the party. The defendants' exceptions are founded upon this error, and we think they are well taken.

The decree will be reversed, and the case will again be submitted to a special master here; and as the account last taken up, on which the decree was based, contains whatever is complained of in the settlements of the administrator, we will confine the reference to an inquiry as to the charges and proofs in the record to affect the several items of the account with fraud, or show that they were the result of accident or mistake. Hon. W. P. Campbell, the clerk of this court, is hereby appointed an especial master for that purpose, and he will charge against the administrator such of the items or parts of items in the said accounts as the proofs in the records shall show to be connected with fraud, or the result of accident or mistake on the part of the administrator or the probate court, and report the evidence upon which such charge is made. And he will allow such items of credit in the account as, through error or mistake, the administrator is entitled to, but only to the extent of the debits against him; and charge legal interest upon any balance against the administrator from the date of his last settlement. The master will report his proceedings to this court on the second Saturday in October next, and the parties or their solicitors are permitted to appear before the master at any time to be set by him to assist him in determining the questions involved.

PADUCAH & M. R. CO. v. PARKS. SAME v. FERRELL. SAME v. HASKINS. SAME v. HARRIS.

(*Supreme Court of Tennessee. May 5, 1888.*)

1. CORPORATIONS—CONDITIONAL SUBSCRIPTION TO STOCK—LIABILITY OF SUBSCRIBER.

Under subscriptions to railroad stock on the following terms: "One-fourth to be paid when the road is completed to a certain county line;" the remainder "to be paid in four equal installments, of four months, as the work progresses through the county, provided the company established a depot" at a certain point,—the erection of the depot is not a condition precedent to payment of the subscriptions; and an assignee of the subscription list may maintain an action thereon for a call maturing after the road is completed to the county line, and while work thereon is in progress, though, at the time the action is brought, work on the road has been abandoned, the depot has not been built, the railway company is insolvent, and its property and franchises have been sold.

2. SAME—ACTION FOR SUBSCRIPTION TO STOCK—WHEN MAINTAINABLE.

But such action cannot be maintained for an installment not maturing until after all work on the road has been abandoned.

3. SAME—ACTION ON STOCK SUBSCRIPTION—TENDER OF CERTIFICATES.

An action may be maintained on a subscription to railroad stock, without a previous tender of stock certificates, though the contract of subscription provides that "certificates of stock issue to said subscribers, as to other subscribers in said company, upon payment of their subscriptions."

4. LIMITATION OF ACTIONS—SET-OFF—WHEN BARRED.

The statute of limitations does not run against a set-off after an action is commenced, and such set-off is allowable, though not pleaded until after it would otherwise be barred, where it was not barred at the time the action was instituted.

Appeal from circuit court, Dyer county; THOMAS J. FLIPPIN, Judge.
Latta & Richardson, for appellants. H. Parks, Jr., and M. M. Neil, for appellees.

LURTON, J. These four suits at law, against subscribers of the stock of the Paducah & Memphis Railroad Company, were tried, by consent, together; and, a jury being waived, the issues of law and fact were submitted to the circuit judge, who has filed his special findings of fact and law as part of the record. There was a judgment in favor of each of the defendants, and an appeal by the plaintiffs. The contract of subscription upon which the suit was brought, was as follows: "JULY 31, 1872. We, the subscribers, agree and

bind ourselves, our heirs and legal representatives, to pay to the Paducah & Memphis R. R. Co. the sums by us subscribed to the stock in said railroad company upon the following terms and conditions, to-wit: One-fourth to be paid when the road is completed to the north or south line of Dyer county; the remainder of the amount subscribed to be paid in four equal installments, of four months, as the work progresses through the county, provided the company established a depot on said road within fifteen hundred feet of G. B. Tinsley's corner store, supposed to be the center of Newbern. It is further provided that certificates of stock issue to said subscribers, as to other stockholders in said company, upon payment of their subscriptions." The proof shows that there was a gap in the line of a road projected between Paducah, Ky., and Memphis, Tenn.; each end of the road being in operation, and owned by different companies. The new company was the result of the consolidation of the two old companies, and it undertook the completion of the missing link. Dyer county, of which Newbern is a flourishing village, would be crossed by the finished road. The assignment of errors is so defective as to raise no question of fact; but the second assignment is sufficient to raise a question of law. We have therefore treated the facts as found by the circuit judge as the facts of case, and will test the soundness of the result he reached by the law applicable. The facts necessary to be stated, as found by his honor, are as follows: That work was commenced on said unfinished part of the road early in 1872, and the Dyer county line was reached on the north in April, 1873, and on the 28th of that month it ran its train of cars into Trimble station, in said county. On the 15th May thereafter, the company made a call for one-fourth of the subscription, according to contract. "This call, together with the second and third calls, were likewise paid by each of defendants. The company did work on the road in Dyer county until the last of July or first of August, 1874, at which time it ceased operations and work of all sorts. The work principally done in Dyer county was between Dyersburgh and Trimble station. The road was mostly graded, or a great deal of it, from Trimble to Newbern, and between Newbern and Dyersburgh; and, in places, bridges were constructed, and cross-ties were collected in one or more places, to be placed on the road. The road was widened at the place where the depot now stands, (in Newbern,) as if for side track, but the company owned no property or land outside of the right of way upon which a depot could be located." He further held that the proof did not show any further preparations for the establishment of a depot at Newbern than the widening of the grade at that point, for side-track purposes. He further found that shortly after cessation of work, in August, 1874, that foreclosure proceedings were instituted by bond creditors, and the property and franchises of the corporation sold at public sale, and acquired by the C. & O. R. R. Co., and this company, being an entirely new, and independent organization, has since finished the projected road through Dyer county. That, to induce location of depot at Newbern, citizens of that place had been compelled to make a new contract with the successor company, who had assumed none of the contracts or liability of the old company. He further found that the old corporation was utterly insolvent at time it abandoned work, and that, at time of trial, it held no property, franchises, and practically no existence. The subscription list was accepted by the Paducah & Memphis Railroad Company, and on the 12th September, 1873, after payment of first call by subscribers, was assigned to Childs, Stevens & Co., contractors for work in Dyer county, and part payment of work done and to be done by them. The suit is by these assignees and contractors of the insolvent company. Three of the suits are for the fourth call, which matured in May, 1874, and before work had ceased; and the fourth defendant is sued alone upon the fifth and last call, which did not mature in point of time until September, 1874, which was after all efforts to complete the road had been abandoned.

The question is as to whether defendants are liable for any of the unpaid calls. His honor, the circuit judge, was of opinion that the construction of the road to the line of the county was a condition precedent to any liability, but that this condition had been met. He was further of opinion that the stipulation requiring the establishment of a depot at Newbern was an independent provision, and not a condition precedent to liability upon the contract of subscription. This latter provision he held required and meant the erection of a depot building, with reasonable facilities for freight and passengers. Upon these facts, and upon the contract as thus construed, the circuit judge held that, although the stipulation as to a depot was not a condition precedent, yet it was a part of the agreement of the corporation, which at some reasonable time it was bound to carry out, and that as it was now obvious that the utter insolvency of the company, and the sale of its property and franchises, had rendered the performance of this contract impossible, that it therefore followed that the defendants were released from liability upon their stock, both as to calls accruing before and after the abandonment of work upon the road. In this conclusion we think he erred. If it be conceded that the proviso concerning a depot at Newbern is not a condition precedent, as his honor does, then it must follow that a breach of an independent covenant will not discharge the other parts of the contract, but that the party damaged by such breach must rely upon his remedy at law for damages, or his remedy in equity by bill for a specific performance. Such breach will not defeat a right of action upon those parts of the contract not dependent upon it. Before such right of action for a breach of this covenant arose, the stock-list was assigned to creditors of the company, and hence such breach can not, as against such assignee, be set up to defeat or abate their legal right of recovery. If the construction of a depot had been made a condition precedent to the subscription, or to liability for calls upon stock, then it would devolve upon plaintiffs to show performance of such precedent condition; but, on the other hand, if they have not chosen to make responsibility depend upon performance of this stipulation, then, clearly, they must rely upon their independent remedy against the company. We agree with his honor that this proviso as to a depot was not a condition precedent, but a mere independent stipulation. The capital of stock companies consists of its stock subscriptions. This is the basis of credit, and an essential to organization. This is a trust fund for the benefit of creditors in case of insolvency. Conditioned subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely, and upon the faith that all stock is equally bound to contribute to the hazard of the enterprise. It misleads creditors, and is the fruitful source of litigation and disaster, tending to the ensnarement of creditors, and contrary to a sound public policy. Conditional subscriptions to corporate shares ought not to be encouraged. Their validity, however, is too firmly fixed by a long line of decisions to be now overturned. Yet the courts will not strain, where creditors are concerned, to convert independent covenants into conditions precedent. If a subscriber desire to make his liability depend upon the performance of some stipulations by the corporation, it is very easy for him to do so in express terms. In the case now under consideration, it is obvious that the subscribers did not intend to make the building of a depot at Newbern a condition upon which their liability should depend. They expressly provide that one-fourth of their subscription shall fall due when the line of the road was completed to the county line. Now, this was a condition precedent; but when it was complied with, the subscriptions became absolute, and one-fourth payable at once, and the remainder, as the work progressed through the county, in four installments, four months apart. Now, a depot at Newbern would be folly without a railroad in operation, and every installment might fall due by the lapse of time, and continued work within the county, before a depot would be of any practical value. The fact

that the first call became payable when the road reached the county line settles the meaning attached to this stipulation. The acts stipulated to be done, are to be done at different times. Hence they are independent of each other, and the remedy of the subscriber for breach of such stipulation is in damages. *Goldsborough v. Orr*, 8 Wheat. 217. The defendants have pressed upon us the case of *Railroad Co. v. Curtiss*, 80 N. Y. 219, 1 Amer. & Eng. Ry. Cas. 362, as sustaining the conclusions of the circuit judge. This case has been carefully examined, and we are of opinion that it in no way supports the contention of defendants. The contract in that case was one between subscribers, whereby they agreed to become subscribers to the stock of the railway company upon certain conditions. They did not, as held by the court in that case, become shareholders *in presenti*, but only pledged themselves to one another to thereafter subscribe, and upon condition that the road should be actually constructed by the Lake Shore Company through the town of Parma. The court held that the actual building of the road by the Lake Shore Company was a condition precedent, and that this condition had never been complied with. The case of *Railroad Co. v. Jones*, 2 Cold. 574, is likewise relied upon. It decides nothing that is in conflict with our view of this case. That case was an action by the company against a subscriber who had subscribed upon the express stipulation that his subscription should be void unless the road was constructed upon a certain line. The directors did locate the road upon the agreed line, but afterwards abandoned this line, and constructed the road upon a totally different line. This court properly held that, by the very terms of the subscription, it became void by this action of the company. The view we have taken as to the construction of this contract, and the effect of the insolvency of the company upon the stipulations as to a depot at Newbern, is supported by a number of well-considered cases in the courts of other states. *Berryman v. Trustees*, 14 Bush, 755; *Railroad Co. v. Winkler*, 29 Mo. 318; *McMillan v. Railroad Co.*, 15 B. Mon. 218; *Stewart v. Railroad Co.*, 24 Mich. 389; *Miller v. Railroad Co.*, 40 Pa. St. 237; *Chamberlain v. Railroad Co.*, 15 Ohio St. 225.

This brings us to the consideration of the question as to whether a suit for the last installment of these stock subscriptions can be now maintained. The subscription provided for the maturity of the calls subsequent to the first in the following language: "The remainder of the amount subscribed to be paid in four equal installments, of four months, as the work on the road progresses through the county." The work was progressing at the time the second, third, and fourth calls were made, and there can be no doubt but that they were rightfully called and properly demanded. But, when the last installment was called, all work had been abandoned, and has never since been renewed. We are of opinion that this last installment has never matured. The requirement that the calls subsequent to the first should be made in equal installments, "as the work progressed through the county," is a condition precedent to the maturity of each installment, and the abandonment of the work before it was finished, and before, in point of time, the last call could have been made if the work had been carried on in good faith, defeats the action for this installment. No right to call for or sue upon this installment exists, by reason of the failure of the company to show that the road was finished, or work going on within the county, at the time it was demanded.

The objection is made by defendants that these suits cannot be maintained, because no tender of stock certificates has been made. This assignment of error is not tenable. This is not a case of the purchase of stock certificates as negotiable securities. The tender in such a case might be necessary to maintain suit for the price; but no tender is necessary to maintain suit upon an ordinary subscription for stock. 1 Mor. Priv. Corp. (2d Ed.) §§ 61, 148.

The set-off relied upon by the defendant Ferrell in the suit against him was improperly disallowed; the court holding "that there was no proof that de-

fendant filed or relied upon said account as a set-off in that case until it was barred by the statute of limitations." This suit was begun before a magistrate, and no formal plea of set-off was necessary there, or upon trial of appeal in circuit court. He did in fact rely upon and prove that the company was in fact indebted to him by account for lumber used in construction at the time they assigned his subscription to plaintiffs. This account was not barred at time suit was instituted against him upon his subscription, and the statute did not thereafter run against his set-off. *Williams v. Lenoir*, 8 Baxt. 395.

Upon this plea of set-off, the judgment in favor of Ferrell (though placed by his honor upon another ground) must be affirmed. The judgment against Haskins must also be affirmed, as he is alone sued upon the last installment, having paid all the other. The costs of both these cases in the court below, and one-half the costs of this court, will be paid by appellants. The judgment in favor of Parks and Harris must be reversed, and judgment rendered here for the fourth call, with interest and costs in each of the cases against them, and one-half the costs of this appeal.

FOGARTY *et al.* v. STACK *et al.*

(*Supreme Court of Tennessee. May 17, 1888.*)

HUSBAND AND WIFE—CONVEYANCES BETWEEN—CONSTRUCTION OF DEED.

Under a deed from a husband to his wife of a certain lot, to the party of the second part, and her heirs, in fee-simple, forever; to have and to hold said lot for the sole use and benefit of said second party, free from the control of her husband, with power to sell, and by deed jointly with her husband convey, the said lot, and vest the proceeds in other property, to be held for the same sole use; and providing that, "should said second party die in the life-time of said first party, then said lot of land is to revert to him in fee-simple,"—on the death of the wife without having disposed of the lot, the husband is entitled thereto as against the wife's heirs, though a subsequent clause in the deed repeats, "to have and to hold the above-described land * * * unto the party of the second part, and her heirs, forever."

Appeal from chancery court, Shelby county, W. W. McDOWELL, Chancellor.

Weatherford & Estes, for appellants. *Metcalf & Walker*, for appellees.

FOLKES, J. The only question in this case is as to the proper construction of a deed made by defendant Ed Stack to his wife, Margaret. The language of the deed is as follows, (so much of it as is necessary to be quoted:) "Hath given, granted, bargained, sold, and conveyed, and by these presents, doth give, bargain, grant, sell, and convey, unto the party of the second part, and her heirs, in fee-simple, forever, a certain lot," etc., (describing it;) "to have and to hold said lot of land for the sole and separate use and benefit of the said second party, free from the debts, liabilities, and control of present or any future husband, with power to sell, and by deed made and executed jointly with her husband, convey the said lot of land, and vest the proceeds in other property, to be held for the same sole and separate use as the property herein conveyed. Should said second party die in the life-time of said first party, then said lot of land is to revert to him in fee-simple;" "to have and to hold the above-described land and premises, together with all and singular the rights and privileges; building, improvements, and appurtenances, of, in, or to the same belonging, or in anywise appertaining, unto the party of the second part, and her heirs, forever." The wife died, without issue, and without having disposed of the property, leaving the husband surviving. Nieces and nephews of the wife, as her heirs at law, now file this bill to recover the property from the husband.

It is insisted for the complainants that the language, "her heirs, in fee-simple, forever," cannot be controlled by the reservation or provision for the property to revert to the grantor, contained in the first *habendum*, (there

being, as is noticed, two *habendums*,) as provision in the *habendum* repugnant to the estate before granted being void. We may concede all that is contended for as to this rule of construction of common law, and it is sufficient answer thereto to say that the rules of the common law, which looked at the granting clause, and the *habendum* and *tenendum* as separate and independent portions of the deed, each with its particular functions and office, have long since become obsolete in this country, and certainly in this state. The true rule is to look to the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties, and not to permit antique technicalities to override such intentions. This is so not only by legislation, but by adjudication. Sections 2812, 2820, Mill. & V. Code; 3 Washb. Real Prop. p. 468, § 61; *Beecher v. Hicks*, 7 Lea, 212; *Hanks v. Folsom*, 11 Lea, 560,—in both of which cases Judge COOPER has presented the adjudged cases with his usual fullness of research, so that further discussion would seem worse than needless. While the rule is that where an estate is given in fee or for life, with an unrestricted power of disposition, a limitation over is void, still, even under this rule, it is manifest that Mrs. Stack did not take an absolute estate of inheritance. She had only a qualified power of sale, to exercise only during her husband's life, and with his consent expressed by joining in the deed, and limited as to purpose, also; being for reinvestment only. *Deadrick v. Armour*, 10 Humph. 596; *McGarock v. Pugsley*, 12 Heisk. 689. It is clear that the husband is entitled to the property upon the death of the wife. Such is manifestly the intention of the parties, and we can reach such intention without contravening any rules of law. The wife had not an absolute but only a conditional fee, liable to be defeated by her death before her husband with the property undisposed of. There is nothing in *Pooley v. Webb*, 3 Cold. 599, contrary to the conclusions here reached. Let the decree of the chancellor be affirmed.

CREATH v. CREATH *et al.*

(Supreme Court of Tennessee. May 26, 1883.)

HUSBAND AND WIFE — JOINDER OF WIFE IN DEED OF TRUST — NOT A SURETY AS TO DEBTS SECURED.

Where a wife released her right of dower and homestead by uniting in a deed of trust executed by her husband upon his lands and crops, to secure his creditors, and the husband sold some of the crops at private sale, and, with the assent of the secured creditors, applied the proceeds to the payment of unsecured debts, she cannot maintain a bill to charge the creditors with the proceeds of such sales, on the ground that she became a surety for her husband, as regards her dower and homestead, as she does not occupy the position of a surety, having conveyed no property, but merely waived a contingent right.

Appeal from chancery court, Sheeley county; H. T. ELLETT, Chancellor.

Poston & Poston and *R. D. Jordan*, for complainant. *W. D. Beard*, for defendants.

FOLKES, J. The question presented for adjudication in this case grew out of the following facts, briefly stated: The complainant, for the purpose of releasing dower and homestead, joined with her husband in the execution of certain trust deeds, made by him to secure creditors, upon lands, and upon crops of corn and cotton. The proceeds of crops realized from private sales were applied by the debtor, with the consent of the secured creditors, to the payment of unsecured debts, leaving a large debt due the secured creditors, for which they were about to have the real estate embraced in the trust deed sold under the terms thereof, when the bill in this cause was filed by the wife of the grantor, claiming that she stood in the position of surety for her husband, as to her right of dower and homestead, and that the creditors should be charged with the amount of proceeds of sales of crops, so far as her rights

are concerned. Can such contention be sustained? We think not. The wife has not an estate in homestead during the life of her husband, but a mere right of occupancy, or a right to have the same exempted from her husband's debts, except where she unites in the conveyance with privity examination. But by uniting she does not convey an estate of which she is seized, but merely consents that her husband may convey his estate, so as to waive her right to an exemption which under our law inures to her benefit. See *Parr v. Fumbanks*, 11 Lea, 398. There is nothing decided in *Jarman v. Jarman*, 4 Lea, 671, at variance with this. The language relied on as *contra* was used *arguendo*, and was unnecessary to the point adjudged. Under the language of the constitution (article 11, § 2) and under the statute (section 2935, Mill. & V. Code) homestead is treated as an exemption only. The same language is substantially used as to homestead that is employed in relation to exemption of personality. See sections 2931, 2934. The only substantial difference is that the husband cannot alien the one without the wife joining, as is said in *Howe v. Adams*, 28 Vt. 541. The homestead law does not vest any title in the wife as to homestead during the life of her husband; it is, at most, but a negative which she has on the conveyance by the husband. To the same effect is *Gee v. Moore*, 14 Cal. 472, and *Jenness v. Cutler*, 12 Kan. 500; in both of which states the provisions as to homestead are nearly identical with our own. In the last case the question was whether the wife, by uniting in the husband's conveyance or trust deed upon homestead, became surety in the sense involved here, and it was held, as we now hold, that she occupied no such relation. It is equally true that as to her right to dower she occupies no position of surety for her husband. Up to the death of the husband, the right of the wife to dower is a mere possibility. The case is put by the complainant's counsel apparently upon the same ground that the wife would occupy had she mortgaged her own property. The difference between the case at bar and as put is too obvious to need argument to establish. What interest had she in the crops that were by her husband, in his life-time, applied to the payment of his debts, unsecured though they were, the second creditor consenting? None. She had waived her contingent right of dower, but had conveyed no property or estate, as she had none in the real estate of her husband, during his life, which was capable of being mortgaged or pledged by her for the payment of debts; her joining in trust deed operating only by way of release or extinguishment of her future contingent claim. *Hawley v. Bradford*, 9 Paige, 199; *Moore v. Mayor, etc.*, 8 N. Y. 110; and see *Dawson v. Bank*, 6 Ch. Div. 218, where this question is learnedly discussed by JESSEL, M. R., and COTTON and JAMES, L. J., and same conclusion reached as here; reversing the decision of BACON, V. C., 4 Ch. Div. 369, to the contrary. See, also, 2 Jones, Mortg. § 1693. The widow here is entitled only to be endowed out of the surplus after the payment of the mortgage debts. *Gwynne v. Estes*, 14 Lea, 662. The matters of fact and of account presented upon the other questions argued at the bar having been correctly determined by the chancellor, who took the view of the law here stated, the decree below will be in all things affirmed.

OTIS v. PAYNE et al.

(Supreme Court of Tennessee. May 28, 1888.)

1. SPECIFIC PERFORMANCE—REQUISITES OF CONTRACT—NEGOTIATIONS BY MAIL.

Plaintiff, desiring to purchase a tract of land owned by defendant, wrote to inquire the lowest price defendant would take upon terms named, and, in due course of mail, received a reply fixing the price; whereupon plaintiff, by mail, accepted the proposition. After defendant received the letter of acceptance, he agreed to sell the land to another party, and refused to comply with his offer to plaintiff. Held, that the letters constituted a complete contract for the sale of the land in compliance with the statute of frauds, and equity would compel its specific performance.

2. VENDOR AND VENDEE—BONA FIDE PURCHASERS—WHO ARE.

The person to whom defendant sold the land did not receive the deed, and pay the purchase money, until after he had full knowledge of plaintiff's rights. He was not, therefore, an innocent purchaser, entitled to the protection of equity.

Appeal from chancery court, Shelby county; H. T. ELLETT, Chancellor.

Bill in chancery by A. Walker Otis against Benjamin M. Payne to compel the specific performance of a contract to convey real estate. W. B. Bates, coming in by petition, claimed the land under purchase from Payne, and was made a party defendant. From a decree granting the relief prayed for both defendants appealed.

Craft & Craft, Frayser & Scruggs, and F. T. Edmonson, for appellant Payne. M. B. Trezevant, for appellee.

CALDWELL, J. This is a bill by the vendee against the vendor to compel the specific performance of an alleged contract for the sale and purchase of a small, five-acre tract of land. Defendant denies that he ever made a contract, in writing or otherwise, to sell the land to complainant. The chancellor granted the relief sought in the bill, and from his decree the defendant has appealed. The facts of the case are few and brief. Payne, the defendant, was a citizen of South Abington, Mass. He owned the land in question, and desired to sell it. It was situated near Memphis, Tenn. Otis, the complainant, lived at Memphis, and knew the land and its ownership. On the 18th of March, 1887, he wrote to Payne, stating that he desired to purchase the land, and asking Payne to give him the lowest price he would take for it, "payable one-third cash, one-third in one year, and one-third in two years, with interest at six per cent. per year." Three days later, on the 21st of March, Payne acknowledged the receipt of this letter, and, in reply, wrote Otis that he would sell the land for \$2,500, on the terms mentioned by Otis. In due course of mail, this reply was received by Otis, who promptly, on the 25th of the same month, wrote to Payne accepting his proposition unconditionally and without modification. This letter of acceptance was mailed at Memphis the same day on which it was written. Four days thereafter, on the 29th of March, Payne wrote Otis as follows: "Yours of 25th at hand. In reply, would say that I have sold the property to another person for cash."

This correspondence constitutes all that passed between these parties. Does it make such a contract as a court of equity will enforce by a decree for specific performance? We think it does clearly. Payne's first letter contains a clear and definite offer to sell a particular piece of property for a certain sum and on specific terms. The second letter of Otis was an immediate and unqualified acceptance of that offer. Thus the minds of the parties came together, and the contract was complete, the same as if they had met face to face, and used the same language. Payne's letter was a continuing offer until received, and for a reasonable time thereafter. It was not binding on him until accepted, and before that he might have withdrawn it at any moment. But when Otis accepted it, and mailed his letter announcing the fact, he at once became entitled to all the benefits of his bargain. The mailing of the acceptance, properly addressed and stamped, and not the reception of it by Payne, completed the contract, and, after the acceptance was so mailed, it was then too late for Payne to recede from his proposition, and sell the land to a different person. *Taylor v. Insurance Co.*, 9 How. 390; 1 Pars. Cont. 483, 484. The first letter of Otis gave a description of the land, and its location. With this letter of Otis the first letter of Payne connected itself by date and other references. In legal contemplation, the two are parts of the same instrument, and, being so regarded, they constitute a sufficient note or memorandum under the statute of frauds; and, when the offer was accepted, the contract became binding upon both parties, and capable of enforcement at the suit of either. *Mill & V. Code*, § 2423, subsec. 5; *Blair v. Snodgrass*,

1 Sneed, 26; *Sheld v. Stamps*, 2 Sneed, 173; *Lee v. Cherry*, 1 Pickle, 707, 4 S. W. Rep. 835. Where the complainant shows a contract in writing, signed by the party to be charged, certain in its terms, fair and just in its provisions, for a valuable consideration, and capable of being enforced without hardship upon vendor, such a contract will always be enforced in a court of equity, though a specific performance is an equitable remedy, depending upon its enforcement entirely upon the sound judicial discretion of the court, and never being allowed as a matter of absolute right. 3 Pom. Eq. Jur. § 1404. *Howard v. Moore*, 4 Sneed, 322; *Blair v. Snodgrass*, 1 Sneed, 25. What we term the other aspect of this case, and that which is yet to be stated, cannot change the result.

The other person to whom Payne referred in his second letter, and to whom he did in fact contract to sell the land, as therein stated, was W. B. Gates, also of Memphis. There had been some correspondence between Payne and Gates about the same property sold to Otis, on the 28th of March, 1887, which was three days after Otis had mailed his letter accepting Payne's offer to him; and after Payne had received that letter, as we infer, Payne telegraphed Gates: "I received offer to-day \$2,500, partly on time. Will you pay that much down?" The next day Gates answered: "Your offer by telegram accepted. I will write particulars." And on the same day Payne wrote Otis, as has already been seen, that the sale had been made "to another person." After this bill was filed by Otis against Payne, and after both Payne and Gates were advised of its pendency, and had conferred with each other about it, the contract between them was deliberately consummated by the execution of a deed of conveyance on the one side, and the payment of the purchase money on the other side. When that had been done, Gates, upon his own motion, was permitted to become a party defendant to the bill of Otis. He filed an answer in which he insisted on the superiority of his purchase, and in that way sought to defeat this action. In support of his answer, he established the facts of his purchase as herein just detailed, and also the further fact that he had no knowledge of the negotiations or trade with Otis until this bill was filed. The chancellor was of opinion that the rights of Otis were superior to those of Gates, and decreed accordingly. Gates joined Payne in the appeal, and insists upon a reversal. The decree is right. We have already seen that the contract of sale to Otis was completed on the 25th of March, when he mailed his letter accepting Payne's offer to him, and that this was three days before Payne made his offer to Gates, on the 28th of March, and four days before Payne and Gates reached an agreement, on the 29th of March. That Gates had no notice of the sale to Otis when he made his contract can be of no avail to him, when it is shown, and admitted by him, that he did have notice of the fact, and of the pendency of this bill, before he completed his purchase by the payment of the purchase money. Not only is it shown that Gates knew of the contract of Otis, and of the pendency of this bill, when he paid the consideration, and accepted the deed, but it is further established that Payne offered to release him from his contract after the bill was filed. In view of these facts, it is needless to say that Gates is not entitled to the consideration and protection usually given by the courts to an innocent purchaser. In fact, he did not interpose the plea of innocent purchaser. In the absence of such a defense, and proof to sustain it, the contract of Otis is superior to that of Gates, and should prevail in this cause, being first in point of time.

Let the decree be affirmed. The costs below will be paid as adjudged by the chancellor, and the costs of this court will be paid by the appellants.

OLD FOLKS SOCIETY OF SHELBY COUNTY v. MILLARD *et al.*

(Supreme Court of Tennessee. May 29, 1888.)

HUSBAND AND WIFE—DECREE IN SUIT BETWEEN—IMPEACHMENT FOR FRAUD.

The recitals in a decree in a suit between husband and wife, in which there was no real litigation, and which had the effect to declare a resulting trust in her favor, and to divest her husband of title to lands, are *prima facie* evidence of the facts stated therein, and the burden of proof is upon the creditors of the husband, who attack the decree for fraud, to overcome the effect of such recitals by proof.

Appeal from chancery court, Shelby county; B. M. ESTES, Chancellor.
Smith & Collier, for appellant. *Harris & Turley*, for appellees.

LURTON, J. A decree in a suit between husband and wife alone, based upon a decree *pro confesso* against the husband, there being no proof and no real litigation establishing a resulting trust in her favor in lands of her husband, and divesting title out of him and vesting same in her, is not such a judicial proceeding as to conclude existing creditors of the husband. *Humes v. Scruggs*, 94 U. S. 22; *Bank v. Hodges*, 12 Ala. 118; *Hix v. Gosling*, 1 Lea, 561. Such decree is, however, entitled to some weight and consideration, as a deed from husband to wife, reciting a valuable consideration, and not appearing to be a voluntary conveyance. If such a decree is attacked by creditors for fraud, the recital of the considerations upon which it was based, like similar recitals in a deed, are to be taken as *prima facie* true, and the burden of disproving them is upon the creditor. Contradictory recitals or slight proof, according to circumstances, may be sufficient to shift the burden. Bump, Fraud. Conv. (2d Ed.) 575, and authorities cited. There is no sufficient proof in this case to overcome the presumption of good faith and a sufficient consideration, and the decree of the chancellor is affirmed.

BIGGS *et al.* v. PIPER *et al.*

(Supreme Court of Tennessee. May 5, 1888.)

1. LANDLORD AND TENANT—RIGHT OF LANDLORD AGAINST PURCHASER OF CROP—ASSIGNEE OF NOTE FOR RENT.

Under Code Tenn. § 4283, providing that "the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property, so that it does not exceed the amount of the rent and damages," the transferee of a note given for rent may maintain an action against the purchaser of the crop for its value, to the extent of the unpaid rent,—the purchase having been made within three months of the maturity of the rent; and this, independently of sections 4280-4283, providing for a lien on the crop for rent, to continue three months after the debt becomes due, and to be enforced by attachment or judgment at law.

2. SAME—ACTION BY ASSIGNEE OF NOTE FOR RENT AGAINST PURCHASER OF CROP—EVIDENCE.

In an action, under Code Tenn. § 4283, by the assignee of a note given for rent, against one purchasing the crop within three months of the maturity of the rent, to recover the value of such crop, parol evidence of the true date of the note is admissible.

Error from circuit court, Shelby county; L. H. ESTES, Judge.
Albert Suggs, for plaintiffs in error. *B. M. Estes*, for defendants in error.

FOLKES, J. This case presents for our consideration the question whether the transferee of a note given by a tenant to his landlord for rent of land can maintain an action against the purchaser of the crops for the value of so much of the crop purchased from the tenant as does not exceed the value of the rent due; the purchase being made within three months of maturity of rent. In the argument of counsel, much stress is placed upon our statutes giving lien on crops for rents due, whether evidenced by note, account, or otherwise; and it is contended that this lien does not pass to the assignee of the note or account. The view we have taken of the case does not render it necessary for

us to determine whether the statutory landlord's lien passes, by assignment of the claim for rent, to a third party or not. The right of the plaintiffs below to maintain this action is given by the act 1879, c. 72, carried into Mill. & V. Code at section 4283, which is as follows: "And the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property, so that it does not exceed the amount of the rent and damages." It is manifest that the lien of the landlord, as given in section 4280, to continue for three months after the debt becomes due, and until the termination of any suit commenced within that time for such rent, as enacted in section 4281, to be enforced by attachment, or by judgment at law against the tenant, as provided in section 4282, is a thing apart from the remedy by suit against the party who purchases a crop from a tenant who has not paid his rent. Thus in *Richardson v. Blakemore*, 11 Lea, 290, it has been held that, under section 4283, a suit by the landlord may be maintained against a purchaser of the crop, or any part thereof, from the tenant, before any recovery of judgment against the tenant, or before the rent is due; and, again, at the present term, in the case of *Davis v. Wilson*, ante, 151, we have held that, under this section of the Code, the landlord might sue the purchaser of the crop for the value of the property, after the expiration of three months from the maturity of the debt for rent, where the sale was made within the three months. From which it is clear that the right of action against the purchaser is not dependent upon the lien, but is an independent and substantive cause of action given by statute against the purchaser of crops from a tenant who has not paid his rent.

The inquiry remains, to whom is this remedy given? Is it confined to the landlord alone, or is it possessed by the assignee of the landlord? The answer need not be sought in any refinements of construction nor astuteness of reasoning. It is settled by the plain, unambiguous, and comprehensive language of the statute itself, as already above quoted. "The person entitled to the rent" may recover, etc., says the statute. If it had been the purpose of the legislature to furnish this extraordinary remedy to the landlord alone, it would have been very easy to have limited it to him by proper terms. It is said that the remedy thus extended is likely to result often in hardship to innocent purchasers, since the act of 1879, dispensing with notice of unpaid rent, as was required under Acts 1857-1858, c. 52, § 3, when this remedy against purchasers was first given. With the hardship or wisdom of the act we are not concerned. Our duty is to expound it, and declare the expressed intention of the legislature. There is no error in the action of the circuit court in holding that the assignee of the rent note could maintain his action against the party purchasing, within three months from maturity of rent, from the tenant, for the value of the crop so purchased, to the extent of the unpaid rent. Nor was it error to permit parol proof of the true date of the rent note, which was offered as evidence of unpaid rent. 2 Whart. Ev. § 920-923, 976, 977. Let the judgment be affirmed, with costs.

FELAND v. MORTON, County Judge.

(Court of Appeals of Kentucky. June 9, 1888.)

COUNTIES—INTEREST COUPONS ISSUED IN AID OF RAILROADS—POWER OF COUNTY JUDGE.

A county judge has authority, under act Ky. Feb. 24, 1868, authorizing subscriptions in aid of a certain railroad company, to cause a levy and collection of a tax for the payment of interest coupons, without associating with him the justices of the peace of the county, who, together with him, constitute a court of claims, under Gen. St. Ky. art. 17, § 1, to make the county levy, appropriate money, and transact other financial business of the county, because the appropriation for the payment of interest on such bonds is already made by the act of 1868, and the duty imposed by it on the county court, to cause the levy and collection of a tax therefor, is merely immaterial, and does not pertain to the court of claims.

Appeal from circuit court, Muhlenburgh county.

John Feland, for appellant. *Thos. W. Brown*, for appellee.

PRYOR, C. J. The bonds of Muhlenburgh county were issued in payment of its subscription of \$400,000 to the capital stock of the Paducah & Elizabethtown Railroad Company. The appellant, John Feland, being the owner of certain coupons attached to those bonds, which evidence the semi-annual interest that had accrued on them, filed this petition in the Muhlenburgh circuit court against the appellee, John H. Morton, the county judge of that county, for the purpose of compelling him to cause to be levied and collected from the property of the county a sum sufficient to satisfy the amount of the coupons, with the interest. The act under which the subscription to the stock of the corporation was made, was approved on the 24th of February, in the year 1868; and that section of the charter under which the appellant's right to the *mandamus* is asserted, reads as follows: "That in case any county, city, town, or election district shall subscribe to the capital stock of the said Elizabethtown & Paducah Railroad Company under the provisions of this act, and issue bonds for the payment of such subscription, it shall be the duty of the county court of such county, the city council of such city, and the trustees of such town, to cause to be levied and collected a tax sufficient to pay the semi-annual interest on the bonds issued, and the cost of collecting such tax, and paying the interest, on all the real estate and personal property in said county, city, or town subject to taxation under the revenue laws of the state, including the amounts owned by residents of such county, city, or town, or election districts which ought to be given in under the equalization laws." A demurrer was filed to this petition of the plaintiff, and sustained by the court below; the principal ground being that the county judge had no authority to impose the levy, or have the collection made. All the facts necessary to the relief sought, have been alleged; and, if the county judge has the power to enforce the collection, the demurrer should have been overruled.

It is insisted by learned counsel for the appellee that the justices of the peace of the county must be associated with the county judge when levying this tax, as provided by article 17, § 1, Gen. St., that provides: "The county judge of each county shall hold the county court on the days prescribed by law; but at the court of claims, which shall be held once in each year, the justices of the peace of the county shall be associated with him, and constitute the court; a majority of whom shall constitute a quorum for the transaction of business, which shall be confined to laying the county levy, appropriating money, and transacting other financial business of the county." The power to thus legislate with reference to the county court is derived from section 29 of article 4 of the constitution, that provides: "The general assembly may at any time abolish the office of associate judges, whenever it shall be deemed expedient, in which event they may associate with said court any or all of the justices of the peace for the transaction of business." Section 37 of the same article also provides: "The general assembly may provide by law that the justices of the peace in each county shall sit at the court of claims, and assist in laying the county levy and making appropriations only." The office of associate judge has long since been abolished, and the justices, under proper legislation, have been associated with the county judge when laying the county levy, and making appropriations by the county; and in all matters affecting the financial interests of the county, such as making appropriations, and laying the county levy for the payment of such allowances or indebtedness as the county court, by virtue of the general power conferred upon it, has the authority to make or create, it has been universally held by this court that the justices of the peace must act in conjunction with the county judge in order to make the appropriation or levy valid. But, on the other hand, when the county becomes a stockholder in a corporation, and makes an unconditional subscription under legislative authority, it will be treated as all other stock-

holders; and, if the collection and levy for the payment of the stock is imperative, this court will not stop to inquire whether the levy has been made by the county court composed only of the presiding judge, or the justices associated with him. No discretion as to the appropriation of the money or the creation of the debt is with the county judge or the justices in this case; and, whatever may be the financial condition of the county, it is no response to the creditor, after the debt has been incurred, to say that it is now inconvenient to meet the obligation by reason of an empty treasury, or the inability of the county to pay the indebtedness. The ordinary test must be applied; that is, a sale of the property of the tax-payer to discharge the liability. The act here is mandatory, requiring the county court to discharge a plain ministerial duty, in regard to which it has no discretion. No appropriation has to be made by the county judge, or the justices associated with him. The appropriation has already been made, and forms no part of that indebtedness that ordinarily pertains to the court of claims; and, if any justice of the peace within the county had been seated with the county judge when this application was made, they had no power to refuse to make the levy. It is said, however, that the coupons might be forgeries, and therefore a discretion would exist with the justices for that reason. This argument would apply to the exercise of every ministerial act, however imperative the command to do the act might be, and is no answer to the claim for relief in this case. There is no such defense made, or any denial as to the validity of the claim other than the power of the county judge, when sitting as a court, to enforce the collection of the subscription made. These questions have been in effect decided in the cases of *Railroad Co. v. Warren Co.*, 10 Bush, 711; *Logan Co. v. Caldwell*, and *Cook v. Lyon Co.*¹ See, also, case of *Meriwether v. Muhlenburg Co. Court*, 120 U. S. 354, 7 Sup. Ct. Rep. 563, opinion by Mr. Justice HARLAN.

The judgment sustaining the demurrer is reversed, and remanded for proceedings consistent with this opinion.

ASHER v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky. June 16, 1888.)

1. EMINENT DOMAIN—COMPENSATION—WHEN MADE.

Under Const. Ky. art. 18, § 14, providing that "no man's property shall be taken or applied to public use without just compensation being previously made to him," a railroad company cannot obtain a writ of possession while an appeal from the verdict of the jury, awarding damages for land sought to be condemned, is still pending, by giving its bond, but such damages must first be paid in money before the owner can be deprived of his land.

2. SAME—ASCERTAINING DAMAGES—INJURY TO ADJOINING LANDS.

Act Ky. April 11, 1882, providing that, in the condemnation of land by a railroad company, the value of the land and material taken must be awarded separately from any damages that may result to the adjacent lands of the owner, does not require that the value of land taken from a small tract upon which the dwelling, barns, orchard, etc., of the owner stand, be awarded separately from the damages to the adjacent land in the same tract, resulting from the injury to the dwelling, barns, etc.

Appeal from circuit court, Bell county.

Proceedings by the Louisville & Nashville Railroad Company to condemn a strip of the land of N. B. Asher.

Thomas H. Hines and W. N. Beckner, for appellant. Wm. Lindsay, John H. Wilson, and D. K. Rawlings, for appellee.

PRYOR, C. J. The appellee, the Louisville & Nashville Railroad Company, in the construction of the Cumberland Valley Branch of its road, in the

¹Logan v. Caldwell, (1880,) and Cook v. Lyon Co., (1884,) are cited in *Meriwether v. Muhlenburg Co. Court*, 7 Sup. Ct. Rep. 568, but are not reported.

county of Bell, found it necessary to condemn a strip of the appellant's land for that purpose. The questions presented here arise out of the proceeding to condemn under the act of April 11, 1882. The award of the commissioners not being satisfactory to the parties, exceptions were filed in the county court, and a jury impaneled to fix the value of the land taken, and assess the damages; and from the verdict of the jury an appeal was prosecuted to the circuit court by the railroad company, that is now pending and undetermined. When the appeal was taken, the company executed its bond, that was approved by the county court, in double the amount of the damages assessed, in order to obtain the right of entry for the purposes of construction, and obtained in the circuit court its writ of possession. From the judgment awarding the writ the appellant, Asher, (the owner of the land,) has appealed, insisting that he is entitled to his compensation by the payment in money of the damages awarded before he can be deprived of his land.

This court, in the case of *Railway Co. v. Piel*, ante, 449, (decided at the present term,) held that section 14 of article 13 of the bill of rights required that, in the taking of private property for public use, just compensation must be previously made the owner by the payment in money of the value of his property before the writ of possession can issue; and it follows, therefore, that this judgment must be reversed, with directions to set aside the order granting the writ. Other questions have been made in the case as to the constitutional rights of the owner, as well as the rights of the corporation, on the return of the case.

The land condemned is a part of a small tract on which stands the dwelling of the appellant, his out-houses, and other improvements, with the line of the road running in close proximity to his dwelling. The act of April, 1882, makes it the duty of the commissioners to award to the owner the value of the land or material taken, separately from the damages, if any, resulting to the adjacent lands of the owner; "but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed." Gen. St. 282. On the trial of the case, the court told the jury that, in estimating the damages, they should take into consideration the location of the defendant's dwelling-house, orchard, barns, well, etc., and the damage to the same resulting from the construction of the appellee's road, and in another instruction told the jury that the benefits and advantages, if any, to the adjacent land by the construction of the road, should be deducted from such damages. The jury, under these instructions, fixed the value of the land taken at \$600, and the damages to the adjacent land, including dwelling-house, barn, orchard, etc., at \$2,543.75. They also said that the owner would receive no advantage or benefits from the operation of the appellee's road. The corporation asks that, on the return of the case, it be allowed to pay the \$600, the value of the land condemned, and enter into the possession, insisting that this court must assume that the \$2,543.75 was for the incidental damages sustained. The instructions given by the court below, as well as the verdict rendered, show that such damages must have been for the diminished value of the property from the injury that would result to the dwelling, barn, orchard, etc., from the construction of the road, and therefore should have entered into and formed a part of the just compensation to which the appellant was entitled for the taking. It was error to tell the jury that the damage to the dwelling, barn, etc., should be lessened by reason of the benefits, if any, received by the owner from the construction of the road; and if the incidental damages mentioned in the statute is made up of the diminution in value of the adjacent land in the same tract, or the injury to the dwellings thereon, it must be held to be in violation of the constitutional rights of the appellant. The benefits received by the owner can in no instance reduce the value of the land or material

taken, or lessen the actual and direct damage resulting from the act by which the owner is deprived of his property, and the title vested in the corporation. It is manifest, in this case, that the jury, by their verdict, gave to the appellant what they conceived to be the value of the property actually taken, and regarded the damage to the dwelling, barn, etc., as merely incidental, when it was in fact a part of the compensation to which appellant was entitled, and subject to no set-off whatever in the way of benefits, and therefore this court cannot authorize an entry by the corporation upon the payment of the \$600. The doctrine with reference to the right of entry, and particularly the question of compensation, differs widely in many of the states from the decisions of this court. We have been unable to find a more just criterion for compensation than is in the case of *Railroad Co. v. Helm's Heirs*, 8 Bush, 681. It is difficult to define every character of damage that is direct, and that naturally results from the act of appropriation, and still more difficult to define the meaning of the words "incidental damage," as used in the statute. The rule in the case cited is, to ascertain, in a case like this, a part of the land being taken, "first, the value of the entire tract of land, excluding the enhancement resulting from the improvement, then what will be its value after the appropriation of such part of it as may be proposed to be taken. The difference in value, thus found, (still excluding this enhancement,) is the true compensation to which the owner is entitled." How much less is the land worth after the taking than before the taking? This constitutes the true estimate. The value is not reached by determining the value of the strip taken for actual use, but its value when considered in its relation to the entire tract, which includes the actual injury to the dwellings and improvements, and every direct damage tending to diminish in value the entire tract by reason of the use and appropriation of the strip for the purpose contemplated, all of which enters into the estimate of compensation, and must be paid for before entry. The diminution in value of the entire tract is as much a taking, within the meaning of the constitution, as the land upon which the road-bed lies. The owner must be placed in the same condition, in a pecuniary point of view, that he would be if the land was not condemned. When the owner is thus compensated for his property, the corporation becomes invested with title to the actual boundary of that part of the land condemned, and the ordinary inconvenience and damage that results from a prudent operation of the road may be set off by the benefits and advantages, if any, that may reasonably be anticipated from the construction and operation of the improvement. Such is the language used by this court in the case of *Helm's Heirs*, and no such meaning can be attached to that decision as gives to the corporation the right to set off the value of benefits to the owner against the diminished value of the adjacent land forming a part of the same tract, caused by the construction of the road. Judgment reversed, and remanded for proceedings consistent with this opinion.

BANK OF COMMERCE v. PAYNE *et al.*

(Court of Appeals of Kentucky. December 17, 1887.)

1. FRAUDULENT CONVEYANCES — ASSIGNMENT FOR BENEFIT OF CREDITORS — PROOF OF FRAUD.

Defendants, commission merchants, disposed of a large amount of goods for their own benefit, on which they had given warehouse receipts as collateral security for money borrowed, and, when the debts were due, procured an extension for the ostensible purpose of enabling them to sell; and, during the consideration by the creditors of a proposition to make a composition settlement, left their place of business to prevent inquiry as to the condition of the business, and afterwards assigned and left the county. *Held*, that the assignment was a scheme to obtain an advantageous settlement, and evade the penalty of the criminal law, and therefore fraudulent and void, and not affected by the facts that it made a ratable distribution of the property, and the assignees and creditors were free from fraud. *PRYOR, C. J.*, dissenting.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—ATTACHMENT BEFORE QUALIFICATION OF ASSIGNEE.

An assignment for the benefit of creditors was not defeated, or the lien thereof affected, because a creditor sued out an attachment, and served a garnishee process on the assignee before the latter had given bond, and taken the oath for the faithful performance of his duties, as required by Gen. St. Ky. c. 109, § 1; as a trust will not be allowed to fail for want of a trustee. And the same was true where the assignee was an incorporated trust company, with a provision in its charter that in such cases its capital should be the only security required, unless requested by the parties, or required by the court.

3. SAME—ACTION TO SET ASIDE FOR FRAUD—ESTOPPEL.

Where plaintiff bank sent its president to a meeting of defendant's creditors very soon after an assignment had been made by defendants, plaintiff was not estopped from attacking the assignment as fraudulent, thereafter, because the president at the meeting assented to a resolution directing the assignee to proceed to collect and apply the property under the assignment, when it was shown that the creditors at the time were not fully advised of the fraudulent conduct of the debtors.

4. ATTACHMENT—DISMISSAL FOR FAILURE TO SERVE PROCESS—RIGHT OF PLAINTIFF TO JUDGMENT IN MAIN ACTION.

In an action wherein an attachment was issued, where there was no personal service of process, but where defendant appeared by counsel, and answered, not controverting plaintiff's claim, the latter was entitled to personal judgment whether the attachment was sustained or not.

5. SAME—GROUNDS FOR—ASCENDING TO EVADE SUMMONS.

Where debtors, in falling circumstances, left their place of business, and went into another county for two months, to prevent inquiry and investigation by creditors as to the true condition of their affairs, and to await the action of creditors on a proposition to make a composition settlement, and, upon its rejection, assigned, and at once went to Canada, the case was within the meaning of Civil Code Ky. § 194, subsec. 4, providing for an attachment against defendants who have left the county of their residence to avoid service of summons.

6. SAME—GROUNDS FOR—DISPOSING OF PROPERTY WITH INTENT TO DEFRAUD.

Where defendants, commission and warehouse merchants, sold, for their own benefit and without their creditors' consent, goods for which warehouse receipts had been given as collateral security for money borrowed, it was ground for an attachment, under Civil Code Ky. § 194, subsec. 7, providing for an attachment against one who disposes of his property with the fraudulent intent to cheat, hinder, or delay creditors.

7. SAME—SEIZURE OF EXEMPT PROPERTY—FAILURE TO CLAIM EXEMPTION.

Where debtors make an assignment, and exempt therefrom such property as they are entitled to under the exemption laws, and a creditor subsequently sues out an attachment, and the debtors made no claim to the exempt property, the court should apply it to plaintiff's debt, the assignee having no interest therein.

Appeal from Louisville law and equity court.

A. P. Humphrey, Chas. S. Grubbs, and W. O. & J. L. Dodd, for appellant.
B. F. Buckner, for appellees.

LEWIS, J. September 10, 1884, the Bank of Commerce instituted this action against Payne & Viley, a firm, composed of H. C. Payne and John T. Viley, doing business prior to that time in the city of Louisville. In the petition, it is stated the plaintiff held four promissory notes, not then due, on the firm, for the aggregate amount of \$18,500; that each of the defendants had departed from the county of his residence to avoid the service of summons, and had sold, conveyed, or otherwise disposed of his or their property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors. In an amended petition it is stated the deed hereafter referred to was made by them with like intent. An attachment was issued, and the Fidelity Trust & Safety Vault Company, created a corporation by the general assembly, was, with others, summoned on the same day as a garnishee. September 12th, the plaintiff filed in the clerk's office its amended petition, making said corporation a party defendant, and stating therein that, September 6th, Payne & Viley executed and acknowledged a pretended deed of trust, purporting to transfer to it all the property owned by them as partners and as individuals, except such as was by law exempt from execution, the kind and description of which is set out in the amended petition. It is recited in the

deed, a copy thereof being filed as an exhibit, that the conveyance was made to the corporation in trust to collect all the property mentioned therein, and with convenient speed sell the same for cash, or on such reasonable credit as the trustee, in its discretion, might deem for the best interest of the creditors of Payne & Viley; that the trustee should, of the money collected, first pay all charges, costs, and reasonable compensation to itself, and the balance left to all creditors of the firm, and of the individual members thereof, according to such priorities or liens as existed by law or contract, and then to distribute ratably. It is also stated in the amended petition that said corporation, September 8th, took possession of a considerable portion of the property, and sold some of it before this action was commenced, but did not, by any one of its officers, qualify as trustee, until after the writ of attachment was issued and executed upon divers garnishees, nor had executed the bond required by law in such cases when the amended petition was filed. The relief prayed for was judgment setting aside the deed, subjecting the property conveyed thereby, and that attached to the satisfaction of the debts; and, in a subsequent pleading, the notes having become due in the mean time, personal judgment against Payne & Viley thereon was also asked. Payne & Viley, though not actually summoned, entered by counsel their appearance, and filed answer denying the deed was executed with the intent alleged by the plaintiff, and controverting the ground of the attachment, as was likewise done by the trustee in its answer; but the justice of the debt sued on was not controverted by either of the defendants. The judgment appealed from is that the attachment be discharged and petition dismissed, at the plaintiff's cost.

There is very little room for discussion about the facts of the case, but legal questions arise, some of which have not heretofore been passed on by this court. It appears that Payne & Viley commenced business as warehouse and commission merchants in 1878, and were from the beginning in the habit of giving warehouse receipts on bagging in, or by them represented to be in, their warehouse, as collateral security for the payment of money borrowed from banks. One of the members also contracted individual debts, for which he pledged his private property, consisting principally of stocks and bonds, and in the end became heavily involved. In the summer of 1882, as both members of the firm in their depositions admit, they knew it was insolvent, but, except their book-keeper, no one else was aware of, or seemed to suspect it, and consequently they were enabled to effect new loans, or postpone the payment of existing debts, by means of the warehouse receipts, although, as the book-keeper testifies, "they disposed of the bagging while the receipts were still outstanding without the consent of the holders of such receipts." In July, 1884, however, being convinced they could not much longer conceal the actual financial condition of the firm, they commenced to devise some plan by which to obtain a composition settlement satisfactory to its creditors, and consulted a friend on the subject, and soon after employed counsel to advise and aid them. There was at first a difference of opinion as to the feasibility of obtaining such settlement without the execution of a deed of assignment, which, for manifest reasons, they wished to avoid; one of the members of the firm and the friend consulted believing it could be done, while the other and their counsel believed it could not. But it was understood and agreed between them that, in order to have the required time in which to determine upon and carry out the plan most likely to accomplish the object of settling with and satisfying the creditors, it was essential to obtain a renewal of such of their notes as fell due about that date; and to induce the banks, their creditors, to agree to it, the members of the firm, or one of them, represented that as the season for the sale of bagging did not commence until about September it was necessary for the payment of the debts to be deferred until that time, to enable the firm to sell the bagging for which the receipts held by the banks had been given, and with the proceeds of such sales, as made, to take up the receipts. Accepting that

representation as true, and believing the bagging was still in possession of the firm, the officers of the banks applied to, except one, the Breckinridge Bank, consented to the proposed removal and extension, while the debt of the one that refused was then paid off in full. Immediately after that transaction, Payne, who seems to have been the leading and controlling member of the firm, left his place of business and county of his residence, and remained away until Saturday, September 6th, when, being notified by his friend, he returned to Louisville for the purpose of executing and acknowledging the deed of assignment, which was done in the office of their counsel after 9 P. M.; the president of the Fidelity Trust & Safety Vault Company being there ready to accept, and a deputy-clerk present to take acknowledgment of, the deed, both of whom were admonished to say nothing about the transaction. In each of the two daily newspapers published in Louisville the next morning, Sunday, an article appeared, prepared at the instance of Payne & Viley, in which the assignment was announced, and the statement made the debts were less than half the amount they turned out to be, and the assets sufficient to pay them; and on the same day, by the first outgoing railroad train, they both left, and went to another county of the state, for the purpose, as they substantially admit, to avoid inquiries as to the actual condition of the firm, and to await the action of their creditors on the proposition for a settlement to be submitted at a meeting which was held the next day, Monday. The estimated value of the firm and individual assets, as appears from a memorandum furnished by them to their creditors, was about \$93,000; but two items of the list, valued at \$25,000, could not then be regarded as more than possibly available in paying the debts, even if in good faith so designed, because they consisted of proceeds of land lying in a distant state, the property of Payne's wife, the power to sell which, for that purpose, was questionable, and a gift from his father which might or might not be made. On the other hand, the indebtedness of the firm was about \$161,000, and that of Payne about \$59,000; while of about 42,000 rolls of bagging for which they had issued and delivered to their creditors warehouse receipts, as collateral security, about 37,000, valued at about \$144,000, had been disposed of, only about 5,500 rolls being, upon examination made after the execution of the deed, found in their warehouse or under their control. Being, as they state in their depositions, advised by their counsel that their creditors had rejected their proposition for a settlement, were very angry with them, and that it was the only thing left for them to do, both Payne & Viley, immediately after the creditors' meeting, left the United States, and went to the dominion of Canada, where they remained up to the time the judgment was rendered.

Whether the deed of assignment be valid or not, we think the lower court was not authorized by the pleadings and proof in this case to either dismiss the petition or discharge the attachment. The record shows Payne & Viley, by their employed counsel, went into court and filed an answer, which was not only duly sworn to by them, but, as they admit, expressly authorized by them to be filed. They should, therefore, be regarded as waiving actual service of summons, and before the court; and, such being the case, the plaintiff was clearly entitled to personal judgment against them for the debt sued on. The proof is sufficient to sustain both the alleged grounds of attachment.

The purpose of Payne in absenting himself from the county of his residence from July to September, as is substantially admitted by him, was to prevent inquiry and investigation by creditors in regard to the true condition of the firm, and the fraudulent methods of business used by the members, which he knew would inevitably cause meritorious actions to be brought and summons issued against them. Their flight to Canada, though for the purpose of avoiding arrest to answer a criminal charge, had the effect to prevent the service of summons to answer in civil action for the same wrong. While, therefore, the

proof does not bring this case within the letter, it does come within the reason, of subsection 4, § 194, Civil Code.

The second ground existed beyond question. For if the disposal by the debtor, for his own benefit, without consent of the creditor, of goods for which warehouse receipts have been issued and delivered as collateral security for money borrowed, be not an act done with the fraudulent intent to cheat, hinder and delay such creditor in the meaning of subsection 7, it is hard to conceive a case that would be. Such an act is not only fraudulent, but by statute is made criminal. The bagging for which warehouse receipts were held by the Bank of Commerce was, as its chief officer testifies, of value sufficient to satisfy the whole of its debts against the firm; but it had been fraudulently disposed of, and none was to be found when this action was commenced.

The remaining inquiry in this connection is, then, whether there was any property, besides that attempted to be conveyed by the deed of assignment, subject to the plaintiff's debts. The trustee did not acquire by the deed any interest in, or control of, the property of H. C. Payne that was then exempt from execution by reason of his *status of bona fide* housekeeper with a family, then, as it is conceded, existing, for it was expressly excepted from the conveyance. Nor has Payne, though a party, set up any claim to that property, or to the proceeds of such of it as has been sold. Therefore, though we think the evidence shows he had, before the judgment was rendered, ceased to be such housekeeper, it is immaterial whether he had or not. For whatever right he had to the property or its proceeds was waived by his failure to set up claim to it in this action; and it was in the power of the court, and its duty, having control of the fund arising from that source, to have applied it to the debts of the plaintiff, the only other party having any claim to it.

The two grounds upon which it is contended the deed of assignment is invalid and inoperative against the attachment are: (1) That the trustee failed to comply with section 1, c. 109, Gen. St.; (2) that it was made with intent to delay, hinder, or defraud creditors. The section referred to is as follows: "That hereafter it shall not be lawful for the trustee or assignee, in any conveyance made for the benefit of creditors in anywise, to proceed to execute the trust until he shall appear in the county court of the county where such conveyance may have been recorded, and take an oath faithfully to execute the duties confided to him by such conveyance agreeably to law; and shall likewise execute a covenant in open court, with good and sufficient security, to be approved by said court, payable to the grantor or any beneficiary in such conveyance, to the effect that he will faithfully, in proper time, discharge all the duties of trustee or assignee imposed upon him by the conveyance or by the laws of the land." It appears that the attachment was issued and levied and summons executed on the Fidelity Trust & Safety Vault Company before either the required oath was taken or bond executed, and that it was not until February, 1885, that any bond with personal security was made, the first one having been given without. It is, however, contended for appellees that, by section 9 of the act incorporating the company and empowering it to act as an assignee, it was exempted from the duty of giving personal security in such cases. That section is as follows: "The capital of said company shall be taken and considered as the only security required by law for the faithful performance of its duties; and other security shall not be required upon its appointment to any of the offices or duties mentioned herein, except when required by the courts or by parties in interest." We perceive no necessary conflict between the two sections; for the court may, in its discretion, require the company, at the time the bond is executed, to give personal security, or may dispense with it, and in either case the instrument would be good as a statutory bond. But we do not assent to the proposition of counsel that the assignee did not, under the statute, acquire title to the property, and, as a consequence, the attachment lien of the plaintiff should prevail, merely because

process in this action was executed before the oath was taken or bond was executed. To sustain that position we have to disregard a rule, admitting of no exception, that a trust never fails for want of a trustee, and to assume the legislature intended, by the section quoted, that the beneficiary interest already vested in creditors, so far as a deed of assignment duly executed, acknowledged, and accepted can vest such an interest in property, may be divested by any appreciable delay to take the oath and give the bond by the mere recipient of the nominal legal interest. Before the enactment of the section quoted, it was settled by this court that, if a deed of assignment be valid, it cannot be rendered invalid by omission or negligence of the assignee. *Bank v. Huth*, 4 B. Mon. 428. And counsel admit that, prior to that section, the deed, if valid, operated to pass the title of the property to the assignee, and, as a necessary consequence, it was not subject to attachment. It seems to us that admission is fatal to their argument, for both the reason for the statute and the language used show it was intended to benefit, not prejudice, the beneficiaries; to render more certain and secure, not more uncertain and precarious, their rights and interests. It was, manifestly, for the better security of creditors against the fraudulent and improvident conduct of assignees, that the oath and bond are required, and for no other apparent reason, for the faithful execution of his duties by the assignee inures to their benefit and to them, and the grantor, who is entitled to the residuum, is the bond made payable. We think, if it had been intended that the omission or delay of the assignee should so unjustly prejudice the rights of the beneficiaries, not at all in fraud, language not susceptible of misconstruction would have been used to say so. The principal ground upon which the deed is assailed is that it was in the language of section 1, art. 1, c. 44, Gen. St., made "with the intent to delay, hinder, or defraud creditors."

But we will first consider the effect to be given to the attendance at a creditors' meeting held September 8th, and the assent by the chief officer of the plaintiff to a resolution there adopted, in substance authorizing and requesting the assignee to proceed to collect and apply the property conveyed to pay the debts. In the reply of the plaintiff it is stated, and not controverted, that at the time of that meeting its president was not informed of the nature and contents of the deed, and he testifies to the same fact. The circumstances of this case preclude the belief that officer acted fraudulently or in bad faith to either the grantors, assignee, or the other creditors; and in view of the short time that had elapsed since the execution of the deed, and the conduct of the grantors, of which the creditors were not then fully advised, we think it would be an improper and unreasonable application of the doctrine of estoppel to deprive the plaintiff of the right to have it set aside, if, as alleged, it was fraudulently made.

The ruling of this court as to the true test of the validity of deeds of assignment, which are in terms embraced by the statute, has been uniform and unvarying, for the language used admits of but one interpretation. "It is the intent and purpose with which the grantor acts that characterizes the conveyance, and renders it fraudulent under the statute." *Taylor v. Eubanks*, 3 A. K. Marsh. 239; *Lyme v. Bank*, 5 J. J. Marsh. 545; *Loury v. Fisher*, 2 Bush, 76. "We readily concede that, if the intention in the execution of the deed be to hinder or delay creditors, such an intention, entering into and producing its execution, being against the statute and bad, will vitiate the whole deed, though it be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution of the effects among all the creditors. * * * When it appears on the face of the deed of trust that the motion for making it was to prevent a sacrifice of the property, a bad motion is shown,—a motion to obstruct the ordinary process of law in the subjection of the property to the payment of the debts,—which vitiates the whole deed. So, if that motion and intention be proved *aliunde*." *Vernon v. Morton*, 8.

Dana, 263. "In every such assignment some delay is unavoidable. It is not, therefore, the fact of delay, but its character, and the motive which actuated it, that is deemed fraudulent in law." *Christopher v. Covington*, 2 B. Mon. 358. "The object of the statute was to prevent deeds, etc., fraudulent in their inception and intention, and not merely such as in their effect might hinder or delay other creditors. It is the corrupt and covinous motive, the fraudulent intention, *mala mens*, with which the assignment or conveyance is made, that constitutes the fraud against which the denunciations of the statute are directed; and without the existence in fact, or presumed existence, of an immoral or bad intention or motive, fraud cannot be perpetrated either at common law or under the statute. The motive is to be arrived at from the facts and circumstances appearing in each particular case." *Bank v. Huth*, *supra*. In *Bank v. Nunes*, 80 Ky. 334, is this language: "In all cases where conveyances are made for the ostensible purpose of securing an equal distribution among creditors of the property of the debtor, the validity of the conveyance depends upon the intention of the debtor. If the intention is to hinder and delay creditors in the enforcement of their demands against the debtor, rather than to secure an equitable distribution of the property among creditors and for their benefit, the conveyance is fraudulent and void. It is not the effect of such conveyance that determines their validity, for every such conveyance in effect hinders and delays creditors. It is the intention that controls, and that intention cannot be better determined than from the language of the conveyance, although it may be established by extrinsic evidence." In *Cadogan v. Kennett*, Cowp. 432, Lord MANSFIELD, construing the English statute, 13 Eliz., said: "The question in every case is whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors." And as said in *Burrill on Assignments*, § 332: "The same test has been referred to as decisive by Story in his work on Equity Jurisprudence, and by Chief Justice MARSHALL in *U. S. v. Hooe*, 3 Cranch, 73."

The preamble to the English statute, from which our own against fraudulent conveyances was taken, so clearly and fully sets forth the reason and object of such enactment as to leave no room for doubt or construction. It is as follows: "For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, etc., more commonly used and practiced in those days than hath been seen or heard of heretofore, which feoffments, etc., have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, and defraud creditors and others of their just and lawful actions, with debts, accounts, damages, penalties, forfeitures, etc., not only to the let and hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and cheivance between man and man, without the which no commonwealth or civil society can be maintained or continued." It seems to us impossible, looking at either the language or reason of the statute, to adopt any other test of the validity of a deed of assignment. For having the necessary effect of suspending, and in many cases defeating altogether, "remedy by the due course of law" guaranteed by the constitution, it should never, when attacked by a complaining creditor, be upheld, if made in bad faith and tainted with fraud. Accordingly, as held in *Vernon v. Morton*, though such deed be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution of the effects among all his creditors, yet, if the intention in the execution of it be to delay, hinder, or defraud them, such an intention entering into and producing it will vitiate the whole deed. And, as said in *Christopher v. Covington*, in every such assignment some delay is unavoidable; but it is not the fact of delay or hinderance, but the intent or purpose which actuates the assignment, that stamps it as *bona fide* or fraudulent. As, then, it is not the actual tendency or effect of such a deed, but the intent with which it is made,

that determines the question of its validity, it follows that, if it be a trick or contrivance for the debtor's own advantage, an equal and honest distribution of his estate among his creditors being a secondary and subordinate consideration, or part of a plan or scheme previously concocted, in pursuance of which creditors are intended to be or have been deceived into false security, overreached and defrauded, then the transaction should be held tainted, and the deed vitiated and void. It does not appear that the assignee or the beneficiaries under the deed participated in the fraud imputed to the grantors, nor is it necessary they should have done so in order to render it invalid; for, as recently held by this court, an assignee for the benefit of creditors generally, is not a purchaser for value. He stands in the position of his assignor, and can assert no equity that could not be asserted by the debtor himself. *Bridgford v. Barbour*, 80 Ky. 529; *Diets's Assignee v. Sutcliffe*, Id. 650. Nor does it affect the question that in setting aside the deed the attaching creditor may, to the partial exclusion of others, be paid his entire debt. For it is not the right of a debtor, unless in good faith and legally done, to deprive any creditor of the remedies given by law, and the injury to those who choose to abide by a fraudulent deed is of less consequence than the necessity of enforcing "true and plain dealing between man and man." In testing the deed of assignment in question by the rules mentioned, so plainly in accord with the letter, object, and scope of the statute, the first inquiry that naturally arises is why, if the intent of Payne & Viley was to make an honest, fair, and full transfer of their estate for the benefit of creditors, it was not done in July. The hopeless bankruptcy of the firm was then known to them; its business was at an end, and practically abandoned. The record places it beyond question that their leading and controlling purpose was to bring about a composition settlement with creditors, whereby to obtain a release from their debts, and get possession of and destroy the outstanding warehouse receipts which were indisputable evidence of their criminal violation of law. It is equally clear that the assignment was a secondary consideration, and not made until they were advised and became satisfied the main object could not be accomplished without it. They, therefore, in order, using the language of Payne, "to hold the thing in its present shape until ripe for settlement," not only delayed until September what good faith to their creditors required done in July, but intentionally and studiously kept the true condition of the firm in the mean time concealed from them. But, as most of the debts were falling due, and suits would be commenced for their collection unless an arrangement deferring payment could be made, they got all of them renewed but that due to the Breckinridge Bank by falsely representing they still had the bagging for which the receipts were given. The Breckinridge Bank is not shown to have had any greater claim upon them than the others; and the only reason for discriminating in its favor, by paying its debt in full when they knew their estate was not sufficient to pay one-half of the whole indebtedness, was that it was necessary to prevent suit by it, and the consequent exposure of the condition of the firm, which it was their purpose to then conceal. The same motive induced Payne to leave Louisville after the debts were renewed, for he admits he left to avoid inquiry and investigation by the creditors. The time and circumstances under which the deed was executed, and the false statement made the next day in newspapers, show the same leading and consistent purpose to deceive creditors as to the actual condition of the firm and their methods of business, and thus more certainly bring about the settlement, and enable them to secure possession of the warehouse receipts. The evidence makes it plain to us that the deed was executed, not in good faith, and with intent to deal fairly and justly by creditors, but in furtherance and as part of a scheme devised by the debtors to obtain an advantageous settlement, and to prevent the enforcement of the statute violated by them, in the accomplishment of which they had already deceived, defrauded, and wronged their creditors. To adjudge such deed

valid merely because under it there may be an equal distribution of such of their estate as the debtors may have seen proper to give up, would be neither wise policy nor sound morals. The judgment of the lower court is overruled, for further proceedings consistent with this opinion.

PRYOR, C. J., (*dissenting*.) The intent of the grantor, in making a conveyance, or the assignor, in making an assignment, is the important inquiry in determining the validity of the instrument when assailed for fraud; and if the motive for making the conveyance, and the purpose to be affected by it, is illegal if carried out, the conveyance will be canceled. That this is the undoubted rule to be applied between the debtor and grantor on the one side and his creditors on the other will not be denied. In fact, there is no essential difference between my associates and myself as to this general doctrine, but, when applied to the facts of the particular case, I feel compelled to dissent from the opinion rendered. This conveyance is assailed by the appellant, one of the creditors of Payne & Viley, on the ground that it was made to delay, hinder, or defraud their creditors, and therefore, under the statute against fraudulent conveyances, is void. The assignment was adjudged valid by the court below, and that judgment has been reversed. I maintain—*First*, that no creditor has been defrauded by the execution of the conveyance, or hindered and delayed in the collection of their debts; *second*, that if the debtors were insolvent when they made the assignment, and by its terms disposed of all their property for creditors, without preference and receiving no advantage to themselves to the prejudice of creditors, the chancellor will not look to the motive influencing the debtors in its execution, that although the principal object in making the assignment was the hope, expectation, or belief on the part of the debtors that the creditors would release them from the balance of their debts, or would decline to prosecute them for crimes committed originating out of their business transactions, such purposes or intention cannot affect the validity of the instrument, unless an agreement to compound the felony has been shown, or, by the terms of the assignment, the title was to vest in the assignee for creditors on such a condition. I shall assume, therefore, that Payne & Viley commenced a system of fraud by repeated promises to pay, and the renewal of paper to the banks, so as to give them ample time to prepare for an assignment that would result, in their opinion, in the delivery to them of their warehouse receipts by their creditors, and in that manner escape all criminal responsibility. The concession made is broader, perhaps, than the facts justify, but necessary to meet the legal questions, or rather the view taken of this case by my associates.

If the purpose to be effected by the assignment is illegal, that is, if the illegal consideration becomes a part of it, either expressly or by fair construction, or is to be carried out by the parties intended, whether by secret agreement or otherwise, then the assignment is void. When absolute and unconditional, and the assignment is made, not only to secure honest debts, but all the *bona fide* debts of the grantor, then the motive to constitute the fraud must, in some manner, enter into the transaction itself in order to affect innocent parties or honest creditors. The reason is that it is unlawful for a dishonest man, one whose life has been mainly devoted to defrauding others, to make an assignment for the benefit of all his creditors; and, although the prime purpose is the belief on the part of the debtor, at the time he executes it, that his creditors will then be merciful to him, and relieve him from punishment for crime, it is not such a motive as should cause the chancellor to cancel a conveyance equitable in all of its terms and just in its results. Where the intent is unlawful, and enters into the agreement, it is not doubted that the conveyance is void. The sufficiency of the consideration in such a case will not uphold the conveyance, and, as was said in *Vernon v. Morton*, 8 Dana, 247, "if the object be to delay and hinder creditors, the just and equitable

distribution of the effects among all creditors" will not save the conveyance. Men do many lawful acts from impure or improper motives, but the vicious purpose will not of itself render that unlawful that without it would be lawful. It was the duty of the debtors in this case, both in law and morals, to secure equality among their creditors. The claims upon them by those they had defrauded, as well as other creditors, demanded of the debtors in their insolvent condition that an assignment should be made. They could make no preference, and when providing for creditors they were compelled to secure equality to all. The act of an insolvent debtor in producing equality between creditors in the distribution of his assets is both commendable and lawful, and when done it is immaterial what motive prompted the debtor in its execution. The motive may be corrupt, but when no creditor has been injured by it, and no advantage obtained by the debtor under it, either by an agreement with creditors or others, the act is lawful, and the transaction should not be disturbed. The creditor who has been provided for with all others under the same instrument will not be listened to because his vigilance has enabled him to discover an impure motive on the part of the debtor in its execution. The assignment had been accepted by the assignee, and also by nearly all the creditors, including the president of the appellant, before the latter obtained its attachment; but it is alleged, and doubtless true, that when the assignment was accepted or the resolution passed, directing the assignee to sell and pay creditors as soon as practicable, and for which the president of the appellant voted, the latter was not aware of the contents of the assignment, or the motives causing the execution of the instrument. While one cannot be estopped by reason of the existence of facts he could not have ascertained, and I do not propose to rest the determination of that case on the doctrine of estoppel, it shows the danger in permitting mere intent and motive to invalidate an instrument lawful in itself, protecting the rights of all and injuring no one. What facts were discovered and really existed? It was ascertained that Payne & Viley had, in dealing with the appellant (a bank) and many other banks, subjected themselves to a prosecution for felony by reason of certain warehouse receipts they had deposited as collaterals; that they were or had been maturing a plan to compromise with creditors, and get possession of those receipts that evidenced their crime; that in order to do this they obtained renewals of their paper from time to time until a period had been reached when they could make an assignment, and bring, as they believed, the creditors to the desired compromise. They then made the assignment, with all their motives unknown to any creditor, and it is now held that the discovery of the fraudulent purpose must cancel the deed, and give the assets to the attaching creditor, to the exclusion of all others. The intent, purpose, and belief formed no part of the contract, but was the inducement to do an act which every principle of equity and justice demanded should be done. That which was lawful is set aside, and that which seems to me to be inequitable and unjust directed to be substituted by the chancellor. It is proper to examine the cases in which the general doctrine as to intent on the part of the grantor has been applied, and the utterances made in the opinions delivered, now relied on as establishing the principle to be followed by the chancellor in the present case. The facts and circumstances connected with those cases may be and are essentially different from the one under consideration, and therefore the propriety of making the investigation to see how this doctrine has been applied, so as to enable us to distinguish the one class of cases from the other. It will be found that those utterances were made either in cases where there was no fraud established, as in *Vernon v. Morton*, 8 Dana, 263; *Bank v. Huth*, 4 B. Mon. 423,—or in cases where the fraudulent motive or intent affected the rights of creditors, or resulted in some advantage to the debtor or the grantor. In the case of *Ward v. Trotter*, 3 Mon. 1, the consideration was sufficient, but, the fraudulent intent appearing.

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ing on the face of the deed, it was held, as a matter of law, that the deed was void. The facts being conceded, the legal question was alone raised. The recital in the deed in that case was that the debtor had ample property to pay his debts, but made the conveyance to prevent a sacrifice of his property. In the late case of *Bank v. Nunes*, 80 Ky. 384, the debtor made an assignment of like character, the deed expressing on its face that he had ample estate to pay his debts, but, to prevent a sacrifice of his property, he conveyed it to an assignee for his creditors. Extraneous proof might have been offered, in the absence of such a stipulation in either deed, that the grantor had ample property to pay his debts, and the chancellor would have canceled the conveyances. Suppose, however, an assignment is made declaring the insolvency of the debtor, and his purpose to have his creditors share equally in his assets; but it appears that the debtor said, at the time of its execution, he made it to prevent creditors from suing him, and require them to purchase his property for more than its value, or that he had forged a note on B., one of his creditors, and he believed unless he made the assignment B. would prosecute him; that but for the fear of a prosecution he would not make the conveyance. Now, ought the chancellor, at the instance of a creditor in either instance, to disregard an assignment, placing all on terms of perfect equality, for the benefit of one creditor, by reason of a notice or intention unknown to any creditor, and communicated only to the confidential friends and advisers of the debtors? Opinion after opinion may be found where the consideration is sufficient, and the creditors placed on terms of perfect equality, and still the assignment has been held fraudulent, because, on its face or by its very terms, the intent of the debtor is made manifest, as in the cases cited, where the debtor, in his assignment, says that he has an ample estate to pay his debts, but to prevent a sacrifice by creditors he transfers his property for the benefit of all. In those cases the intent to hinder is plain, and as a matter of law, from the recital, the assignments will be held fraudulent. So we see, from those cases, what is meant by canceling a conveyance made to hinder and delay creditors, although it be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution between creditors. Such intention must not only produce but enter into the execution of the instrument. Although the consideration is sufficient, if the intent to hinder and delay appears, the assignment will be disregarded. The mere declaration of the intent or the purpose, or where devices have been resorted to in order to accomplish the intent, when no fact appears showing a hinderance or delay, but, on the contrary, it appearing there was neither, the chancellor will not long hesitate before pronouncing the act valid. There is no benefit reserved in this assignment to the debtors; nothing compulsory on the assignee or the creditors, the assignee being required to sell as soon as practicable and pay the debts. The hope,—expectation,—the motive made known only to counsel and friends, cannot affect the rights of creditors. If the rule of equity is applied, as in the principal opinion, and the fraud practiced on creditors prior to the assignment, and traced to the day of its execution, is to affect creditors, to what extent is the doctrine to be carried? Can a debtor who has defrauded his creditor make a general assignment? If so, what mere motive or intent will defeat it? Every intent that is not innocent. But what if carried out would be unlawful, must, if this rule is established, be the guide? Innocent beneficiaries, whose rights are secured by it, must always be governed by the intent of the maker, although the act done is lawful, or field for judicial speculation is opened that, in my opinion, places the honest creditor at the mercy of the insolvent debtor, who, while he cannot prefer under the statute, may protect his favored creditor by a general assignment with a fraudulent intent, that the latter may obtain his attachment and secure his debt. The barriers against fraud are removed, and the dishonest invited to enter. The punishment inflicted on the maker of such an instru-

ment is but what he invites and is willing to receive for the protection of his favored creditor. The innocent are made to suffer for the motive and intention of the wrong-doer, that forms no part of a contract that is legal, just, and equitable to all. I concede, as all the authorities say, that an intent to defraud, when established, avoids the assignment; but, says Mr. Barrett, in his work treating of this subject: "In determining whether an assignment is or is not fraudulent against creditors, the question is said to be not whether fraud may be committed by the assignee, but whether the provisions of the instrument are such that when carried out according to their apparent and reasonable intent they will be fraudulent in their operation." What is the assignee required to do under the assignment in this case? He is to sell the property in a reasonable time, and divide the proceeds between creditors. No felony has been compounded or criminal prosecution abandoned, but, on the contrary, as appears from the record, no such proposition would be listened to by creditors, and the debtors sought refuge from prosecution in going to the dominion of Canada. That the debtors defrauded the appellants as well as many other banks, who are now claiming an equal distribution with it, is evident. That they delayed and postponed the time for making the assignment by false promises, in order to accomplish their purpose, which was to avoid prosecution, is equally manifest; but while this fraud and delay and false promises affected one creditor as much as another, in what manner did an assignment for the benefit of every creditor Payne & Viley had, hinder, delay, or defraud creditors in the collection of their debts? They may have defrauded them by constant promises to pay, and delayed the bringing of any action against them for the purpose of making the general assignment, but at last in what manner is that assignment fraudulent in its operation, and in what respect does it hinder and delay creditors? The response must be that it neither hinders, delays, nor defrauds creditors, and is just such a distribution of the assets as the debtors should have made, and such as the law required them to make. Payne & Viley had divested themselves of all title to the property. The estate was in the hands of an assignee for the benefit of those entitled to it. The delay was only such as pertains to every ordinary assignment, and the fact that the debtors believed that this one apparent evidence of honesty would appeal to the mercy of enraged creditors affords no reason in law, equity, or justice for the interference of the chancellor and the cancellation of the assignment.

"Assignments must be absolutely and fairly made for the genuine purpose of paying honest debts, and not for the use and benefit of the grantor, or to hinder and delay creditors," etc. *State v. Benoist*, 37 Mo. 501. This is a correct rule, but it does not mean that if made with the intention merely to use it for the benefit of the grantor to accomplish some vicious purpose, that it is fraudulent as to creditors who are not parties to the wrongful intent. The assignment is for the benefit of all creditors. It vests the assignee with the absolute title, and no right to use it for a bad purpose exists with the grantor without the assent of the beneficiaries in the deed; and when that assent is obtained, or the right of the creditor to the property or its proceeds is made to depend on the exercise of such a use by the grantor, the instrument is then fraudulent and void. Prior to the act of 1856 a debtor in this state, although insolvent, could, in good faith, secure one creditor in preference to all others. Now, suppose, as the law then existed, the debtor had secured an honest debt to a *bona fide* creditor, the security being fair and reasonable in its terms, but it appeared that the intent of the debtor was to secure the one creditor so as to force a compromise with the other creditors by which they could be induced to take less than the real amount of their debts. This intent is unknown to the secured creditor, but he stands innocent of any wrong. Now, will it be maintained that the deed is fraudulent as to this creditor because of the improper use the debtor supposes he made of it? Surely not. In

the investigation of this case, since the original opinion was delivered, I have read the case of *Brooks v. Marbury*, 11 Wheat. 78, the opinion delivered by Chief Justice MARSHALL, a case bearing a striking analogy to the case before me, and one not before the court when this case was considered. Fitzhugh had executed his notes for large sums of money in December, 1819, and forged the names of certain parties as indorsers of the paper, and then discounted the notes in certain banks. Fitzhugh, being unable to meet the paper at maturity, with a view of pacifying the banks, executed to one Marberry a deed to valuable property for the benefit of the defrauded creditors, they to be first paid, and the balance, if any, to go to the unpreferred creditors. Fitzhugh then fled the country, and the unsecured creditors obtained their attachments that were levied on the property. They contended that the consideration of the conveyance was illegal, because executed for the purpose of suppressing a prosecution by the banks for the felony. The testimony in the case, says the great jurist, "was abundantly sufficient to justify the jury in drawing the inference that the deed was executed by Fitzhugh in hope that payment of the forged notes would enable him to escape a prosecution, and that the same hope was entertained by Marberry, the assignee." The jury, at the instance of the banks, was, in substance, instructed by the court below "that if this purpose or motive on the part of Fitzhugh and Marberry was unknown to the banks, and accepted by them without any agreement, express or implied, to suppress or forbear the prosecution of Fitzhugh, they must find for the banks." This instruction was excepted to, and the creditors asked the following instruction: "That if, from the evidence, the jury believed that the deed was devised and executed by Fitzhugh, and procured and accepted by Marberry, with the motive and intent and for the purpose and object of suppressing a prosecution against Fitzhugh by prevailing with the holders of the forged notes to forbear and forego a prosecution for the forgeries, that then the deed is fraudulent and void in law as to the plaintiffs." The instruction was refused. The chief justice, in discussing this last instruction, says, in substance, that it is of doubtful meaning, and, if confined to the stipulations of the deed, is in conflict with the instruction given for the banks; "but if counsel is to be understood as asking the court to say that if the deed was to be used by Marberry as an instrument by which to procure the suppression of the prosecution, that being the condition on which the holders of the forged notes were to entitle themselves to its advantages, it was fraudulent and void as to the plaintiff, there can be no doubt but that the instruction should have been given," etc. The counsel for the plaintiffs also asked the court to instruct the jury "that if the great majority of creditors, in number and value, of said Fitzhugh, were, by means of said deed, unjustly and purposely hindered, delayed, and defeated in their proper suits and remedies for the recovery of their said debts on the absconding Fitzhugh, and that the deed was executed with the purpose of defeating all legal recourse in behalf of the unsecured creditors against the property of Fitzhugh, then the deed is fraudulent and void." This instruction was refused, and for the reason that the debtor had the right to prefer one creditor over another. In discussing the facts of that case the chief justice said: "This act was entirely consistent with law. His right to give the preference is not questioned, nor is the validity of the consideration, so far as is removed from creditors, suspected with any vicious principle or in any manner brought in doubt. Everything on the part of creditors is exceptionally fair and legal." The case cited meets directly the question of motive and intent, where the act done is lawful, and the intent alone of the grantor when executing it is vicious. Here the creditors connived at no fraud or vicious act on the part of the debtor. They were innocent in their acceptance of a writing, lawful on its face, just and equal to all, of any impure motive on the part of the maker. Creditors are entitled to demand equity when their debtor is insolvent and undertakes to make provisions for them. The principle rec-

ognized in *Brooks v. Marbury* should apply with greater force in this case, because there a certain class of creditors were preferred, but here all are placed on an equal footing. The legislature of this state affords a guide to the chancellor when called on to determine the validity of such assignments. The statute in regard to fraudulent conveyances is not only in force, but by section 1 of article 2, same chapter, it is provided "that every sale, mortgage, assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors." Insolvent debtors, in their effort to secure creditors, often gave priority by mortgages and assignments to those more vigilant than others; and to prevent such a preference, and place all creditors on terms of equality, when the insolvent debtor attempted to prefer, by any plan or device whatever, it was provided that such a preference should, by operation of law, pass the whole of the debtor's estate to his creditors. The law makes the assignment for him, and all are permitted to share equally in the assets, subject to existing liens, or such as are given by the statute. The securing of one creditor by the debtor, when in this insolvent condition, has been held by this court, in repeated decisions, to evidence his design to prefer. So, in July, 1884, or at the time the assignment was made, and long before, these insolvent debtors could have made no preference between creditors without being guilty of constructive fraud, and passing their whole estate to all creditors. The limitation to a proceeding for constructive fraud in such a case is six months, and, if assailed by a creditor within that time, the chancellor would have said to Payne & Viley, "You have violated the statute by giving a preference, and I will now do what you should have done,—pass your whole estate in the hands of a trustee or commissioner for the benefit of all your *bona fide* creditors." So these debtors could secure no creditor, or make terms with any, because it would have resulted in an assignment to all; but, when they make an assignment to all, they are then told that the intent was vicious, and therefore the doctrine of equality is disregarded, and the attaching creditor is at last given the preference over all others. Payne & Viley occupied the anomalous position of being unable to secure one creditor, and, in their condition, unable to secure all. They had progressed so far with their fraud and their vicious motives leading to the assignment that no act, however lawful, done by them, could be free from the taint of fraud or corrupt intent. The policy and wisdom of the legislature pointed out to the debtors the path they were to pursue in their deplorable condition, and, while they may have obscured it, in being prompted by an unlawful motive, the act itself being lawful, innocent parties will hold under it. Every principle of law, justice, and equity will sanction the act, while no judge or chancellor can approve the motive prompting its execution. Other questions have arisen, about which a difference of opinion exists, but I am content to confine my views of the case to the principal question involved. My individual opinion is, although not necessary to the decision of this case, that no general assignment can in any case be held fraudulent by reason of the equities of the statute in regard to preferences, unless the creditors, or some of them, participate in the fraud.

CITY OF LOUISVILLE v. KAYE *et al.*

KAYE *et al.* v. MOODY.

(Court of Appeals of Kentucky. April 5, 1888.)

1. JUDICIAL SALES—RESALE—LIABILITY OF PURCHASER'S SURETY.

A purchaser of mortgaged lands at judicial sale paid a price sufficient to satisfy the mortgage and accrued taxes, executing bonds with surety for the purchase

money. Being unable to pay the bonds, he and the surety surrendered the lands into court to be resold. On the second sale, the amount realized was insufficient to pay the mortgage and taxes. *Held*, that the mortgagee's failure to issue execution upon the bonds for the deficiency within one year after maturity did not release the surety; the delay having been at the latter's instance, to enable him to contest the claim for taxes, and he having agreed in writing to remain bound.

2. SAME — RIGHTS OF ONE NOT A PARTY — WITHDRAWAL OF PURCHASE MONEY FROM COURT.

In such case the purchaser at the second sale excepted to the report of sale because of the accrued taxes. It was ordered that he pay the purchase money into court, a sum sufficient to pay the taxes to be there held. The city of Louisville, claiming the taxes as due to itself, was then allowed, upon application, to withdraw the fund. *Held*, that the city, not being a party to the suit, had no right to withdraw the fund, as the surety of K., being liable to the mortgagee for the excess of the proceeds of the first sale over that of the second, should be allowed to contest its claim, and that it was properly required to return the fund.

3. APPEAL—APPEALABLE ORDERS—WHAT ARE.

An order on a rule requiring money to be paid back by one who, not being a party to the suit, has withdrawn the same on application, is an appealable judgment.¹

Appeal from Louisville chancery court.

George Kaye purchased at a judicial sale a house and lot, on which J. B. Moody had a mortgage, at a price sufficient to pay this mortgage debt, as well as the taxes that were afterwards asserted against the property, and executed bonds for the purchase price, with D. M. Rodman as his surety. Kaye, failing to pay the bonds as they became due, and having become insolvent, formally surrendered his purchase into court to be resold to satisfy the bonds that he and Rodman had executed. At the second sale the property sold for less than at the first, and Levy, the purchaser, having excepted to the report of sale because certain taxes were then due upon this property, it was ordered that he should pay the purchase money into court, and that there should be held in court a sum sufficient to pay whatever taxes might be due upon it. It being afterwards suggested to the court that the amount of taxes due upon this property had been ascertained by a decision of this court, the city of Louisville was allowed to withdraw the money retained by the court to pay the taxes. Thereupon Moody obtained a rule against Kaye and Rodman to pay him the deficiency still due to him upon the bonds executed by them; said deficiency arising by reason of the failure of the property, at the second sale, to sell for a sufficient sum to pay both the taxes and Moody's debt. It is from a judgment making this rule absolute that Kaye and Rodman appeal; Rodman insisting that he, being a surety, was released by the failure of Moody to cause executions to issue upon the bonds within one year after they became due. Kaye and Rodman took a rule against the city of Louisville to show cause why it should not be required to pay back into court the money withdrawn by it, and the city of Louisville appeals from a judgment holding its response insufficient, and making this rule absolute. Both appeals were heard together.

E. H. Brown and James Harlan, for Kaye *et al.* *Hargis & Eastin*, for Moody. *L. N. Dombitz*, for city of Louisville.

PRYOR, C. J. The facts of the record establish beyond controversy the liability of Rodman, the surety, to Moody, for any deficit arising from the second sale of the property. The lot sold, in the first place, for a sum sufficient to pay the Moody debt and the taxes. Rodman was surety on the bonds of the purchaser; and, the latter failing to pay, the lot was surrendered by Kaye and his surety, to be sold to satisfy Kaye's bonds. It brought less on the last sale than the first, and the surety on the bonds executed at the first sale became liable for the difference. The failure to issue an execution on the sale—

¹Concerning appealable orders, see *Jones v. Trumbo*, (S. C.) 6 S. E. Rep. —, and note.

bonds did not release the surety, even if the appellee Moody was entitled to have it issued, because the delay was at the instance of the surety, and for the purpose solely of relieving him from liability, or give to him an opportunity to contest the claim of the city for back taxes alleged to be unpaid on the property sold, and for the additional reason that, by a writing executed by the surety, he agreed to remain bound, or to pay the debt.

The sale to Levy, the last purchaser, was confirmed, and an order made by which the taxes due were to be deducted from the purchase price. All the purchase money had been paid on the second sale except a sum sufficient to cover the tax claim. That fund was in court, subject to the direction of the chancellor, and about which the parties had the right to litigate. The city of Louisville was not a party to the action, and, while the taxes may be due and owing, had no right, by an attorney or otherwise, to withdraw the fund, upon the assertion merely, without being a party, that the claim for taxes existed or had been established. All parties consented that these taxes should be paid, if properly owing, and such was the meaning of the order. The surety was liable to Moody, and the fund, or the balance of it, left in court for the protection of Levy, the purchaser, in order that the taxes might be paid, and the claim of the city upon the property removed. The order of June 6, 1877, recites that counsel on both sides agreed that the taxes should be deducted from Levy's purchase. This, however, should not be done unless the city shows a right to enforce payment. The surety, as he has the deficit to pay, may assign some reason for having the fund paid to Moody, and not to the city. What reasons may be assigned, do not appear in this record; but the city, when not a party to the action, having withdrawn the money without the consent of the surety, as well as the parties, prevented the surety, or those interested, from contesting the tax claim. The court, therefore, very properly required the city to pay this money back for the purpose of having the right of the city as to this fund determined. The city may, by proper pleading, assert its right; and, if the taxes are due, the purchaser, Levy, should be protected by an order requiring the fund to be applied to the payment of such of the taxes as the property may be liable for.

The judgment making the rule absolute as to the surety is affirmed, and the judgment on the rule against the city, is also affirmed. We understand that the disposition to be made of the fund has not been decided, but an order or judgment entered only requiring the city to pay this money back, that the rights of the parties may be ascertained. The order on the rule requiring the money to be paid back is such a judgment as may be appealed from.

McDOWELL v. CHESAPEAKE, O. & S. W. R. CO.

(*Court of Appeals of Kentucky.* June 7, 1888.)

MASTER AND SERVANT—DANGEROUS PREMISES—DUTY OF MASTER TO REPAIR.

In an action by an employe against his employer for injuries received in consequence of the latter's neglect to construct a suitable railing around an elevated platform upon which it was necessary for plaintiff to stand while adjusting certain parts of the machinery, plaintiff alleged that he had been in the employ of defendant but three or four days when the accident occurred, and that defendant had been warned of the dangerous condition of the platform, and had promised to place a railing around it within a reasonable time. *Held*, that such complaint was not demurrable because of its failure to aver that defendant had not made good its undertaking, as the promise to repair placed the risk on defendant; there being no pretense that plaintiff had used the platform for such length of time as to induce the belief that defendant intended to or had violated its promise to repair, or that the danger was so imminent that one of ordinary prudence would not have continued to use the platform.

On petition for rehearing. For former opinion, see 5 S. W. Rep. 413.

E. D. Walker, Matt O'Doherty, and R. C. Davis, for appellant. P. H. Darby, for appellee.

PRYOR, C. J. This action having been instituted to recover for a personal injury sustained by the appellant while in the employ of the appellee, by reason of defective machinery belonging to and used by the latter, and a demurrer having been sustained to the petition by the court below, that judgment was affirmed. On petition we are inclined to reconsider the opinion delivered, and to now hold that the petition contains a cause of action. The promise by the employer to repair within a reasonable time after notice by the servant of the danger places the risk on the employer. There is no pretense that the appellant used the platform for such a length of time as would evidence the belief that the employer intended to or had violated his promise to repair, or any inference that the defect and danger was so imminent as that one of ordinary prudence would not have continued its use. The judgment below is reversed, and case remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

COOK v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* June 12, 1888.)

HOMICIDE—INSTRUCTIONS—EVIDENCE TO SUPPORT.

Upon an indictment for murder, while it is the duty of the court to instruct the jury upon the whole law of the case, yet it is not error to give the law of murder, omitting the law of manslaughter, when all the evidence tends to prove murder, and no circumstances are shown tending to reduce the offense to the lower grade.

Appeal from circuit court, Ballard county.

Indictment for murder. Defendant, Charles Cook, was tried, found guilty, sentenced to confinement in the penitentiary for life. From said judgment defendant appealed.

Z. W. Bugg, for appellant. *S. H. Crossland*, for the Commonwealth.

HOLT, J. This conviction is for murder. The punishment awarded is confinement for life in the penitentiary. A proper instruction as to murder, but none as to manslaughter, was given to the jury. The appellant asked the trial court to give the whole law of the case. It was its duty to do so, in the absence even of such a request. No instruction should ever be given, however, unless based upon an hypothesis supported by some evidence. If the court passes this line, it is no longer the law of the case. In this instance there was no combat between the deceased and the appellant. There was, so far as the evidence discloses, no demonstration or offensive movement whatever upon the part of the deceased. Because of offensive words spoken by him, the appellant crushed his skull with an axe, resulting in death. The person of the appellant was at the time in no danger. There was no legal provocation to reduce the offense from murder to manslaughter. Says Wharton: "Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent, provoking actions or gestures, expressive of contempt or reproach, without an assault upon the person." Whart. Crim. Law, § 455a. This rule is well settled. The peace of society, and the safety and value of human life, will not admit of a different one. The facts of this case did not authorize an instruction as to manslaughter. Judgment affirmed.

VINCENT *et al.* v. MCALPIN *et al.*

(*Court of Appeals of Kentucky.* June 16, 1888.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT ARE PREFERENCES—COMPLETING CONTRACT OF SALE.

The delivery of lumber by an insolvent vendor, shortly before an assignment for the benefit of creditors, under contracts on which the vendees had, as required, ad-

vanced the entire purchase money to enable him to comply with the contract, is not a preference within the Kentucky insolvent act of 1856, which provides that every sale made in contemplation of insolvency, and with the intention to prefer some creditors in preference to others, shall operate as an assignment of all the debtor's property, and inure to the benefit of all his creditors.

SAME—PRETENDED SALE—ACCOUNTABILITY OF PURCHASER.

Vendees who advanced money to enable their vendor to comply with a contract for the sale of lumber, but received lumber in excess of that contracted and paid for, are, on insolvency of the vendor, accountable to his creditors for so much as they received in payment of an old account.

Appeal from circuit court, Boyd county.

W. C. Ireland and K. F. Prichard, for appellants. *Wm. Lindsay, Moore & Brown and Alex. Lackey*, for appellees.

PRYOR, C. J. M. H. Johns, on the 21st of March in the year 1884, made an assignment for the benefit of his creditors. In April, 1884, George W. McAlpin & Co. and other creditors instituted this action to have certain transactions between Johns, the debtor, and the appellants, Vincent, Goble & Pritchard, declared fraudulent as being made in contemplation of insolvency, and with the design to prefer them as creditors. The appellants had for many years been engaged in conducting the business of purchasing what is known as "round lumber" in the town of Catlettsburgh, Ky. Johns, the debtor, was engaged in buying and selling lumber in the same part of the state, and, for years prior to the transactions adjudged to be within the act of 1856, had sold and contracted to sell to these appellants large quantities of timber; the appellants advancing him the money to purchase the timber, fell it in the forests, and prepare it so as it could be rafted to the appellants at their place of business, or at points where they desired it to be delivered. In August and September, in the year 1883, there was a written and also verbal contract made between Johns and these appellants for timber. On the 8th day of August, 1883, they made a written contract with Johns, as follows: "I have sold to Vincent, Goble & Pritchard five hundred ties, that I have purchased of Blankenship, Mrs. Conly, Clay Farley, and others, on Little Rockcastle, a tributary of Wolf creek, in Martin county, at two cents per lineal foot, and agree to deliver it at Catlettsburgh by June 17, 1884, for fifteen cents for twenty-inch timber at the top, forty feet long, and one cent off or on. No raft to be less than 17 inches in diameter. M. H. JOHNS." On the same day a verbal contract was made for an inferior article of timber; and in September, 1883, a verbal contract was made for the purchase of certain oak timber. Under these contracts, Johns, in February and March, 1884, delivered timber of the value of near \$7,000 to these appellants, the money for which had been paid to Johns by the appellants in advance, to enable him (Johns) to pay for the timber, paying his hands, furnishing them provisions, etc., to enable him to comply with his contract.

It is alleged, and not denied, that these appellants were, under the agreement with Johns, to make him these advances; and that such was the agreement, regardless of the averment in the pleadings, is clearly inferable from the proof. The contracts are clearly established, and the money actually advanced is made manifest by the proof; and the sole question is, Johns being insolvent when the contract was made and the moneys advanced, did the delivery of this timber, in payment of the advances made, bring the transactions within the act of 1856? The chancellor so held, and of this the appellants complain. It seems that, at the date of the contracts, the timber sold was in trees not then severed from the ground, with no marks or other identification so as the title passed to the purchaser. The contracts were purely executory; the appellants to make advances to enable Johns to cut the timber and deliver it in compliance with his undertaking. The timber, however, was cut and delivered to these appellants, and it is therefore immaterial whether the title passed at the time of the sale or not. It was perfected by the delivery, and

made that valid which could not have been enforced. The money was advanced on the faith of this executory contract, and in pursuance of an agreement to advance; and it is certain that it was advanced and used for the purpose of preparing this timber for the market. It was not merely a loan of the money, but an advance of the funds to be paid for in this identical timber. It was a purchase of the timber that was made complete by its delivery, and the fact that it was delivered at a different place, or a different measurement adopted than that provided by the contract, can make no difference. Such facts would only be evidence to show that no such contract as that alleged was ever made; but that it was made there can be no doubt. The relation of creditor and debtor did not exist between these parties; and prior to June, 1884, when this timber purchased was to be delivered, it was in fact delivered. There never was any refusal on the part of Johns to perform his part of the contract; but, on the contrary, he delivered to his vendees the timber they purchased from him; but because the contract was not enforceable, we are asked to determine that no purchase was made, and the relation of debtor and creditor only existed. This would not be just or equitable, and, we might add, would prevent the parties from complying with a contract they were not only willing to comply with, but had in fact executed. It is questionable whether these appellants, prior to June, 1884, when this timber was to have been delivered, although they had advanced large sums of money on their contracts, could have demanded payment in anything else but in the timber they had purchased; or if they could have sued at once for the money, being the vendees, and having received the timber, this relation, and no such relation as debtor and creditor, existed. They were no such creditors of Johns, in any aspect of the case, as brought them within the act of 1856; and no preference was designed or contemplated when the timber was delivered. In *Napper v. Yager*, 79 Ky. 241, creditors sought to set aside a deed executed by one of the parties, as was alleged, in contemplation of insolvency, etc. Napper had executed a deed to Ludwick under a parol agreement by which Ludwick had advanced to Napper several hundred dollars, for which he was to convey the land. It was held that the transaction did not create the relation of debtor and creditor, and that Ludwick could not be regarded as a creditor until the parol contract had been repudiated by Napper. In the present case, the facts refute the idea of any intention to prefer; and the fact that an account was exhibited by the appellants, showing the state of accounts between them, with the credits and debits, does not affect the question involved. The appellants had to keep an account of moneys advanced, and, because kept in the usual way, did not create the relation of creditor and debtor, and destroy the relation of vendor and vendee, that existed by virtue of the contracts between the parties. It is attempted to be shown by A. H. Goble that one of the appellants denied having purchased any timber from Johns; and, while this may be so, it is plain that it was purchased, and much of it had been delivered, before the alleged conversation (that is denied) took place. We perceive no reason for disturbing these contracts, or requiring appellants to account for the value of the timber purchased under them.

There is a question remaining, however, that brings a branch of the case within the insolvent act. Some \$408 of the claim paid in this timber was the balance due on an old account, or for advances made on other timber. It was a plain indebtedness, and the promise to pay it in timber or money, under the circumstances, with an actual payment made in 1884, was a preference, and must be so construed. The payment in timber was the preference, and this the appellants must account for, but nothing more, as the timber purchased, and upon which the advances were made, cannot be construed as a preference, within the meaning of the statute. Judgment reversed, and remanded for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. COLMAN'S ADM'R.

(Court of Appeals of Kentucky. June 16, 1888.)

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

Decedent was walking on defendant's track. As a train, approaching him from behind, whistled to indicate that it would stop at the station near by, decedent went upon the side track. The switch was not closed at that time, but as the train passed the switch it switched off a car, and the switch was closed, and the car ran upon it by its own momentum. The engineer endeavored, by whistling and shouting, to attract decedent's attention to the detached car. The conductor left the brake on the detached car, and ran forward to shout at decedent, but failed to make him hear, and before he could regain the brake decedent was struck. *Held*, that decedent's death resulted from defendant's negligence, and the refusal of the trial court to instruct the jury peremptorily to find for defendant was not error.¹

Appeal from circuit court, Warren county.

On rehearing. For former opinion, see 6 S. W. Rep. 438.

Wm. Lindsay, H. W. Bruce, and Mitchell & Du Bose, for appellant. *Wright & McElroy and P. F. Edwards*, for appellee.

BENNETT, J. The counsel for the appellant think that the case of *Nichol's Adm'r v. Railroad Co.*, 6 S. W. Rep. 339, decided by this court January 10, 1888, is in conflict with this case. This is a mistake. In that case the court said that, as Nichol was walking on the company's track without right, the engineer had the right to believe that he would look out for his own safety, and leave the track in time to avoid a collision with the train; and when the engineer saw that Nichol did not leave the track, and was in danger of being struck by the engine, "he called to him to leave the track, and blew the whistle for down brakes, but the car was then so near as to render it impossible to check its progress so as to save the life of the deceased." We thought in that case that the facts of it justified the decision. We still so think. It was not held in that case that it was not the duty of the engineer, after discovering the peril of a trespasser upon the track, to use all the means at his command to avert injuring him. It was not held that if the engineer saw the peril of Nichol, and that his shouting to him did not arouse him to a sense of his danger, it was not his duty to put down the brakes and stop the train in time to avoid a collision, if he could. In the opinion in this case, the doctrine was announced that upon the conductor's seeing that the shouting to Colman to leave the track, and the blowing of the alarm whistle, failed to arouse him to a sense of his peril, it was his duty to put down the brakes, they being at hand, so as to stop the car, if he could, in time to avoid a collision, and not trust to arousing Colman to a sense of his danger by again shouting, as that resource had failed to accomplish the purpose. This doctrine is in harmony with the *Nichol Case*, is sound law, and is supported by the weight of authorities. The petition for a rehearing is overruled.

¹One who goes upon a railroad track without license of the company is a trespasser, and guilty of such contributory negligence as will defeat recovery for injuries received through the negligence of employees of the company in failing to discover him. The company is only liable for the wanton conduct or reckless carelessness of its servants after the situation of the trespasser is perceived. *Railway Co. v. Monday*, (Ark.) 4 S. W. Rep. 732; *Baumeister v. Railroad Co.*, (Mich.) 34 N. W. Rep. 414. See *Railroad Co. v. Smith*, (Ga.) 3 S. E. Rep. 397; *Masser v. Railway Co.*, (Iowa,) 27 N. W. Rep. 776, and note; *Scheffler v. Railway Co.*, (Minn.) 21 N. W. Rep. 711; *May v. Banking Co.*, (Ga.) 4 S. E. Rep. 330; *Nichols' Adm'r v. Railroad Co.*, (Ky.) 6 S. W. Rep. 339; *Kennedy v. Railroad Co.*, (Colo.) 16 Pac. Rep. 210; *Railroad Co. v. Colman's Adm'r*, (Ky.) 6 S. W. Rep. 438; *Strong v. Railroad*, (Miss.) 8 South. Rep. 465; *Railway Co. v. Ryon*, (Tex.) 7 S. W. Rep. 687.

RATLIFF *et al.* v. MARRS *et al.*

(Court of Appeals of Kentucky. June 16, 1898.)

DEED—ESTATE CONVEYED—LIMITATION BY HABENDUM.

Where the granting clause of a deed conveys a fee-simple, with nothing to indicate that the grantor intended such clause to be limited by the *habendum*, which conveys only a life-estate, the grantee will take an absolute title to the property, unrestricted by the terms of the *habendum*. Affirming *Ratliff v. Marrs*, 7 S. W. Rep. 395.

Appeal from circuit court, Pike county.

On motion for rehearing. For former opinion, see 7 S. W. Rep. 395.

Thos. H. Hines, C. M. Parsons, and Stewart & Stewart, for appellants.
R. T. Burns and J. M. York, for appellees.

BENNETT, J. The case of *Henderson v. Mack*, 82 Ky. 379, is not in conflict, but in harmony, with this case. In that case the *habendum* read as follows: "To have and to hold the same, with all the appurtenances thereon, to the second party, his heirs and assigns, forever, with covenant of general warranty during his natural life, and after his death to go to and belong absolutely to Belle Mack; she paying the unpaid purchase money as aforesaid." This court held in that case that as the *habendum* set forth the fact that Belle Mack had paid the unpaid purchase money for the land, and that in consideration thereof the remainder interest was expressly conveyed to her, it was manifest that the grantor intended the *habendum* to control the granting clause. In the case of *Brown v. Ferrell*, 83 Ky. 417, a deed made since the General Statutes went into effect was construed according to the provision of section 10, art. 1, c. 63, of said statutes. The deed in this case was made in 1848, at which time there was no statutory rule similar to that contained in said section and chapter. Therefore the deed under consideration must be construed without reference to said section and chapter. The construction placed upon it in the opinion we still adhere to. The petition for a rehearing is overruled.

DICKINSON v. GRAY.**CINCINNATI & S. E. RY. CO. v. SAME.**

(Court of Appeals of Kentucky. June 16, 1898.)

1. CONTRACTS—RESCISSION—RIGHTS OF SUBCONTRACTORS.

Plaintiff, a subcontractor, entered into a contract with defendant, a railroad contractor, to furnish materials, and construct the piling and trestling, upon a portion of the road, which contract stipulated that, in the event the railroad company failed to pay the monthly estimates of defendant, the latter should have the right to cancel the contract upon giving notice, and only be liable for labor and materials furnished up to the date of such cancellation. The railroad company subsequently made default in payment of the monthly estimates, and defendant notified plaintiff to stop work until further orders; that efforts were being made to secure a satisfactory adjustment with the railroad company, but, pending these, work was to be suspended along the entire line. Held, that plaintiff, having ceased to work upon such notice to suspend, and not resuming it, must be regarded as having accepted it as a notice of cancellation of the contract, and, in an action on the contract, was not entitled to prospective profits which would have resulted from its completion.

2. SAME—INTERPRETATION—"MATERIALS FURNISHED."

Under a contract by a subcontractor with a railroad contractor for the construction of a portion of the railroad, which provided, in the event of cancellation of the contract, that the subcontractor should be paid for "labor done and materials furnished up to the date of such cancellation," the right of the subcontractor to recover for materials furnished was not restricted to such materials as had been delivered, inspected, and received at the time of cancellation of the contract, but he was also entitled to pay for material procured or prepared to be furnished for the work.

8. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW—EXCEPTIONS TO EVIDENCE.

When exceptions are filed to the competency of evidence, but are not called up by the exceptant to be acted upon by the lower court, they will be considered waived, and exceptant cannot complain, on appeal, of their non-disposition.

4. SAME—ERRONEOUS ENTRY OF JUDGEMENT—MOTION TO CORRECT.

A mere clerical error in the entry of a judgment cannot be assigned as error on appeal, when no motion is made in the lower court to correct it.

Appeal from chancery court, Campbell county.

Simrall & Mack, for appellants. *J. G. Carlisle* and *Chas. Eginton*, for appellee.

HOLT, J. Prior to June, 1881, P. P. Dickinson contracted with the Cincinnati & Southeastern Railway Company to build its road from Newport, Ky., to Hazel Green, Ky., a distance of about 185 miles. On June 23, 1881, the appellee, John Gray, as a subcontractor, entered into a contract with the appellant Dickinson to furnish the materials, and construct the piling and trestling, upon the road between the towns of Dayton and Augusta, a distance of 40 miles; the work to be completed by November 1, 1881, and to be done under the supervision of the chief engineer of the railroad. Shortly after the making of the contract, Gray began to make contracts with third parties for the necessary materials. The appellant Dickinson was to furnish to Gray bills for the work. The record clearly discloses that there was much delay in doing so, and that Gray frequently complained of it. The proposed road was located along or near the Ohio river, and it was desirable to obtain the material by water transportation, and as soon after making the contract as possible, owing to the then price of lumber, and the stage of the water. The work was not completed at the time named in the contract, but progressed until May 20, 1882, when it was stopped under a notice from Dickinson to Gray to suspend until further orders. The work was never resumed; and on July 17, 1882, Gray brought this action against Dickinson to recover an alleged balance of \$16,586.55 for work done and materials furnished under the contract, and \$20,940.78 profit which he claimed he would have made if he had been permitted to complete the work. The railway company was made a defendant; it being averred that Dickinson was a non-resident, and that it was indebted to him upon its contract with him for the building of its road in the sum of \$42,706.80, and that a suit brought by Dickinson against the company was then pending in the United States court to recover it, and enforce a lien upon the road. An attachment against this indebtedness, or enough of it to satisfy Gray's claim, was sued out in this case on September 16, 1882; and of it the company had notice, as it was then a party to the suit, and first objected to the filing of the amended petition upon which it issued, and, upon its being filed, demurred to it. It settled with Dickinson on September 20, 1882, paying him in money and bonds more than the amount of Gray's claim. Dickinson denied that he owed Gray anything save \$787.40, which he tendered, and paid into court. The company filed an answer, which, by the understanding or under the agreement between counsel, must be regarded and treated as a mere denial of indebtedness to Dickinson. The lower court rendered judgment for Gray against Dickinson, and also against the company as a garnishee defendant, for \$15,410.13, with interest from May 20, 1882, subject to a credit of \$747.40 as of May 7, 1883, by reason of the amount paid into court. Dickinson has appealed, and also the company. The two appeals are upon the same record, and are heard together. The appellee, Gray, has a cross-appeal in each case, contending that his claim for profits should have been allowed. We will consider the questions upon Dickinson's appeal first.

It is manifest that the credit given by the court below in its judgment should have been \$787.40, instead of \$747.40; but the appellee, Gray, subsequently came into court, and acknowledged, by an entry upon the record, the re-

ceipt of \$787.40, "paid into court by P. P. Dickinson, defendant, as the uncontested portion of the claim sued on." Conceding, however, that Dickinson could still complain because the credit was not properly given in the judgment, yet it was but a clerical misprision; and, no motion having been made to correct it, he cannot rely upon it upon appeal.

There is a large volume of testimony in the case. It has been carefully read and considered. Much of it consists of hearsay, opinion, argument, and copies of papers; the originals not being produced, or their absence accounted for in legal way. The most of all this is, of course, incompetent. The appellant Dickinson filed exceptions to the competency of certain portions of the evidence taken by Gray. They were, however, never acted upon in the lower court. This is now a ground of complaint. The appellant never called them up, however, nor did he ask that they be acted upon; nor, when the cause was submitted, was it also submitted upon the exceptions. The lower court never refused to act upon them, and it had a right, under the circumstances, to consider them as waived, and the appellant cannot now for the first time complain of their non-disposition. It is proper, however, to add that, if it had done so, it would not have affected the conclusion now reached. The judgment of the court below was based on the allowance of the following claims:

Under the head of "Work Done and Materials Furnished:"

20,283 feet piles driven, at 50 cents per foot,	-	-	\$10,141 50
14,836 feet 7-in. piles del'd, worth 32 cts.,	-	-	4,765 68
7 days' grading, at 8 miles,	-	-	12 25
390 tenons cut on piles, at 60 cts. each,	-	-	234 00
163,472 feet 8-in. B. M. trestle timber, at \$27.50,	-	-	4,495 48
220 feet sawn piles, estimated,	-	-	71 00
1,108 pounds pile shoes delivered, at 8 cents,	-	-	88 64
1,768 " bolts and washers, at 6 cents,	-	-	106 08
26 " " in piles, at 3 miles,	-	-	1 56
Total,	-	-	\$19,916 19
Less amount received	-	-	10,242 11
Balance due	-	-	\$9,674 08

Under the head of "Materials Prepared to be Delivered:"

(j) 7,784 lin. feet piles, at 11 cents where they lie,	-	-	\$856 24
(k) 4,705½ pounds rods, bolts, etc., at 6 cents,	-	-	282 33
(l) 167,181 feet 6-in. B. M. trestle timber, at \$27.50 per M.,	-	-	4,597.45
Total,	-	-	\$5,736 02
	-	-	9,674 08

Grand total, - - - - - \$15,410 10

We shall not consider them, save in some particular respects, further than to say that the evidence is conflicting as to quantity and value. Their determination was a question of fact, and the lower court has passed upon it. With a view, however, to noticing some questions as to them that have been discussed by counsel, it is necessary to refer to some portions of the contract between Gray and Dickinson. It provided, *inter alia*, as follows: "It is hereby expressly agreed that in case the Cincinnati & Southeastern Railway Company should fail in negotiating their first mortgage bonds fast enough to meet, from the proceeds thereof, the monthly estimates of the party of the second part thereto, then, and in that event, the said party of the second part hereby reserves the absolute right and privilege to terminate and cancel this contract, upon giving the party of the first part ten days' notice, in writing, of his de-

termination so to terminate and cancel said contract; and, upon giving such notice, the said contract, for all future work, shall be considered null and void, and the party of the first part shall have no further rights or privileges under it, or by virtue of its terms, except for the amount then due in payment thereof; and the said party of the second part shall be, and he is hereby, released from all further liability under said contract, except as mentioned hereinbefore, and shall only be required to pay the said party of the first part the actual amount of the estimate of the engineer of the said Cincinnati & Southeastern Railway Company in charge, for work and labor done and materials furnished up to the date of such cancellation and termination. * * * On or about the 1st day of each month, during the progress of the work, an estimate shall be made of the relative value of the work done, to be judged by the engineer, and upon his certificate of the amount being presented to the party of the second part, [appellant,] or such disbursing agent as said party may appoint, eighty-five per cent. of the amount of said estimate shall be paid to said party of the first part, [appellee;] and when all the work embraced in this contract is completed, agreeable to the specifications, and in accordance with the directions, and to the satisfaction and acceptance of the engineer of the Cincinnati & Southeastern Railway Co., there shall be made a final estimate of the quantity, quality, character, and value of said work, agreeably to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to them, upon their giving a release, under seal, to the said party of the second part, and furnishing the engineer of the Cincinnati & Southeastern Railway Co. a sworn statement that all their obligations due for labor and material have been paid. * * * The parties to this contract hereby mutually agree that the chief engineer of the Cincinnati & Southeastern Railway Co. shall be the sole judge and arbitrator, in all cases of disagreement, difficulty, or dispute, as to the quality or amount of work performed under this contract, and also in relation to all other matters of difference that may arise between the parties hereto in relation to or touching the proper performance of any or all the conditions thereof; and his decision, given in writing, shall be in the nature of an award, and the same shall be conclusive upon and between the parties hereto, as a final judgment in a court of competent jurisdiction, and no appeal shall be taken, or suit instituted or prosecuted, in any court, to set aside or contest the same, or to readjust or question the validity or correctness of any matter upon which he has passed. * * * That all measurements made by the said engineer, or his assistants, shall be considered and accepted as correct, full, and final." The contract fixed the price of driven piles at 25 cents a lineal foot; but it was "further agreed that the price of twenty-five (25) cents per lineal foot is to be advanced to fifty (50) cents per lineal foot, provided that an application to the Cincinnati & Southeastern Railway Co., to be made for an increase of said price to fifty cents, is successful; if otherwise, the party of the first part agrees to furnish the piles at the said price of twenty-five cents per lineal foot, and the party of the second part agrees to pay the party of the first part the sum of fifteen hundred and sixty-nine (\$1,569) dollars, and two (\$2) dollars per 1,000 feet, board measure, for crestling, in addition to foregoing prices." It is contended that the estimates of the quantity of work made by the company's engineers are conclusive. Copies of them are in the record, but some of them are altogether uncertified. Others are signed by one Patton, who was the general manager of the company or its superintendent of construction, but not an engineer, while others are certified by some one of the assistant engineers. It does not satisfactorily appear where they were made; but it is certain that Gray was no party to them, and was not present when they were made. These estimates, and the testimony offered by Gray, are conflicting as to the quantity of work done and material furnished. There is evidence tending to show that at least one of the assistant engineers was hostile to Gray, and seemed determined to break

him down, if possible. Circumstances appear, which need not be enumerated, tending to raise suspicion as to the correctness, in all respects, of these estimates. Conceding that the confession by Gray of the demurrer to the original petition places it beyond consideration, and that, therefore, only the amended petitions can be considered, and that, therefore, these estimates are not attacked for fraud by the pleadings, yet we do not consider that they are of such a character that, under the contract, they are to be regarded as conclusive of the quantity of work done and materials furnished. It is not necessary to determine the power of parties to oust the courts of jurisdiction by entering into stipulations like those *supra*, because, in this instance, the engineer was made the arbiter or judge in case of "disagreement, difficulty, or dispute;" and "his decision, given in writing, shall be in the nature of an award, and the same shall be conclusive upon and between the parties hereto as a final judgment in a court of competent jurisdiction." These provisions certainly implied the existence of a controversy between Dickinson and Gray. They did not relate to the ordinary estimates that might be made from time to time. They were entirely *ex parte*. When a controversy is to be decided, each party has a right to be present and to be heard. It is not pretended that Dickinson and Gray ever submitted any matter of dispute to the chief engineer, nor did he ever attempt to decide any between them. It is true, there was made out, at some place, and in the absence and without the knowledge of Gray, what is termed a final estimate; but it cannot be regarded as an award under the contract between these parties. Moreover, the work was abandoned in May, 1882, and the railway official in charge of it then left the state. There was no attempt to carry out this provision of the contract. The work was abandoned by Dickinson. He was absent from the state; and Gray had a right to look to the courts for relief. Gray had a right to recover for what he actually did under the contract.

It is contended that the words, "labor done and materials furnished up to the date of such cancellation and termination," restrict his right to recover to such materials as had then been delivered, inspected, and received. This is not a reasonable interpretation of the contract. Gray was necessarily preparing materials for the work all the time. The word "furnished," in the contract, is not to be held as equivalent to "delivered," but as authorizing Gray to recover, not only for the work done and material furnished upon the line of road, but also for material procured or prepared to be furnished for the work. Any other construction would work a forfeiture of all work and expenditure in the preparation of material not delivered upon the line of the road prior to the notice of cancellation of the contract, and bring ruin to a party proceeding in good faith to fulfill his contract. An application was made to the company to increase the price of driven piles to 50 cents per lineal foot. The evidence tends to show that its president assented to it. Its chief engineer not only approved it, but the estimates of Gray's work for two months were so made out, and not only approved by the proper officers of the company, but in fact paid. After such action, an attempted cutting down by the company to the old price of 25 cents per foot could not affect the price as it had been advanced, as between Dickinson and Gray. Moreover, the chief engineer proves that it was worth 50 cents per foot to furnish and drive the piles. There is no dispute as to the quantity driven. It is proven that the cost of driving was 18 cents per foot; and it appearing that, when driven, they were worth 50 cents per foot, it follows that, when undriven, they were worth the 32 cents per foot allowed by the court. The contract price of the trestle timber, when put into the work, was \$35 per thousand feet. Gray was, however, prevented by notice from Dickinson from putting it in place, and was therefore entitled to its reasonable value, which the chancellor fixed at \$27.50 per thousand feet, and the testimony supports this estimate. It is noticeable, too, that while Dickinson was not allowed by the company for as large a quantity, yet for

this very material, and in precisely the same condition, he was allowed \$53.28 per thousand feet. He got for it \$6,034.43, while Gray by the judgment gets but \$4,495.48. Again, Dickinson was allowed, as damages for delays, over \$7,000, while Gray gets nothing upon this score. We shall not further notice the different items as allowed by the lower court for the reasons already stated.

We will now consider the appeal of the company. It claims—*First*, want of notice of Gray's claim prior to the settlement with Dickinson, and that it was not in court before the payment to him, *second*, that, when the judgment against it was rendered, it was out of court, having been dismissed at a prior term; *third*, that its answer of non-indebtedness was conclusive. The record shows that it demurred to the original petition on September 7, 1882; also that it objected to the filing of the amended petition of September 11, 1882, and that its objection was sustained; also that it objected to the filing of the amended petition of September 16, 1882, upon which the attachment was sued out, and, upon its objection being overruled, it demurred to it. It certainly had notice of it. It is in law chargeable with knowledge of its purpose and contents. Indeed, the testimony shows that its general manager was in court at the time, and, of course, its attorney knew the purpose and object of the amended petition when objecting to the filing of it. The company was a defendant to the suit. It objected to the filing of a pleading that sought to subject the indebtedness upon its part to Dickinson to what the latter owed Gray. Why the need of process to apprise it of what it already knew? It cannot, under such circumstances, be heard to now say that it had no notice of the proceeding to subject what it owed Dickinson until the service of the attachment upon its agent, on September 25, 1882. It knew that the claim of Gray against Dickinson was for the same labor done and materials furnished that was the basis of part of its indebtedness to the latter. It should have been disposed to protect Gray. Instead of doing so, however, as soon as it and Dickinson were by the amended petition of September 16, 1882, aware of Gray's intention, its officers and Dickinson got together in a town in the distant state of Pennsylvania, and there, on September 20, 1882, they settled, and the company paid Dickinson. Up to this time, the latter had appeared to Gray, by letter and declaration, to be very hostile to the company. The testimony tends to show that they united in an effort to defeat Gray in the collection of an honest claim, and, after such collusion, they do not present themselves in a favorable light to a court of right and equity. On May 19, 1883, the company filed this answer: "The defendant the Cincinnati & Southeastern Railway Company denies that it is indebted to its co-defendant, Dickinson, in the sum of \$42,706.80, or in any sum whatever. It says that, for all the work and labor done and material furnished by the said Dickinson to this defendant, it had fully paid him, the said Dickinson, prior to the 20th day of September, 1882. It says it was in nowise indebted to said Dickinson in any amount on the 16th of September, 1882, nor has it in anywise or in any amount been indebted to said Dickinson at any time since the said 16th day of September, 1882. R. W. NELSON, Attorney for C. & S. E. Ry. Co." The testimony shows that its statements were not true. The attorney who filed it, and who is known to the court as one of high integrity, acted, doubtless, upon information. The company had not paid Dickinson prior to September 20, 1882; nor was it true that it was not indebted to him on September 16, 1882. The affirmative averments of the answer appearing not to be traversed, the lower court, at the first hearing, dismissed the action as to the company. At the same term of the court, however, a motion was made to modify and set aside this much of the judgment; and by orders which, in substance, held up and continued the motion, and reserved the question arising upon it, the court retained control of it until a subsequent term, when it rendered judgment against the company also. It appeared beyond question—in fact, it was admitted by the company's attorney—that, when the answer was filed, it was agreed that its affirmative statements

were to be regarded as traversed, or that the answer was to be treated as a mere denial. It was proven, however, that its indebtedness to Dickinson did exist on September 16, 1882, and continued until the 20th day of that month. The company was not out of court when the judgment was rendered. It was a defendant to the suit. It had made an issue as to the indebtedness, but failed, upon the testimony, to sustain it.

Gray's claim for prospective profits cannot be allowed. If Dickinson, without right, or the consent of Gray, had prevented the latter from completing his contract, then he would have a right to recover those profits which are not merely conjectural and possible, but which would naturally and reasonably have resulted to him from its completion. The contract authorized Dickinson, however, to terminate it upon 10 days' notice in the event the company failed to negotiate its bonds fast enough to meet his monthly estimates. This 10 days' notice was not given; but the following notice was received by Gray on May 20, 1882: "NEWPORT, May 19, 1882. *T. Gray, Esq., Contractor, Covington*—DEAR SIR: The Cincinnati & Southeastern Railway Company having defaulted payment on its estimate for work done by us in April, 1882, you are hereby instructed to stop all work pertaining to your contract with us until further orders. Efforts are being made to secure a satisfactory adjustment of our matters with the company, but, pending these, we have deemed it for the best interest of our subcontractors to suspend work along the entire line. Hoping that an early settlement of its affairs, and early resumption of work by the company, may be made, we remain, yours, truly, P. P. DICKINSON & Co. By C. O. COLTON, Atty." It is contended that this notice was merely to suspend work, and not to stop it finally and to cancel the contract. Gray must be regarded, however, as having accepted it in lieu of the 10 days' notice named in the contract, because he ceased the work, and never resumed it. He then abandoned the work. He could, either by parol or conduct, waive the right to 10 days' notice, and his right to insist upon a compliance with the letter of the contract. He abandoned or terminated the contract by stopping work; and, never resuming it, he treated the relation of contractor and contractee between himself and Dickinson as at an end. This was a waiver of the notice required by their agreement. He acted upon a defective notice; but he chose to do so, and leave his contract uncompleted. He is not entitled, therefore, to recover profits which would likely have resulted from the completion of the work.

The judgment of the lower court in each case is affirmed, both upon the original and the cross appeal.

ALLEN *et al.* v. KENNEDY *et al.*

(Court of Appeals of Kentucky. June 16, 1888.)

1. PRINCIPAL AND SURETY—LIABILITY OF SURETY ON EXECUTOR'S BOND—ESTOPPEL TO DENY.

Where the sureties on the bond of an executor, who was directed to hold and loan out the balance of the estate for the payment of certain legacies, at periods of from 10 to 19 years, the estate being otherwise fully administered, brought a bill in equity to restrain the misappropriation of the sums loaned, on the ground that they were liable on the executor's bond, and the legatees filed cross-bills seeking to make them so liable, but alleging no breach of the bond, for which reason the judgment holding the sureties liable was reversed, the sureties are not estopped, on the return of the case and the filing of answers and cross-bills by the legatees presenting a cause of action, to set up that the fund in question is held by the executor as trustee, and that their liability has therefore ceased.

2. EXECUTORS AND ADMINISTRATORS—FUND HELD IN TRUST, WHEN—LIABILITY OF SURETIES.

Where a will directs that the executor sell all the estate of the testator, pay first his debts, and then certain specified legacies, and hold and loan out the balance for the payment of certain other legacies, payable at periods of from 10 to 19 years, upon the arrival at age of the legatees, the executor, having completely adminis-

tered the estate, and paid the special legacies within two years, becomes trustee for the sums loaned out, especially where he is made residuary legatee, and the liability of the sureties on his bond as executor ceases.

Appeal from circuit court, Daviess county.

Stuart & Atchison and Sweeney & Son, for appellants. Williams & Powers, for appellees.

PRYOR, C. J. The will of N. B. Allen was admitted to probate in the year 1867. James Weir, of Texas, was appointed his executor, who executed a bond with W. J. Courtney and S. D. Kennedy as his sureties. As executor, Weir collected the claims due the testator, paid all his debts, sold his land on long credits, taking the notes payable to himself as executor, and within two years after his qualification had fully administered the estate. By the provisions of the testator's will he made special devises to his nieces and nephews, who were at the time infants, to be paid them on their arrival at the age of 21, and the money to be loaned out until that period. He makes Weir, "his worthy father-in-law, executor;" and directs him also to pay his mother during her natural life an annuity of \$100, payable out of the portion devised to his executor, Weir, to whom is given the entire residue of the testator's estate. The executor, being a resident of Texas, returned to that state after administering the estate of the testator; and having pledged some of the notes due him as executor to the Planters' Bank, to secure his individual indebtedness, the sureties, believing they were liable for the payment of the special legacies to testator's nieces and nephews, filed this petition in equity, alleging their liability, and assailing the transfer to the bank of the notes payable to the executor from the sales of the estate of the testator. The appellants, the nieces and nephews, filed answers and cross-petitions, seeking to make the sureties liable on the bond of the executor for the special devises made to them. On the hearing below, the sureties were made liable, and on an appeal to this court the judgment was affirmed, but a rehearing was afterwards granted, and the judgment reversed. The opinion affirming the judgment said, in express terms, it was too late to make the question here that the holding by Weir was as trustee and not as executor, as their liability was admitted, and on that ground they were seeking the aid of a court of equity. No issue of that character was made by the pleadings, but the plain averment that these sureties were liable on the executor's bond. The rehearing was granted after affirming the judgment, on the ground that no breach of the bond or covenant had been alleged in the cross-petition. In the opinion reversing the case, this court said: "The question as to how the assets of the estate were held at the time of the bringing of the suit cannot be determined in the present condition of the pleadings, as no issue as to liability of any kind is presented." On the return of the case, the legatees filed answers and cross-petitions presenting a cause of action, and the sureties presented the defense that Weir held this fund for the legatees as trustee, and not as executor, and therefore no liability existed on their part by reason of the bond of the executor. This issue was tried, and decided for the sureties, and the legatees have appealed.

It is insisted by their counsel that the opinion affirming the original judgment, as well as the admission of their liability by the sureties in the original pleading, has precluded the sureties from making any such defense. It is sufficient to say that the legatees had no cause of action against these sureties on the original proceeding; and therefore when they attempted, on the return of the case, to assert their claim in a proper manner, the sureties had the right to make or present any defense they had to the recovery. It was the first and only time they had been called on to respond to the claim of the appellant, and the opinion reversing the case intimates plainly the reason why the question was not disposed of on the first hearing. If the cross-petition of Crawley and

wife had presented a cause of action, then, with no question raised as to the liability of the sureties, but with the admission that they were liable, the judgment below would have been affirmed. The effort of the sureties to prevent a wasting of the assets by the trustee or the executor did not enlarge their liability, or estop them from making the question when sought to be held responsible. They doubtless thought they were liable, and proceeded against the bank on that idea; but there is no principle applicable to the law of estoppel that would preclude them from making a defense if meritorious, when sued by the legatees, unless their action had worked an injury in some way to the appellants. Instead of injuring the appellants, they have stopped the bank from appropriating the funds of the estate to the payment of Weir's own debts. So the practical question in this case is, how did Weir hold these funds,—as executor or trustee? He had paid the debts and all the special legacies required to be paid within a certain period; that is, within two years from his qualification: He had converted the estate into cash, or sold it, taking notes payable to himself as executor. He was not required to pay this money over to the legatees, but required to loan it out until they arrived at 21 years of age, and to pay to his mother, out of the fund passing to him as the residuary legatee, \$100 per annum. The testator had implicit confidence in the father-in-law he was at the time making his executor; speaks of him as a worthy man; and intrusts him with the duty of loaning out and managing this fund, out of which the legacies are to be paid, until the legatees arrive at age. The will was probated in the Daviess county court in the year 1867. The first legacy was not due until June, 1878; the second, March, 1880; the third, April, 1880; the fourth, January, 1883; the fifth, June, 1885; and the sixth, February, 1887. These legacies were payable from 10 to 19 years after the probate of the will by the residuary legatee of the entire estate. The money coming to his hands was a fund, first, to pay debts and certain legacies that were due and payable at once or in a short period, and the balance was to be held by him and loaned out for the benefit of these appellants, and what was left belonged absolutely to Weir, save the charge made upon it for the benefit of his mother. The sureties had no power over this fund. Everything had been paid that should have been paid, and the balance left in the hands of Weir to be loaned out by him for the appellants. He confided in Weir, his father-in-law, and required him to keep the fund at interest until the children arrived at age. The loaning out of this money, and holding it for from 10 to 20 years, was no part of the executor's duty, as such. He became trustee for these appellants, and as such can be held responsible. See *Neely v. Merritt*, 9 Bush, 346. In *Warfield v. Brand's Adm'r*, 13 Bush, 77, this court, in speaking of the powers and duties of executors, said: "And we think we ought, in furtherance of that intention, to treat all those powers and duties conferred and imposed by the will, the faithful performance of which are secured by the executorial bond, and which pertain to the settlement of the estate, and the ascertainment of the net amount, and its distribution according to the usual course of administration among those entitled to it, as legal executorial powers and duties, and all others as trusts." There is no doubt but under a devise by which the executor is directed to pay a particular sum of money to the devisee, or a special legacy, that the sureties on the bond are liable to make good the default of the executor; but where a devise is made by which the executor is to sell all the estate of the testator, pay first his debts, and then pay certain specified legacies, and to loan out a part of the proceeds of sale for 10 or 20 years for certain other purposes, that he then, as to those sums, becomes a trustee, and his office as executor ceases, and particularly when he is invested with the absolute title, first, as executor or trustee, and then as the residuary devisee. In *Lasley v. Lasley*, 1 Duv. 117, the testator bequeathed to his grandson "five hundred dollars, for the purpose of educating said grandchild, and to be paid out and furnished in such

a way and at such times as my executor may deem proper." It was held that "the executors should be presumed to hold as trustees after two years from the date of qualification." In this case, Weir, as executor, trustee, and devisee, held and owned the entire estate, a part of the proceeds of which was to be loaned out for the period of from 10 to 19 years, for the payment of certain legacies. This made Weir trustee as to the loan, and his sureties are not liable for this money. Judgment affirmed.

SAVINGS BANK OF LOUISVILLE'S ASSIGNEE v. CAPERTON *et al.*
MEYERS *et al.* v. SAME.

(Court of Appeals of Kentucky. June 2, 1888.)

1. **BANKS AND BANKING—LOSS BY DEFAULTING CASHIER—LIABILITY OF DIRECTORS.**
In an action by depositors in a bank against the directors personally for loss occasioned by a defaulting cashier, who owned a one-fifth interest, and was the leading spirit in the bank, a man of recognized business ability, and as was supposed of the highest integrity, it appeared that for nine years he had been making false entries, and had embezzled a large amount; that the services of the directors were gratuitous; that at the time of a merger of the old bank in a new one no new books had been opened, thus enabling the cashier to conceal his former defalcations, but there was nothing to excite suspicion as to the cashier's honesty, the frauds being perpetrated by false entries, which made the weekly statements apparently correct; that the duties of cashier, book-keeper, and teller were all performed by the defaulting cashier. *Held*, that the directors were not liable.
2. **SAME—LOSS BY DEFAULTING CASHIER—PROOF OF NEGLIGENCE OF DIRECTORS.**
In such case, the fact that bonds belonging to one of the directors were used, in his absence, by the cashier, in his statement as to the condition of the bank, as bank assets, the bank being accustomed to invest in like bonds, does not indicate negligence on the part of the directors in their failure to examine the books to see to whom the bonds had been charged, there being no suspicion of the cashier's integrity.
3. **SAME—NEGLIGENCE OF DIRECTORS—DEPOSIT IN ANOTHER BANK TO SECURE DRAFTS.**
In such case, the bank being run in two departments, as a savings bank and a commercial bank, the directors are not guilty of neglect in placing certain bonds belonging to the savings side of the bank in the custody of a New York bank for the purpose of enabling the bank to draw upon New York when necessary, which bonds the defaulting cashier afterwards pledges as collateral to raise money.
4. **SAME—LIABILITY OF DIRECTORS FOR DEFAULT BY CASHIER—BURDEN OF PROOF.**
In an action by depositors against the directors of a bank to hold them personally liable for defalcation of a cashier, the burden is upon plaintiffs to show a want of diligence on the part of the directors in discovering the fraud.

Appeals from Louisville chancery court.

Action by Gustave Meyers and others, depositors in a bank, to hold liable John Caperton and others, as directors, for loss occasioned by the cashier's defalcation. The cross-petition of the bank's assignee, who was made defendant, was dismissed, from which he appeals. Judgment was rendered for defendants, and plaintiffs appeal.

R. Weissinger and *A. P. Humphrey*, for the assignee. *Wooley & Buckner* and *Kohn & Barker*, for Meyers *et al.* *James Speed*, *A. Barnett*, and *Thos. & John Speed*, for appellees.

PRYOR, C. J. This action was instituted by Gustave Meyers and others against the president and directors of the Louisville Savings Bank to recover the various sums due to them as depositors in its savings department, the loss having been caused from the embezzlement of the funds of the bank by J. H. Rhorer, the cashier. The ground of recovery is the alleged negligence of the directors in the general conduct of the bank, and particularly in their failure to inspect the books of the bank, and a want of diligence in supervising the acts of their subordinate, the cashier. The bank, by reason of the defalcation, was rendered insolvent, and an assignment made in January, 1880, of all of its assets to the appellant Jones. The creditors of the bank filed their petition in equity, alleging that Jones, the assignee, refused to sue the direct-

ors, or to unite with them in the action. Jones was made a defendant to the action, and by a cross-petition sought to recover of the directors for the default of Rhorer, on account of their negligence with reference to the affairs of the bank; alleging that he had delayed the litigation for the purpose of ascertaining the condition of the bank, and the facts, if any, upon which a recovery could be had against the directors. A controversy originated in the court below as to the right of Jones to maintain the cross-action, and, on motion of the creditors, they were allowed to prosecute the cause of action set up in the original petition, and the claim of the assignee, in so far as it affected the depositors, was dismissed. It is not necessary, in the light of the facts presented, to discuss the right of either Jones or the creditors to maintain the action, further than to say that the bank or its assignee is the proper party plaintiff, in such cases, unless it plainly appears that a cause of action exists, and the bank refuses to bring the action. We will proceed, therefore, to consider the case on its merits. The corporation, the Louisville Savings Bank, was organized in the year 1866, and was the successor of a bank called the "Louisville Savings Institution," the former having been merged in the latter, by taking all its assets and assuming all its liabilities. An election of directors was held in August, 1866, and James Guthrie, Jordan F. Ward, James W. Heming, Milton H. Rhorer, and Jonas H. Rhorer were elected. The directors then elected J. H. Rhorer, the subsequent defaulting cashier, president, and Thomas Barclay cashier; and when this was done, directed the president and other officials to have the balances on the books of the old bank transferred to the books of the new bank. Guthrie died in April, 1869, and John Caperton was made director in his stead. In 1871, J. H. Rhorer resigned as president, and was made cashier; Barclay having ceased his connection with the bank. Caperton was then elected president. In 1874, M. H. Rhorer resigned as director, and Andrew Sabine was placed in his stead. From the 1st of January, 1871, J. H. Rhorer filled the place of cashier, teller, and book-keeper in the commercial or general department of the bank. The bank had two departments in the same building,—one known as the savings department, and the other as the general or commercial department; both regarded, however, as the one bank, and money often transferred from one department to the other. The directors sought to be made liable are Caperton, Heming, Speed, and Sabine, the fifth director being J. H. Rhorer. The books of the general department were kept by Rhorer, and of the savings department by Joshua F. Speed, Jr. In the year 1872, shortly after Rhorer was elected cashier, the bank built what is termed a safety vault, at a cost of \$55,000. The capital stock of the bank was only \$100,000, one-fifth of which was owned by J. H. Rhorer, the cashier. Rhorer was not only the cashier and the one-fifth owner of the stock, but, as is manifest from the proof in this case, was the leading spirit in directing and controlling the affairs of the bank during the series of years in which he was engaged in making fraudulent entries in the books of the bank to enable him to appropriate its funds to his own use. His entire administration of the affairs of the bank evidences a systematic purpose in embezzling the funds of the institution, and betraying an almost unlimited confidence placed in him by the directors. It was not until the 9th of January, 1880, that the frauds were discovered, although practiced for the nine years he was cashier, and long before, and then made known by the written acknowledgment of Rhorer, found with the papers of the bank, to the effect that he had been robbing the bank, and had surrendered himself into the custody of the law. The investigations and settlements made since the assignment, shows the defalcation to be \$118,000.

The only question presented in this case is whether the directors acted in good faith, and with ordinary care and diligence, in conducting the affairs of the bank, or such diligence as ordinarily prudent men would have exercised with reference to the conduct of such a moneyed institution. It is not a

question as to how the frauds of the cashier might have been discovered, but were these directors guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised. The directors received no compensation for their services; the benefits to be derived by them from the profits of the bank flowing solely from their interests as stockholders. If their liability is to be measured by that imposed upon the president or the director who received as compensation a sum equivalent to an undertaking to supervise the entire affairs of the bank, by an actual inspection and examination of the accounts and books of the bank as well as other duties pertaining to such a position, then there would be no question as to the liability of the appellees in this case; but with services rendered that are merely gratuitous, or at least without reward, it cannot be held that a liability is to be fixed upon them for no other reason than their failure to detect the fraudulent entries made by the cashier in the books of the bank, although extending through a period of nine years. The facts, however, presented by this record, must determine the question of negligence or the want of diligence on the part of the appellees. It was incumbent on the directors to appoint all the officers necessary to carry on the business of the bank, and to use ordinary diligence in the selection of men qualified to fill such positions. In the year 1871, when Rhorer was elected cashier of the bank, and also made its book-keeper, his past life as a business man, so far as then known, was a sufficient guaranty to the directors of his honesty and capacity for the position. He had been made president of the bank at its organization, in 1866, with, as the proof shows, some of the most successful business men as directors,—Guthrie, Speed, and Heming. His experience in banking, as well as his high character for integrity, both personal and financial, commended him to all business men as well qualified for such a position. There was no reason for suspecting his fidelity to his co-directors, and to the interests of the bank, whose affairs he had been called on to manage; and yet he was, at the time he was elected president of the savings bank, a defaulter in the savings institution that had been merged into the former bank in the sum of \$17,000. It is insisted, as one of the grounds for imputing negligence to the directors, that Rhorer, who had been elected president of the savings bank, and was directed to transfer the balances from the books of the savings institution to the new bank, failed to open new books, but continued to use the old books, and especially the individual ledger containing the accounts of depositors, in the savings bank until its supervision, in the year 1880; that this aided Rhorer to cover up his defalcations in the old bank, and to practice his frauds in the new bank, when, if the accounts on the old books had been balanced, and the proper entries made in the new books, the fraud already practiced might have been detected; that a proper and thorough examination of the accounts of the savings institution would have been the safest method for these directors to have pursued, with new accounts opened for depositors, must be readily conceded, but Rhorer, having been cashier of the old institution, and had at the time of the merger of the two banks been elected president of the savings bank, it was not unreasonable, but consistent with the duty these directors owed to all interested, that Rhorer should have been selected to make the transfer, and to pursue that course that in his judgment was proper, in opening the books for the new bank. There was nothing to excite the least suspicion as to his honesty, and it cannot be regarded as neglect on the part of the directors in permitting him to use the books of the old for the purposes of the new bank. If balances had been struck and transferred from the old set of books to the new, the fraud already practiced would necessarily have entered into the books of the new bank, as Rhorer, who was directed to make the transfer, would scarcely have made entries that would have resulted in an exposure of his fraudulent practices.

The frauds perpetrated by the cashier in abstracting the money of the bank

were committed in various ways: *First*. When deposits in certain instances were made he would credit them on the individual ledger, but make no charge on the blotter. In one instance, the Louisville Steel-Works is credited on the individual ledger with \$5,000, and this sum not credited to the concern or charged to cash on the blotter. Again, the same party is credited by several items, amounting to \$2,719, in the same way. *Second*. The blotter shows a deposit on January 25th of \$8,898.50, and on that day Rohrer & Cotton are credited with that amount on the individual ledger. On the same day the Metropolitan National Bank of New York is credited on the blotter with \$6,101.50. These two items amount to \$10,000, and the bank on the general ledger is credited by \$10,000. It appears that the Metropolitan Bank was entitled to a credit of \$10,000, when Rhorer only placed to its credit \$6,101.50, and gave credit to Rhorer & Cotton for \$8,898.50, when no such deposit had been made; but by crediting the bank's account in the ledger with the true amount, \$10,000, the accounts appeared correct, and enabled the cashier to appropriate \$3,898.50 to his own use. Another instance is where Rhorer is credited on the blotter with \$350, and this sum is posted to his account in the individual ledger as \$2,350. Again, he would charge a depositor on the blotter with a certain sum, as if paid on the depositor's check. This sum would be posted to his account on the individual ledger, and when balancing the account the item would be omitted from the addition. This character of fraudulent entries in the books of the bank was practiced from the year 1871 until the close of the bank, in January, 1880. The amount of defalcation, concealed by the fraudulent entries, amounting in the aggregate to near, if not quite, \$60,000, with the cash found short in the sum of \$58,000. The entire defalcation was \$118,228.57, as reported by the expert accountants in the examination made of the bank accounts.

The principal grounds relied on for a reversal in this case are—*First*, that the directors, in giving to Rhorer the sole control of the books of the bank, making him cashier, book-keeper, and teller, placed it within his power to perpetrate the fraud, and for that reason they were guilty of such neglect as makes them responsible to the bank; *second*, they failed to make proper examinations as to the condition of the bank, and allowed the books to be falsely kept. We have said that it was their duty to exercise that reasonable and ordinary care with reference to the affairs of the bank that ordinarily prudent men would exercise in reference to such business affairs. If it was the duty of the directors to examine the books of the bank in the absence of any reason for suspecting the honesty of the bank cashier, with a view of testing their correctness with the weekly statements made them, or when making their periodical investigations of the money on hand, and the notes, bills, and bonds belonging to the bank, it being manifest that the frauds could have been easily discovered, at least by a book-keeper of ordinary intelligence, then responsibility would necessarily follow. It is difficult to define each and every duty pertaining to such a position; but we are satisfied that a bank director is neither required to be an expert or a competent book-keeper, nor do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily, or monthly statements made to the board correspond with the general balance upon the books. In this case the weekly statements as to the cash on hand, bills discounted, etc., corresponded with the cash account as it appeared each day, or at the time the statement was made with the cash account on the teller's blotter, where, as in this case, the cash account was kept. It is argued, however, and the expert so states, that these frauds could have been readily detected, by comparing a balance on the individual ledger with the amount stated to be due depositors in Rhorer's weekly statements. It is plain that any director, if at all conversant with book-keeping, could have gone to the individual ledger, and running over the accounts of depositors, and then com-

paring that with the blotter evidencing each day's transactions, could have discovered the fraud, or it might have been discovered by ascertaining the amount due each depositor, as appeared from that book; but we know of no rule of law or reason that would require such an investigation by directors, and to hold them responsible for failing to discharge such a duty would be imposing a responsibility that no business man would assume, without a compensation commensurate with the labor required. If they have selected a cashier and book-keeper regarded at the time as qualified for the position assigned, or used reasonable care and precaution in making the selection, and taken from him a bond in an adequate penalty for the faithful discharge of his duties, his weekly or daily statements, as the custom of banks may be, agreeing with the balance as found on his books, connected with the periodical count of the money, notes, bonds, etc., it is all the supervision required, unless the directors have some cause for suspecting or see that he is neglecting his duties. In the present case the cashier made weekly statements to the directors that were compared with the cash balances, and found correct; or, if not compared at the time, those statements agreed with the general balance found on the books, that were, however, false and erroneous by reason of fraudulent entries and forced balances. They examined the general condition of the bank once in every six months, by making an actual count of the cash, and ascertaining the amount of bills, notes, bonds, and securities on hand,—all of which agreed with the statements made by the cashier, and verified by the general balance found on the books.

It is argued, however, that as one of the means of preventing such defalcations, it is prudent to have different employees in charge of the books, as checks upon each other, and not intrust those duties to one man. This no doubt is the safest course to pursue so as to prevent fraud and have perfect accuracy in the accounts; but the fact that these directors saw proper to confide in Rhorer, and permit him to discharge the double duty of book-keeper and cashier, does not evidence a want of ordinary diligence on their part. If called on to adopt that mode, which would approach nearer to absolute security against such thefts than any other, the usual custom in the banks of a city would be adopted; but the question here presented is, were the directors, in making such an employment, doing that which men of ordinary prudence in such business would have regarded as unsafe? We think, measuring the duty of a director by the character of the business he is supervising, that the entire testimony in this case gives a negative response to the question. He had been trusted to an unlimited extent, prior to this undertaking, in the conduct of financial transactions involving millions of dollars. He was regarded as a man of means, and worthy of every man's confidence by reason of his supposed great moral worth, as well as his financial standing, and no reasonable man, unless exercising the highest degree of care under the circumstances, would have supposed that a check on his conduct in the bank was necessary, or that any inspection of the books, by way of detecting errors, was demanded. We therefore see no reason for holding these directors personally liable by reason of frauds concealed by a system of false entries requiring the skill of expert accountants to ascertain, when no breach of duty on the part of the cashier had been brought home to the directors, and the defalcation resulted from no act of their own. J. F. Speed, Jr., who had charge of the books in the savings department of this bank, was an inexperienced book-keeper at the time of his selection, yet his books were accurate, and his fidelity to the bank and its patrons unquestioned. The evidence of honesty and the utmost good faith was found on the side of the youthful book-keeper, while a systematic concealment of fraud was being practiced by the shrewd and experienced financier. Henning and Speed, two of the directors, were in the bank daily, aiding in its control and management. They were both business men, with their capital invested in the stock of the institution, and to adjudge that they were indif-

ferent to their own interests, or that of the bank, would be a conclusion not sustained by the facts before us. The case of *Dunn's Adm'r v. Kyle's Ex'r* 14 Bush, 134, is very similar in many of its features to the case before us, in which it was held that the directors were not liable to stockholders for the default of the cashier unless occasioned by their fraud or gross neglect. The absence of ordinary care was attempted to be shown in that case, because of the failure of the directors to discover the fraudulent acts of the cashier, such as required the skill of an accountant to develop. Where directors, by their own act, cause the loss to the bank, or the corporation they represent, no doubt as to their liability can arise. Where they discount paper known to be worthless, or cause the cashier or other officer of the bank or corporation to do that which is forbidden by the charter, and loss arises, they will be held responsible. *Spring's Appeal*, 71 Pa. St. 11; *Shakers v. Underwood*, 9 Bush, 609; *Bank v. Hill*, 56 Me. 385. Here the directors are charged, not with any wrongful act of theirs by which loss has been sustained, but for neglect in failing to do that which they ought to have done. They were ignorant of the thefts being committed, but it is alleged they could have discovered the fraud by the exercise of ordinary diligence.

If this action was against the bank, it would not be allowed to say that its directors were ignorant of these frauds; for in such a case the law presumes that the directors knew every entry made by its subordinate officers in the bank books, and therefore the misappropriation of funds by a cashier, unknown to the directors, constitutes no defense to the bank; but in an action against the directors to make them personally liable no such presumption exists, and the burden is on the creditor of the bank to show a want of diligence on the part of the directors in discovering or preventing the fraud. Directors are under no personal liability to the creditors of a bank by reason of a neglect of duty. They are the agents of the corporation, and could only be sued in this case by the creditor because of the refusal of the assignee to sue. They may be proceeded against personally for a conversion of special deposits by them because guilty of a tort, as in the case of *Shakers v. Underwood*, 9 Bush, 609; or, in a case where the president and directors are the parties to be charged, there is no reason why the creditor may not sue, making the bank and directors defendants. So, at last, it is the bank suing the directors in this case for a neglect of duty; and, if there were no depositors, could the bank claim that the directors were guilty of neglect in permitting Rhorer to act as cashier and book-keeper, or in failing to detect the frauds so manifest after the discovery? We think not. The appellants also say that the directors were guilty of neglect in placing certain United States bonds, amounting to \$35,000, in the custody of the Metropolitan Bank, in the city of New York, that were afterwards hypothecated with that bank for money loaned to Rhorer, without the knowledge of the directors. These bonds belonged to the savings side of the bank, the books of which were under the control of Joshua Speed, Jr. This book-keeper reported in his statements these bonds as belonging to the savings side of the bank, and the directors believing them perfectly secure, and having placed them with that bank to enable the bank at Louisville, as Henning states, to draw upon the New York bank whenever it might need money, made no inquiry as to any use that might have been made of them by its bank officers. They had no reason to believe that Rhorer had pledged them as collateral to raise money, that he might increase the fund in the home bank upon which to plunder, and we perceive no reason for holding them guilty of an imprudent act in depositing them with the New York bank for the purposes mentioned by Henning, one of the directors. They, it is true, might have suspected Speed of using them for his purposes, if his honesty had ever been questioned or doubted by them, or they might have suspicioned Rhorer of stealing the bonds from Speed or the New York bank; but, as no cause existed for suspecting either of the book-keepers, the deposit-

ing of the bonds with the bank in New York did not constitute any character of neglect, as it was proper that they should do so under the circumstances.

In regard to the Semple bonds belonging to Caperton, and that were used in his absence in the statements as to the condition of the bank by Rhorer, as assets of the bank, it appears that the bank was in the habit of investing in bonds, and whether these bonds were all of the series of the Semple bonds does not appear. Rhorer exhibited them to the other directors as belonging to the bank, and how they were to know they had been charged to the account of Caperton is difficult to perceive. They did not suspect Rhorer of deception. The bonds were in the vaults of the bank, and exhibited as part of the assets. If it was their duty to examine Caperton's account in order to prevent fraud on the part of the cashier, their liability might be asserted; but even if Caperton had been present, with a series of bonds of a like character, he would doubtless not have suspicioned Rhorer of using his bonds as assets of the corporation. Nothing occurred during the interval between 1871 and 1880 that called the attention of the directors to the individual ledger, or to a minute examination of any book connected with the corporation. In the case of *Scott v. Depeyster*, 1 Edw. Ch. 542, the cashier or treasurer of the corporation embezzled the funds by a series of frauds running through several years, in a manner much like the cashier did in this case. The stockholders attempted to make the directors liable on the ground of neglect, etc. The court, in discussing the facts of that case, said that "such subordinates [alluding to the cashier] must be supposed to act honestly until the contrary appears, and the law does not require their employers to entertain jealousies and suspicions without some apparent reason;" and further said the court: "I think the question in all such cases must necessarily be whether they [the directors] have omitted that care which men of common prudence take of their own concerns." In the case of *Manhattan Co. v. Lydig*, 4 Johns. 377, it is said on this question of diligence: "The examinations of the bank, by the committee of directors, were in the usual way, and the fraud practiced eluded detection by means of a false balance-sheet. It is not for the court to point out the mode banks are to pursue to detect frauds, but if they take the usual and uniform method adopted, not only by this but by other banks, they cannot be subject to the charge of negligence." And if the mode adopted by business men in such cases is to fix the measure of diligence or determine the question of neglect, as said by Lord HATHERLEY, in *Turquard v. Marshall*, L. R. 4 Ch. 376, then directors are relieved from liability. Taking the entire testimony of bankers in this case, these directors were as vigilant or more so than the directors of other large moneyed institutions; and to hold them responsible under the facts presented would be to deter business men from accepting the position of a director, when by so doing they are required, in effect, to insure the honesty of bank subordinates by being made responsible for their fraudulent acts. We have considered other questions of neglect made in this case involving fraudulent overdrafts, and the fact of notice given a man, supposed to be perfectly honest, of the day on which his money as cashier was to be counted, in all of which we perceive no want of ordinary diligence. These directors were the principal stockholders. Their own interests were involved to a greater extent than that of the depositors. They were business men. Two of them were almost daily at the bank. The assets of the bank will pay 80 or 90 cents to the dollar, and if they paid less it could not affect the question here. They (the directors) have conceded their neglect in the particular of failing to have ample security to the bond of the cashier. They have made that neglect good by accounting to the bank for the penalty of the bond, which was \$20,000. They have exercised ordinary diligence in the discharge of their official duties, and suffered loss, in common with the appellants, by the fraud of a cashier in whom they all had the right to confide. The judgment below is affirmed.

ELDRIDGE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1888.)

1. CRIMINAL LAW—SENTENCE—PROVINCE OF JURY.

Under Gen. St. Ky. (New Ed.) 464, giving the jury authority, in fixing the penalty for a misdemeanor prescribed in chapter 29, Gen. St., if the same "be a fine, * * * to say in their verdict whether * * * the defendant shall be put at hard labor in lieu of imprisonment, for non-payment of the fine," the offenses so punishable being manifestly misdemeanors only, a judgment upon a verdict directing punishment by hard labor for receiving a bribe for voting, being a crime for which, under Const. art. 8, § 4, a person may be excluded from office and suffrage, is erroneous.

2. SAME—VERDICT—FIXING PUNISHMENT BY JURY.

Under Gen. St. Ky. (New Ed.) 464, giving, in certain cases, authority to the jury to say whether defendant shall be put at hard labor in lieu of imprisonment for non-payment of fine, it is insufficient for the verdict to say merely "the working statute applied," but, under instruction, they should fix in their verdict the extent of the punishment they intend to inflict.

Appeal from circuit court, Harlan county.

Indictment and conviction of Carr Eldridge for receiving a bribe at an election. The defendant appeals.

John Dishman, for appellant. *P. W. Hardin*, for appellee.

LEWIS, J. The offense charged in the indictment against appellant is receiving a bribe for his vote at an election, denounced by section 11, art. 12, c. 33, Gen. St., the punishment for which is a fine from \$50 to \$500, and exclusion from office and suffrage. But, under an instruction of the court, the jury returned a verdict of guilty, fixing the punishment at \$50, exclusion from office and suffrage, and, in the language used, "the working statute applied," and thereupon the court rendered judgment for the fine, for excluding him from office and suffrage, and, further, that, having failed to pay or replevy the fine and the cost of the prosecution, he be placed in the custody of the jailer, and worked in the public streets and roads of Harlan county the period of 50 days, of eight hours each, under the supervision of the jailer, and, when not at work, to be kept in jail. The "working statute," as it is called in the verdict, and under which the judgment of the court was in part rendered, is one approved April 10, 1878. See Gen. St. (New Ed.) 464. By section 2 of that statute it is provided that if part or all of a penalty for a misdemeanor prescribed in chapter 29, Gen. St., "be a fine, it shall be in the discretion of the jury fixing the amount of the fine to say in its verdict whether, if the fine and costs are not immediately paid or replevied by the defendant, he shall be put at hard labor in lieu of imprisonment, for non-payment of the fine; and, if such be the verdict of the jury, the court shall direct that the defendant be placed under the control of the jailer at hard labor for the benefit of the county," etc.

There are two sufficient reasons why the judgment rendered in this case is erroneous and illegal. *First.* The statute gives to the jury discretion to say—and, to authorize any judgment of the court in regard thereto, it seems to us, requires the jury to say in terms—whether the defendant shall be put at hard labor. It is not, in our opinion, sufficient for the jury to say in their verdict merely, "the working statute applied." It was the duty of the court to instruct the jury what was the nature and meaning of the statute, and for them to fix or not to fix in their verdict the character and extent of the punishment they intended to inflict under it. *Second.* The offenses for which it was intended by the statute to prescribe the punishment at hard labor are manifestly such as may be punished, under chapter 29 of the General Statutes, merely by fine and imprisonment in the county jail, and such as, by reason of the punishment, are denominated misdemeanors, as distinguished from crimes and high misdemeanors, for which, under section 4, art. 8, of the constitution, a person may be excluded from office and suffrage. Section 1 of the statute re-

lates to cases where a part or all the penalty prescribed is confinement in the county jail; while section 2 relates to cases where part or all the penalty is a fine,—the punishment by hard labor being authorized, at the discretion of the jury, under both sections. And section 3 is as follows: "If the penalty for a misdemeanor prescribed in said chapter be both fine and imprisonment, the principle of section 1 shall govern as to the imprisonment, and that of section 2 of this act shall govern as to the fine." It is thus made clear that no offenses for which a greater or other punishment than fine and imprisonment can be inflicted are contemplated by the statute, and that the punishment of hard labor cannot be imposed, in addition to the punishment of exclusion from office and suffrage. In our opinion, the judgment rendered in this case is unauthorized and void, and consequently must be reversed for a new trial.

PEARCE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1888.)

1. INDICTMENT AND INFORMATION—FINDING AND FILING—RECORD ENTRIES.

Crim. Code Ky. § 121, providing that "the indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk," is substantially complied with by the following record entries: "The grand jury appeared in open court, and by and through their foreman made the following report," followed by the entry of the style of the indictment. And: "On the back of said indictment is the following indorsement, viz.: 'A true bill. WILLIAM WORTH, Foreman.' And: 'Received from the foreman of the grand jury, in the presence of the grand jury, and filed in open court.'"

2. HOMICIDE—EVIDENCE—HARMLESS ERROR.

Upon trial for murder, the deceased having been shot in the night by some one outside the house where he was, the commonwealth proved that persons jointly indicted with defendant, but not on trial, on the day following the murder, were hunting cartridge shells at the place of the killing, and also proved conversations of such parties relative to the murder, all which took place in the absence of defendant. Although the evidence was incompetent, as it does not appear that it could have prejudiced defendant, its admission was harmless error.

3. SAME—ADMISSION OF IMPROPER EVIDENCE—INSTRUCTIONS TO DISREGARD.

Improper documentary evidence having been admitted at the instance of the commonwealth, the error is rendered harmless by its withdrawal before the close of the prosecution's testimony, and instruction to the jury to disregard it.

4. SAME—EVIDENCE—STATEMENTS OF ACCOMPLICES.

A homicide having originated from a feud between two factions, though the commonwealth proved the whereabouts of the leader of one of them at the time of the commission of the crime, statements by such leader relative to the murder are inadmissible in evidence for the defendant.

5. WITNESS—CONSPIRATORS—COMPETENCY.

Parties against whom were shown circumstances strongly criminative, jointly indicted with defendant, who is being tried separately upon an indictment charging a conspiracy, are incompetent witnesses for the defense.

Appeal from circuit court, Knox county.

Indictment for murder, against Richard Pearce, T. J. Henderson, Joseph Henderson, and Alvis Turner. Defendant Pearce was separately tried, found guilty, and appealed.

J. H. Tinsley, for appellants. *D. Y. Lyttle*, for the Commonwealth.

LEWIS, J. Section 121, Crim. Code, provides that "the indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, and remain in his office as a public record." The transcript before us shows an entry of record in this case in these words: "The grand jury appeared in open court, and by and through their foreman made the following report;" which was followed by the entry of the style of an indictment for murder against appellant and the others indicted jointly with him. At the same time the following entries were also made: "On the back of said indictment is the following indorsement, viz.: 'A true bill. WILLIAM WORTH, Foreman.' And: 'Received from the foreman of the

grand jury, in the presence of the grand jury, and filed in open court.' " It seems to us the Criminal Code has been in every respect substantially complied with; for there can be no uncertainty or doubt of the indictment under which appellant was tried having been duly presented to the court, and filed with the clerk.

Howard Monroe was, about a half hour after dark, shot through a window of the house of John Myers, where he was at the time a visitor, and killed, and appellant, T. J. Henderson, Joseph Henderson, and Alvis Turner, were jointly indicted for the murder; a conspiracy between them being charged. It appears there had, for some time previously, existed in the county of Bell, where the crime was committed, a feud between two factions, the leaders of which were, respectively, Jack Turner and Sanders, by reason of which several persons had been killed; Jack Turner being one of them, having been shot in the town of Pineville from the house of Alex. Monroe, an uncle of Howard Monroe. The four defendants were cousins, three of them being nephews and one a son of Jack Turner, and all of them partisans of the faction of which he was the leader until his death. But the deceased was not a member of either faction, had not taken any part in the feud, nor, so far as the evidence shows, had there ever been any enmity or even intercourse between him and appellant before he was killed. The only one of the four persons indicted who it appears had any ill feeling at all against him, or personal reason or motive for taking his life, was T. J. Henderson, who, the evidence tends in some degree to show, was jealous of him by reason of attentions paid by him to a young lady. But it seems to be conclusively shown that he did not actually commit the deed, being, at the time the shots were fired, in another part of the Myers house, where he lived, eating his supper; nor did either Joseph Henderson or Alvis Turner, according to the evidence, do the shooting, for they likewise established an *alibi* by a witness introduced by the commonwealth. Appellant also was away from the scene of killing, according to the testimony of his relations; but the jury seems to have disbelieved them. If appellant be guilty, the motive or incentive for the deed must have been the remorseless and blood-thirsty spirit which had been engendered by the feud between the factions, or that he was hired by T. J. Henderson, which seems to be the theory of the prosecution, and in support of which there was evidence regarded by the jury sufficient to authorize conviction. The evidence is, the four defendants had been for some time associating and going together armed, and were seen in company, on the premises of Myers, the day Howard Monroe was killed, though he was at the time absent, in company with the young lady referred to; and they were together at the same place next day after the killing. Two men were seen near the house of Myers a short time before the killing, who, from the suspicious circumstances detailed by the witnesses, were anxious to avoid recognition; and a witness testified one of them looked like T. J. Henderson, and stated facts tending to show it was he. And one witness, John Crook Turner, who had belonged to the Jack Turner faction, testified the appellant confided to him he had killed Howard Monroe, firing two shots at him, and that T. J. Henderson had agreed to give him a suit of clothes, \$20, and a pistol to do the deed. And that testimony was corroborated by the evidence of another witness, who testified that on Saturday, the day of the killing, he loaned his pistol to T. J. Henderson, who offered to buy it, and asked him what he would have to pay if it was not returned; that the next day he saw the pistol in the possession of appellant, who told him he had bought it from Henderson, whom he would have to see about it; that he went with appellant to where Henderson was, and, insisting upon the return of his pistol, appellant, after having a private conversation with Henderson, did return it, but gave him two less cartridges than Henderson had gotten from him, and appellant then had in his possession a \$20 bill. The commonwealth was permitted to prove, the

appellant objecting, that, the next day after the crime was committed, T. J. Henderson was hunting cartridge hulls, giving his opinion as to where, near Myers' house, they should be found, and that he did pick up one which the witness stated he did not think had been recently fired. It was proved that Jo Henderson was also, on the day after the killing, hunting cartridge hulls, of caliber 45, and one witness testified that he gave to him some hulls which he (witness) had some time before picked up and carried home, and that he next saw them at the examining trial of the parties charged with killing Howard Monroe. It is true, the conversation and conduct of the Hendersons took place after Monroe was killed, and without the presence of the appellant; but it does not appear what the object of the prosecution was in introducing the evidence, nor do we see how it could have affected appellant one way or another. The only effect it could have had was to create a suspicion that T. J. and Joseph Henderson themselves were the guilty parties; but we do not perceive how even that could have been, because it does not appear to us how the cartridge shells could be used to fix the identity of the assassin. The evidence, though incompetent, did not, therefore, we think, prejudice the substantial rights of the appellant.

The copy of an indictment for killing Thomas, against the appellant and others, which was in the Bell circuit court, though improperly permitted to go to the jury, was subsequently, and before the conclusion of the evidence for the commonwealth, withdrawn by the court, and the jury were told they had no right to consider it for any purpose in making their verdict. We have no right, therefore, to presume that appellant was prejudiced by reading that indictment; for to do so requires the assumption that the jury disregarded their duty and their oath to try the accused according to the evidence. It was not competent to prove, by the witness called for the defense, what he heard Sanders, the leader of one of the factions, say in regard to the killing of Monroe; and the objection of the attorney of the commonwealth was properly sustained. Nor did the evidence introduced by the prosecution as to where Sanders and his gang were when the killing took place render hearsay evidence in behalf of the defendant competent. We think there was evidence tending strongly to show that not only T. J. Henderson, but also Joseph Henderson, conspired with appellant to murder Monroe; and the court did not, therefore, in our opinion, err in refusing to permit them to testify; and, as to T. J. Henderson's complicity with the appellant in the killing, we think the evidence was such as to satisfy the court. Moreover, Alvis Turner was introduced as a witness for appellant, and accounted for the way in which the two cartridges were used that appellant failed to return to the owner when the pistol was given up; and that is the only fact exculpatory of appellant that it is contended in argument Joseph Henderson would or could have testified to, having such bearing, for he was not present at the time the killing was done. No objection is made to the instructions of the court to the jury, nor do we see any.

In our opinion, no error of law prejudicial to the substantial rights of appellant occurred at his trial, and the judgment of conviction must be affirmed.

ROSENBERG *et al.* v. THOMPSON *et al.*

(Court of Appeals of Kentucky. May 5, 1888.)

CHattel MORTGAGES—ON STOCK OF GOODS—REFLENISHING STOCK—LIEN.

Where one gave his note, and a mortgage on a stock of goods, to secure a loan, and the mortgagee permitted the sale of the goods, and the replenishing of the stock, and the mortgagor afterwards made an assignment for benefit of creditors, the mortgage is good as against creditors; but the proceeds of goods acquired subsequently to the mortgage should be distributed among the creditors generally, and the burden is on the mortgagee to show what goods are embraced by the mortgage lien.

Appeal from circuit court, Montgomery county.

Jacob Dinkenspiel a dry-goods merchant of Mount Sterling, Ky., borrowed of his brother-in-law L. Oppenheimer, \$1,150, for which he executed his note; and, to secure its payment, he executed to Oppenheimer a mortgage on the stock of goods then in his store in Mount Sterling. Subsequently, not being able to continue his business, he executed to W. W. Thompson a deed of assignment for the benefit of his creditors, recognizing in the deed his lien debt to Oppenheimer. The assignee sold the stock of goods, and realized therefrom only a sum sufficient to pay the mortgage debt. Thereupon the complainants, Rosenberg & Nathan *et al.*, creditors of Dinkenspiel, instituted this action against Thompson, Oppenheimer, and Dinkenspiel, alleging that the mortgage to Oppenheimer was without consideration; that the recognition of said mortgage in the deed of assignment was an attempt to prefer Oppenheimer, and to defraud Dinkenspiel's other creditors; and that the goods actually received and sold by Thompson, the assignee, were purchased by Dinkenspiel after the execution of the mortgage, and hence not embraced by it. They prayed that Thompson and Oppenheimer be made to account to them for the proceeds of the sale of the goods. There was a judgment for defendants, and Rosenberg & Nathan *et al.* appeal.

Arthur Carey, H. L. Stone, H. Marshall, and Laf. Joseph, for appellants.
W. H. Holt and James Harlan, for appellees.

PRYOR, C. J. It plainly appears from the evidence that Thompson, the assignee of Dinkenspiel, has acted in the best of faith with reference to the assigned estate, and equally clear that Oppenheimer loaned the money for which the mortgage was given to secure. The relation of the parties towards each other might be a circumstance, in connection with other facts, to establish fraud; but here there is an absence of any testimony showing a want of consideration for the note, but, on the contrary, the uncontradicted statement of both the mortgagor and mortgagee that the money was loaned; and therefore, the note being unpaid, the mortgage must be held valid as against creditors. The error in this case consists in the payment by the assignee of the entire amount realized from the sale of the goods to the mortgage creditor. It is evident that many of the goods sold were purchased by the mortgagor after the mortgage was executed; and, as those goods were not embraced by the mortgage, the mortgagee could not have appropriated them to his own use; and, if not, the assignee is in the wrong when he attempts to divert the money in that way. That the stock of goods was replenished from time to time, and money expended by the mortgagor for that purpose after the date of the mortgage, is conceded, and therefore the payment of the whole amount realized to Oppenheimer was improper. If the goods have been so mingled as to prevent the ascertainment of those on hand when the mortgage was given, the mortgagee, permitting the sale of the property mortgaged, and the replenishing of the stock by the debtor, must suffer the loss, if any; in other words, the burden is on him, under such a state of case, to show the goods embraced by the mortgage lien. There is enough in this case, however, to show that many of the goods were sold by the assignee that were in the store when the lien was created, and certainly not more than one-third of the proceeds should be held as from goods not embraced by its terms.

This case must be reversed, with directions to ascertain what amount was included in the note from the sale of goods that were purchased subsequent to the mortgage, and to appropriate that sum to the payment of creditors generally; and, if no other proof is taken, at least one-third of the amount of the note should go in that way. The judgment is reversed, and remanded for proceedings consistent with this opinion.

HOLT, J., not sitting.

TURNER v. SHAW.

(Supreme Court of Missouri. June 18, 1888.)

1. HUSBAND AND WIFE'S SEPARATE ESTATE—DEED FROM HUSBAND.

A husband, in 1861, conveyed to his wife real estate in Missouri, with a *habendum* clause, "To have and to hold unto the said S. A. T., and to her sole use and benefit. Held that, though in law such conveyance may have been void, in equity it vested the wife with a separate estate in said land.

2. SAME—DEED FROM WIFE TO HUSBAND.

Being so vested with such equitable separate estate, in 1874 the wife executed a deed for said land directly to her husband. Although this conveyance, as to a statutory separate estate, may have been invalid, it was operative and effectual to pass such equitable estate.

3. EQUITY—REFORMATION OF DEED—EVIDENCE.

The proof of mistake, to warrant the reformation of a deed, must be clear, positive, and satisfactory, and equivalent to an admission.¹

Appeal from Louisiana court of common pleas; ELIJAH ROBINSON, Judge.

Ejectment by Stephen J. Turner against Mary J. Shaw for city lots in Louisiana, Pike county, Mo. The case was tried without a jury, and judgment was rendered for plaintiff, from which defendant appeals.

W. H. Morrow and Thos. J. C. Fagg, for appellant. *John W. Matson*, for respondent.

SHERWOOD, J. Ejectment for an undivided one-sixth part of lots 519 and 520, in block 65, in the city of Louisiana, Pike county, Mo. The plaintiff and defendant are brother and sister, children and heirs at law of their father and mother, John F. and Sarah Ann Turner. The answer was a general denial, with a statement of special matters of defense set out at length, alleging that John F. Turner, deceased, the common source of title, being a southern sympathizer, and alarmed at the condition of the country, in June, 1861, executed a deed of conveyance of the property in question to his wife, Sarah Ann Turner. This deed was recorded in 1865. John F. Turner, with his family, consisting of his said wife and two daughters, Mary J. Shaw and Sallie Turner, continued in the uninterrupted possession of the property up to the date of his death, in 1880. The wife died in 1882. The defendant, Mary J. Shaw, widowed sister of the plaintiff, was the housekeeper and general manager of the household from the time of the acquisition of the property, in 1852, until the death of her mother, Mrs. Sarah Ann Turner, in 1882. That on account of his fears for the safety of himself and property, and for the purpose of placing all his property in such a condition that his family might have full benefit of it in case of his death, or its confiscation, on June 5, 1861, in consideration of "love and respect" for his said wife, he conveyed to her all of his property, consisting of several tracts of land, together with the lots in question, which were occupied as his homestead. In September, 1874, the wife, Sarah Ann Turner, in consideration of the sum of five dollars, etc., re-conveyed the same property to her husband. In August, 1878, being advised that the last-named conveyance was ineffectual to reinvest him with the legal title to the property so as to enable him to make a proper disposition of his entire estate among his children, and especially to secure to his two daughters, aforesaid, the property in dispute, for a permanent home for them, he and his said wife executed a deed to the said Mary J. Shaw, by which they intended to convey all of his property, including these two lots. That, on the same day, Mary J. Shaw executed her deed to her father for the same property, following the description of the last-mentioned deed. In both of these conveyances, lots 519 and 520, in block 65, were omitted by the mistake of the scrivener. October 25, 1878, John F. Turner made his last will, devising these two

¹See note at end of case.

lots to his said daughters, subject to the life-estate of his wife, Sarah Ann Turner. Sallie Turner afterwards conveyed her interest to her sister, Mary J. Shaw. It is alleged that John F. Turner, in his life-time, had given to the plaintiff, by way of advancement, money and property largely in excess of his distributive share in the estate, and that Mrs. Sarah Ann Turner, at all times, up to the date of her death, assented to the propriety of making such a disposition of the property as to secure this home to the two daughters, and did all that was deemed necessary to accomplish that end. These allegations of the answer concluded by praying for such reformation of the deeds of 1878 as to include the lots aforesaid. Except denying that the plaintiff was the brother of the defendant, the reply was a general denial. The court found and gave judgment for the plaintiff.

1. This case was heard and determined solely upon the theory of the special defense set forth in the answer, that defendant was entitled to have the deeds of 1878 so reformed as to have included therein the lots in controversy. After an examination of the evidence, I am satisfied that it is not sufficient to warrant a decree for the reformation of those deeds. In order to reach such a standard of probative efficacy, the evidence must be clear and positive and convincing, (*Modrell v. Riddle*, 82 Mo. 31, and cases cited;) or, as Judge Story puts it, "entirely satisfactory, and equivalent to an admission," (1 Story, Eq. Jur. (13th Ed.) § 156.) There is therefore no fault to find with the action of the lower court in this view, and on this theory of the case.

2. But there is another aspect in which this case is to be regarded,—one which appears to have escaped the attention of both court and counsel. It is this: The deed from a husband to a wife, or from the latter to the former, are null in law; this arising from their being regarded as one person. Very differently, however, are they regarded in a court of equity. There they may sue and be sued, contract and be contracted with, become the debtor or creditor of each other, with like effect, so far as regards equitable contemplation and rights, as if they twain had never become one flesh. *Morrison v. Thistle*, 67 Mo. 596, and cases cited; 1 Bish. Mar. Wom. §§ 35, 37, 713, 717. The deed of 1861, from John F. Turner to his wife, while it did not vest in her a legal title to the lots in litigation, still passed to her an equitable estate.

3. And the estate thus created in the wife was an equitable separate estate. This is apparent for two reasons: (1) Because the language of the *habendum* of the deed last mentioned is, "to have and to hold unto the said Sarah Ann Turner, and to her sole use and benefit," (*Morrison v. Thistle*, *supra*;) (2) because the deed was made directly from the husband to the wife. If the deed had been made by a stranger to the wife, then a separate estate in her would not have been created, absent the necessary words; but, being made to the wife by the husband, a separate estate, as against him, was the result. *Deming v. Williams*, 26 Conn. 226; *Huber v. Huber*, 10 Ohio, 371; *Steel v. Steel*, 1 Ired. Eq. 452; *Maraman v. Maraman*, 4 Metc. (Ky.) 84; *McWilliams v. Ramsay*, 23 Ala. 813; 1 Bish. Mar. Wom. § 838.

4. It being, then, established that, in consequence of the deed of 1861, the wife became the owner of an equitable separate estate in the land thereby conveyed, what was the effect of her deed, made back again to her husband in 1874? I can regard it as having but one effect, and that was to convey to him the same lands, that is, her equitable estate therein, which prior thereto she had been the recipient of from him. This must have been the effect of the deed of 1874, or else it had no effect at all. But it may be urged that this deed was utterly invalid because it was executed by the wife alone. However this may be as to mere statutory estates, which require a joinder of husband and wife in order to their valid execution, it will not hold as to separate estates in equity, which the wife may charge, mortgage, or convey without let or hinderance from her husband. With regard to such property, she is, in equity, a *feme sole*, and has the *jus disponendi*, which is the inseparable in-

cident of ownership. By virtue of this, she charges, she incumbers, or she absolutely disposes of it, or she binds it by her parol agreements, just as any other owner would. This position is sustained by abundant authority, both here and elsewhere. *Livingston v. Livingston*, 2 Johns. Ch. 537; *Whitesides v. Cannon*, 23 Mo. 457; *King v. Mittaberger*, 50 Mo. 182; *McQuie v. Peay*, 58 Mo. 56; *Clafin v. Van Wagoner*, 32 Mo. 252; *Schafroth v. Amba*, 46 Mo. 114; *Kimm v. Weippert*, Id. 532; *Lincoln v. Rowe*, 51 Mo. 571; *De Baun v. Van Wagoner*, 56 Mo. 347; *Gay v. Ihm*, 69 Mo. 584; 1 Bish. Mar. Wom. § 853; 2 Bish. Mar. Wom. § 163; *Taylor v. Meads*, 34 Law J. Ch. 203. It is upon the idea that a *feme covert* possessed of a separate estate may convey it, that gave origin, in the conveyances creating such estates, to clauses against alienation. 1 Bish. Mar. Wom. § 844. Such clauses, the invention of Lord Thurlow, amount to a constant assertion of the power which the *feme* possesses but for such prohibitions. Those views are contrary to those expressed in *Martin v. Colburn*, 88 Mo. 229; but the opinion there was by a divided court; and, satisfied now that it was erroneous, we all agree to overrule that case.

5. The husband being the possessor of the legal estate in the lots in question, and having received from his wife all the equitable estate which, by his deed of 1861, he had conveyed to her, it results that, at the time he made his will, he had full power and ownership to dispose of the lots as he would; and that no reformation of the deeds of 1878 was necessary.

We reverse the judgment, and remand the cause, with directions to enter judgment for the defendant.

With the exception of RAY, J., absent, all concur.

NOTE.

EQUITY—REFORMATION ON GROUND OF MISTAKE. The provisions of a written instrument will not be disturbed for the purpose of reforming it, unless it be shown—

(1) That the instrument does not set forth the true intent of the parties. *Fritzler v. Robinson*, (Iowa,) 31 N. W. Rep. 61; *Water-Power Co. v. Merriman*, (Minn.) 27 N. W. Rep. 199; *James v. Cutler*, (Wis.) 10 N. W. Rep. 147.

(2) That the failure to make the instrument express such intent arose from oversight or mistake in draughting it. *Fritzler v. Robinson*, *supra*; *Dod v. Paul*, (N. J.) 11 Atl. Rep. 817.

(3) That such mistake was mutual. *Henderson v. Stokes*, (N. J.) 8 Atl. Rep. 718; *Spare v. Insurance Co.*, 19 Fed. Rep. 14; *Wachendorf v. Lancaster*, (Iowa,) 14 N. W. Rep. 816, 16 N. W. Rep. 683; *James v. Cutler*, *supra*; *Houser v. Austin*, (Idaho,) 10 Pac. Rep. 87; *Griffith v. County*, (Ark.) 8 S. W. Rep. 886; *Rosseau v. Lambert*, (Ky.) 7 S. W. Rep. 923; *Clark v. Roots*, (Ark.) 6 S. W. Rep. 728; *Worsley v. Insurance Co.*, (Iowa,) 88 N. W. Rep. 161; *Keister v. Myers*, (Ind.) 17 N. E. Rep. 161; *Probett v. Walters*, (Mich.) 38 N. W. Rep. 320; *Ellison v. Fox*, (Minn.) Id. 358. It must appear that both parties have done what neither intended. *Henderson v. Stokes*, *supra*; *Spare v. Insurance Co.*, *supra*; *Houser v. Austin*, *supra*. Where there is any miscarriage in expressing the mind of a party to a contract, it would seem to be just that he should be bound by what he fairly expressed, whether he intended it as he expressed it or not. *Building Co. v. Sloan*, 21 Fed. Rep. 561.

But an instrument may be reformed, though the mistake is not mutual, if the one party knew or had such implied knowledge of the mistake of the other as would make it inequitable to permit him to benefit thereby. *Town of Essex v. Day*, (Conn.) 1 Atl. Rep. 620; *James v. Cutler*, *supra*; *Peasley v. McFadden*, (Cal.) 10 Pac. Rep. 179. An instrument may be annulled for the fraud of a party thereto, but a bill in equity to reform a written instrument will not lie, nor will other relief be granted, in the absence of a specific allegation of fraud, where the only evidence of a mutual mistake is that complainants, being unable to understand English, relied upon statements of the defendants as to the meaning of the document, which statements were untrue. *Fehlberg v. Cosine*, (R. I.) 18 Atl. Rep. 110.

A mistake of law, made through the representations of an agent, may be corrected in equity, *Bailey v. Insurance Co.*, 13 Fed. Rep. 250; and while for a bare mistake of law alone relief will rarely, if ever, be afforded, yet equity will interfere where it further appears that the defendant, availing himself of the opportunities of the mistake, will take an unconscionable advantage of the plaintiff, *Benson v. Markoe*, (Minn.) 33 N. W. Rep. 88; *Kornegay v. Everett*, (N. C.) 5 S. E. Rep. 418.

(4) Nor will such instrument be reformed unless the mistake be clearly proved. *Baltzer v. Railroad Co.*, 6 Sup. Ct. Rep. 216; *Griswold v. Hazard*, 26 Fed. Rep. 136; *Gull-*

martin v. Urquhart, (Ala.) 1 South. Rep. 897; *Frederick v. Henderson*, (Mo.) 7 S. W. Rep. 186. It must be satisfactorily proved,—to a moral certainty. *Spare v. Insurance Co.*, *supra*. The proof must be so full and clear as to leave no room for controversy. *Henderson v. Stokes*, *supra*. It must be entirely clear and satisfactory, *Rawson v. Lyons*, 28 Fed. Rep. 107; clear, satisfactory, and conclusive, *Cummins v. Monteith*, (Iowa,) 16 N. W. Rep. 591; clear, satisfactory, and free from reasonable doubt, *Wachendorf v. Lancaster*, (Iowa,) 14 N. W. Rep. 816, 16 N. W. Rep. 533. It must be clear and convincing, *Fritzier v. Robinson*, *supra*; and leave no reasonable doubt in the mind of the court, *Houser v. Austin*, *supra*. It must be clear, precise, and indubitable, *Ahlborn v. Wolff*, (Pa.) 11 Atl. Rep. 799; and parol evidence is admissible to prove the mistake, *Goff v. Jones*, (Tex.) 8 S. W. Rep. 525.

DOUGHERTY v. MISSOURI R. Co.

(*Supreme Court of Missouri*. June 18, 1883.)

1. CARRIERS—INJURIES TO PASSENGERS—EVIDENCE.

In an action for injuries sustained from the negligent and sudden starting of a street car, testimony of a former driver of the same car that there were four different teams used in its operation, one of which was very apt to start with a jerk, while the others were gentle and tractable, and that though he had left the service of defendant, he was so situated as to know that the same teams were employed on the car up to the time of the accident complained of, though he could not say which team was attached to the car on that day, is admissible, though the real issue in the case was the conduct of defendant's servant in the management and control of the motive power.

2. SAME—DEGREE OF CARE REQUIRED.

In an action against a street-railway company, an instruction that, in the transportation of passengers, defendant must exercise "the utmost human foresight, skill, and care," is proper.¹

3. SAME—CONTRIBUTORY NEGLIGENCE OF PASSENGER.

Where, in an action for personal injuries, the evidence, as to the facts in dispute showing contributory negligence, is conflicting, it is not error to refer the question to the jury.

4. SAME—INSTRUCTIONS.

An instruction, in an action for injuries received on a street car, that "if the jury believe that plaintiff acted with reasonable and ordinary care in not taking hold of a strap, or in not moving further forward, though if he had done so the accident would not have happened, and as a prudent man would ordinarily have acted," he was using all the care and diligence required, being correct in itself, cannot be assigned for error, as inferentially excluding other circumstances relied on by defendant to show contributory negligence.

5. SAME.

In an action for personal injuries, an instruction that though the jury believe plaintiff was guilty of negligence, but that such negligence did not contribute to or cause the injury, or if they find defendant negligent, and that without defendant's negligence the injury would not have happened, notwithstanding plaintiff's negligence, they will find for plaintiff, is not objectionable, as in effect charging that defendant is liable, though plaintiff's negligence contributed to the injury.

6. SAME.

In an action for personal injuries, an instruction which directs the jury, if they find certain facts showing defendant's negligence, to bring in a verdict for the plaintiff, is not fatally erroneous because ignoring the question of contributory negligence, when the doctrine of contributory negligence is given in other instructions.

7. SAME—MEASURE OF DAMAGES.

In an action for an injury sustained from the sudden starting of a street car, whereby plaintiff, a passenger, was thrown down, and his hand thrust through the car window, and severely cut, it appeared that he was sick from his injuries for several months, and was finally compelled to have his arm amputated just below the elbow, and that his expenses therefor were nearly \$2,000; that his salary as a telegraph manager was \$144 per month, and, being an expert operator, he occasionally made \$50 per month extra; and that his value and usefulness as an operator had been impaired to the extent of one-half. *Held*, that a verdict for \$12,000 was not excessive, though the nature of the case only allowed compensatory damages.

¹But a carrier of passengers is held to the exercise of the highest care which human vigilance can give only in respect to things appertaining to the actual transportation of the passengers, and in regard to results naturally to be apprehended from a failure so to do. *Morris v. Railroad Co.*, (N. Y.) 13 N. E. Rep. 455; *Hayman v. Railroad Co.*, (Pa.) 11 Atl. Rep. 815; *Kelly v. Railway Co.*, (N. Y.) 15 N. E. Rep. 879.

8. SAME—PLEADING—AMENDMENT.

In an action against a street railway company for an injury sustained from the sudden starting of a car on which plaintiff was a passenger, an amended complaint, setting out that the team hitched to the car was wild, untractable, and scary, as defendant's officers well knew, and that the sudden starting of the car was due to both the nature of the team and the negligent conduct of defendant's servants; this being merely a specification of negligence, embraced in other allegations in themselves sufficient, is not objectionable, as substituting or adding a new cause of action.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Action by Christopher Dougherty against the Missouri Railroad Company, for an injury to plaintiff, while a passenger on its street railway, from the careless, unskillful, and negligent management and operation of a car thereon, whereby "plaintiff was suddenly and violently thrown down and against the side of the car, and his hand and arm thrown against and through one of the car windows." From a verdict and judgment for plaintiff for \$12,000 damages, defendant appeals.

Dyer, Lee & Ellis, for appellant. *Boyle, Adams & McKelghan* and *Wm. B. Thompson*, for respondent.

RAY, J. Upon a former trial of this cause plaintiff was compelled, at the close of his evidence, to submit to a nonsuit; but on writ of error to the St. Louis court of appeals the judgment of the circuit court was reversed. 9 Mo. App. 483. On writ of error by defendant to this court, the judgment of the court of appeals was affirmed. 81 Mo. 325. There has since been another trial of the cause in the circuit court, which resulted in a verdict for plaintiff in the sum of \$12,000, and judgment thereon, from which defendant has appealed to this court.

At the second trial, now under review, an amended petition was filed, containing the allegation of the original petition as given in 81 Mo., and other allegations, (as to which some questions are now made,) as follows: "Plaintiff states that the horses hitched to said car were wild, scary, untractable, and skittish; and that said sudden and violent jerk and movement of said car, causing said injury to the plaintiff, was due, not only to the careless, negligent, and unskillful manner in which the servants and employes of said defendant started and set in motion said car, but as well to the wild, untractable, scary, and skittish character of the horses hitched to said car, which unsafe character of said horses was long before well known to said defendant, its officers, agents, and employes, before said occurrence; and yet said defendant, contrary to its duty, carelessly and negligently continued to use said horses in the transportation of its passengers, and the plaintiff, as one of them, on the occasion referred to." These allegations, thus added, were not necessary to enable plaintiff to make the proof necessary to his *prima facie* case; which, if made, as might be done, under the circumstances of the case, by showing the injury to plaintiff while a passenger in defendant's car, would have devolved upon defendant the burden of showing, among other things upon the issue as to its negligence, that the team employed was a proper and suitable one. *Dougherty v. Railroad Co.*, 81 Mo. 330; *Hipsley v. Railroad Co.*, 88 Mo. 348; Ang. Carr. § 569. This presumption would itself stand in lieu of the actual proof as to the character of the team, until rebutted by the evidence on defendant's part. In this view, and under these authorities, the allegations were immaterial, unnecessary, and harmless. But if plaintiff saw fit not to rest his case upon the presumption in his favor arising upon the proof aforesaid, but desired to offer testimony to show defendant's negligence in the designated particular, then we see no good and sufficient reason why evidence as to the disposition of the horses,—whether vicious or not,—might not be received under the allegation that "defendant, its agents, servants, etc., disregarding its and their duty to the plaintiff as such passenger, so carelessly and negligently operated said car" as to cause the injury to plaintiff com-

plained of. The amendment did not go to the gist of the cause of action, or substitute or add any new cause of action, but was, we apprehend, a specification of negligence already involved and embraced in the other allegations, which were in themselves sufficient upon the proof mentioned to create the presumption of negligence, or to admit direct testimony in that behalf.

Other questions involved arise upon the court's action in the matter of instructions. Our attention has not been directed by counsel to any error in the instructions refused for defendant, unless it be the ninth, which presented defendant's theory as to the act of neglect set forth in the amendment to plaintiff's petition, and is the converse of the ninth given for plaintiff, and was, we hold, properly refused, for the reasons already given. As to the others, their refusal was justified for the reason that the matters embraced therein were covered by those previously given in the cause. The refused instructions, therefore, may be dismissed without further notice.

On the part of plaintiff, the court gave the following: "(1) The court instructs the jury that if they believe from the evidence that the plaintiff was, at the time of the occurrence in question, a passenger on one of the cars of the defendant's street railroad, exercising reasonable care and diligence, and that the car started before plaintiff took his seat, with a sudden and violent jerk, that by reason thereof the plaintiff lost his balance, and his hand was thrown against and through one of the windows of the car, cutting and injuring it, then, and in that case, the defendant is liable to the plaintiff for the damage caused by and resulting from said injury to the plaintiff; unless the jury further believes from the evidence that the defendant, its agents, servants, and employees managing said car, were not guilty of any negligence or want of care in the management of said car causing the injury, and the burden of showing such care and want of negligence is upon the defendant to prove to the satisfaction of the jury. (2) The court instructs the jury that if they believe from the evidence that the plaintiff was, at the time of the event in question, a passenger on one of defendant's cars, then the defendant owed to the plaintiff the duty of exercising the utmost care and vigilance to carry him over its road safely, and is responsible to the plaintiff for any neglect or want of proper care, which the jury may find from the evidence if they so find, causing the injury in question arising from the management of the car and horses by the defendant's servants or employees, or from the use of skittish or unsuitable horses, causing the injury in question. (3) The court instructs the jury that if they believe from the evidence that, at the time of the event in controversy in this action, the defendant was engaged in the business of operating a street railroad for the transportation of passengers in the city of St. Louis, that at said time the plaintiff was received on one of its cars as a passenger to be transported thereon, and that while in said car for said purpose he was injured by a sudden and violent starting of the car, then the burden of proof rests upon the defendant to prove to the satisfaction of the jury that said injury was caused by something not under the control of defendant, and not from the use of unsuitable or skittish horses, or careless or unskillful driving or management of said car, and that by the exercise of the utmost human foresight, knowledge, skill, and care such injury could not have been prevented by defendant, its agents or servants; and, unless the jury so believe, they will find for the plaintiff. (4) The court instructs the jury that if they believe from the evidence that the plaintiff was a passenger on one of defendant's cars, and, while exercising reasonable care and diligence with respect to his own safety, the car started with a sudden and violent jerk, causing the injury now being inquired into, then the burden is thrown upon the defendant to show to the satisfaction of the jury that the horses hitched to the car were suitable for the service in question, or that the accident was not due to the horses, and that the servant of defendant managing the car exercised the utmost care, skill, and foresight in the management of

the same, or that the accident occurred by reason of some cause not under the control of defendant, or its servants and employes; and, unless the defendant has so satisfied the jury, their verdict should be for the plaintiff. (5) The court instructs the jury that if they believe from the evidence that the plaintiff at the time of the injury in question went upon the defendant's car as a passenger, and there was a vacant seat, then and in that case it was the bounden duty of defendant, its servants and employes, either to not start the car until he had time to get a seat, or, if it started it before, to use the utmost care to start it smoothly, and in such a manner as not to throw him off his feet. And if the jury believe from the evidence that the car was started before the plaintiff had reasonable time to take his seat, and with a sudden and violent jerk which might have been avoided, causing said injury, the jury will find for the plaintiff, unless it appears from the evidence that said jerk was produced by some cause not under the control of defendant, or its agents, servants, or employes. (6) The court instructs the jury that if they find for the plaintiff they will assess his damages at such sum not exceeding what as they may believe from the evidence will compensate him for amounts paid and contracted to be paid for medical attendance and attendance of nurses, if necessarily employed, and all mental and bodily pain and anguish they may believe from the evidence the plaintiff suffered, together with such sum or sums as will compensate plaintiff for any permanent injury and incapacity they may believe from the evidence he has sustained from the injury in question, but not exceeding the amount claimed in the amended petition. (7) The court instructs the jury that although, when the occurrence in question happened, the plaintiff had not paid his fare, and by reason of said event got off without paying, yet if the jury believe from the evidence that he went on the car as a passenger with the intention of paying his fare when called upon, then he was a passenger and the defendant owed to him the same duties as if in fact he had paid his fare. (9) The court instructs the jury that the express and specific allegations in plaintiff's amended petition with respect to the horses hitched to the defendant's car do not change the cause of action originally sued on, and the defense of the statute of limitations set up in the defendant's answer should be disregarded by the jury. (10) The court instructs the jury that although they may believe from the evidence that the plaintiff was guilty of negligence on his part at the time of the injury in question, yet if the jury further believe from the evidence that such negligence did not contribute to or cause the injury, or if they find from the evidence that the defendant's servants or agents were negligent in the management of the car or in the use of unsuitable horses, and that if there had been no such negligence on the part of defendant said injury would not have happened, notwithstanding the negligence of plaintiff, then the jury will find for the plaintiff. (12) The court instructs the jury that although they may believe from the evidence that if the plaintiff had, on entering the car, taken hold of a strap, or taken a seat nearer the door than the one he attempted to take, the accident would not have happened, yet if the jury further believe from the evidence that he acted with reasonable and ordinary care, in not taking hold of a strap or in moving further forward, and as a prudent man under similar circumstances would ordinarily act, then he was using all the care and diligence imposed by law upon him. (13) The court instructs the jury that, if they find from the evidence that any witness has willfully and corruptly sworn falsely to any material fact in the case, the jury may disregard the whole of his testimony. (14) The instructions of the court are all to be taken and read together, and the law therein laid down applied by the jury to the facts of the case accordingly as the jury may believe and find the facts to be, under the evidence before them."

The court gave the following instructions asked by the defendant: "(1) The court instructs the jury that even though they believe the defendant's

company was to blame in starting the car in which plaintiff was standing with a violent and unusual jerk, and before plaintiff had an opportunity of taking his seat, yet if the jury also find that plaintiff was informed by the conductor's striking the bell, or in any other way knew or had reason to expect the car was about to start, then it was the duty of the plaintiff to have protected himself by the most prudent means within his reach against the starting of the car; and if you find that straps were provided in said car for the use or convenience of passengers, by which the plaintiff, after the warning of the conductor's bell, might have supported himself while the car was being started, and that he failed so to do, and by reason of such failure he was injured, then you will find the issues for defendant. (2) The court instructs the jury that it was not the duty of the defendant company to provide the plaintiff with a seat in the forward part or any particular part of its car, nor was it the defendant's duty to plaintiff to provide him with two seats, one for himself and one for Mr. McCreary, nor to provide plaintiff with room enough for himself and Mr. McCreary, nor was it the duty of the defendant to wait before starting its car until plaintiff could reach seats for both himself and Mr. McCreary, nor was it defendant's duty to wait before starting its car until plaintiff had walked to the forward part of the car, if there was a seat for plaintiff nearer than that. (3) The court further instructs the jury that, although they may believe that the negligence or want of care of the agents and servants of the defendant contributed to the happening of the injury to plaintiff, yet if they believe from the evidence that the plaintiff was likewise guilty of negligence or want of care, which directly contributed to produce said injury, the verdict must be for the defendant. (5) The court leaves it to you to determine, in view of the evidence and the circumstances of the case, whether plaintiff was himself guilty of any fault or negligence that directly contributed to produce the injury in question, and you should determine this fairly, under the evidence, without bias for or prejudice against either party, and if you find the plaintiff guilty of such fault or act of neglect, then you will find in favor of the defendant. (6) The court instructs the jury that the defendant is not liable for any damage that resulted to the plaintiff by reason of any lack of care on his part in properly caring for and treating the wound which he received while in the car of the defendant; and if the jury believe, from the evidence, that by any act of imprudence on plaintiff's part, or that, by want of proper care or treatment of the wound received by plaintiff, the said injury was thereby aggravated to such an extent as to render necessary the amputation of plaintiff's arm, then the defendant is not liable for the damage to the plaintiff resulting from such amputation."

The objection taken to the third in the series for plaintiff is that it requires of the company "the exercise of the utmost human foresight, knowledge, skill, and care." These terms of strict care, so employed in the instruction, may apply, as counsel suggests, with special propriety to such common carriers of passengers as railroads operated by steam, but they are also held applicable to common carriers of passengers generally. *Hutch. Carr.* §§ 500-504; *Lemon v. Chanslor*, 68 Mo. 340; *Railway Co. v. Twinnam*, 13 N. E. Rep. 55; *Dougherty v. Railroad Co.*, 81 Mo. 330; *Kelly v. Railroad Co.*, 70 Mo. 609; *Leslie v. Railway Co.*, 88 Mo. 55.

The fifth, given for plaintiff, is complained of for the reason that it ignores the contributory negligence of plaintiff, and authorizes and directs a verdict for plaintiff, without regard thereto. A similar omission in an instruction of this sort was held fatal error in the case of *Sullivan v. Railway Co.*, 88 Mo. 182; but the doctrine of that case has recently been overruled in the late case of *Owens v. Railroad Co.*, 8 S. W. Rep. 350, and upon the authority of the *Owens Case*, and under the views there adopted by a majority of my associates, the omission of the defense of contributory negligence from the instruction under review is not to be regarded as fatal error, requiring a reversal of

the judgment in the cause. My individual views as to this question are set forth in the opinions in the *Sullivan Case*, already referred to; but the instructions in this case, taken as a whole, are, in my judgment, far more satisfactory than those in the *Sullivan Case*.

Instruction No. 12, given in plaintiff's behalf, is complained of as erroneous and misleading, because it is claimed the instruction selects but two of the different facts charged in the answer as contributory negligence, and thus gives them undue prominence, and impliedly directs the jury, it is claimed, not to consider the evidence, if any, tending to prove the other facts not mentioned in the instruction, but charged in the answer as contributory negligence. The instruction is not fairly subject to these criticisms. It will be observed that it does not undertake to cover the entire case, and does not, upon a finding of the facts submitted, authorize a verdict in the cause. Properly limited and considered in reference to the matters treated of, the instruction is not, we think, objectionable. It cannot be said as matter of law that the duty absolutely devolved on plaintiff to take hold of the strap immediately on entering the car, or to take the seat nearest to the door, and it is in reference to plaintiff's conduct in this behalf that the jury are told that, if they believe from the evidence that he acted with reasonable and ordinary care in not taking hold of a strap, or in moving forward, and as a prudent man, under similar circumstances, would ordinarily act, then he was using all the care and diligence imposed by law upon him. It is with respect to such instructions, good as far as they go, but not complete in themselves, and not attempting to set out and cover the case, that reference may most appropriately be had to other instructions in the cause, and the series looked to and judged in its entirety. The prominence given in the evidence and cause to the question as to the proper use of the strap by passengers on such cars, not improperly, perhaps, called for a more specific instruction than would ordinarily be necessary, as to what, under the law, would be the duty of plaintiff in that behalf, and under other instructions in the cause the whole subject of plaintiff's conduct, as to this feature as well as the other acts alleged in the answer as negligence on his part, was, we think, properly submitted to the jury for their determination. Again, we think defendant's counsel misconstrues instruction numbered 10, given for plaintiff. It does not, as we read and understand it, say, as counsel claims, that where the negligence of plaintiff, as well as that of defendant, contributed to the injury alleged, the defendant is liable. Its very terms, we think, limit the negligence of plaintiff which may co-exist with liability on the part of defendant to such as does not contribute to or cause the injury. If, however, by reason of its construction, it may be somewhat involved, or obscure, the other instructions in the cause unquestionably remedy that defect. Instructions numbered 1, 3, and 5, given for defendant, which are exceptionably strong for defendant, are not, we think, contradictory, and taken together they set out the law in his behalf as favorably as defendant could ask, and in terms so plain that the jury could have hardly failed to understand and apprehend their meaning. This disposes of the principal objections urged against the court's action in the matter of instructions. The objection to them, it will be observed, arise mainly upon the issue as to plaintiff's contributory negligence. As to the evidence upon that issue, it is sufficient to say that the facts are in dispute and doubt, the evidence conflicting, and that defendant manifestly has no reason to complain that the issue was sent to the jury for their determination.

A question is also made upon the admission of portions of the testimony of the witness Newton Jarrett, who had been, it seems, several months prior to the date of the injury to plaintiff, in the employment of defendant as a driver of the car in which plaintiff was afterwards injured. His testimony as to the matter to be considered in this connection was that, during the period of his service as driver in charge of the car in question, four certain teams belonged

to and were used in the operation of said car. He further testified that, after leaving his said employment, which it seems he did in November or December, 1876, he was engaged in business for the next six or twelve months, at a telegraph office, which, it appears, is situated on the line of this street railroad, and that he thus had opportunity to see the car passing back and forth every day during the winter and spring and summer following, which includes the date of injury, which occurred in April, 1877, and that, so far as he observed or knew, there was no change in the teams used in connection with the car in question. One of these teams was composed, as he testifies, of a stallion and gelding, which were troublesome and very mean, in starting the car with a jerk; that the drivers complained of this team, which he testifies "would draw themselves in the collar and back up the traces, and as soon as the bell would tap, unless the driver held his reins tight, one of the horses would throw himself right forward, and start the car with a jerk." The three other teams, he says, started of their own accord in such a manner as not to produce a jerk to the car. We are not prepared to say that there was error in the admission of Jarrett's testimony in this behalf, requiring a reversal of the judgment in the cause. True he says he does not know that this team was in fact attached, but his testimony further is that the other teams, ordinarily and regularly used with this intractable team in drawing the car in question, were gentle, and started the car when the bell tapped in such manner as not to give the car a jerk, and that this was so even if the driver was himself to some extent negligent and careless. The driver, Lyon, in charge of the car at the time, subsequently testified for defendant that the team in use was a certain team of mares, and he was, we believe, the only witness who attempts to identify directly and positively the particular team in use at the time. But his statement in that behalf was not necessarily undisputed or conclusive. His testimony in its entirety was before the jury, and his credibility was for them. The evidence in the cause indicates that, by means of the reins and the car-brake, the driver could effectually control the horses and the movements of the car; and upon the issue as to defendant's negligence the real question was, we think, whether the defendant had overcome plaintiff's *prima facie* case, and shown that the driver was without negligence or fault as to his management and control of the motive power. And this was for the jury, under proper instructions.

A remaining question urged in the argument is that the damages are excessive. Plaintiff's left hand and arm were, in consequence of the fall given him by the violent jerk of the car, thrust through the glass window of the car, and a severe and painful wound, and some smaller cuts, perhaps, were inflicted upon his left hand. His health for several months was seriously affected, and loss of life was threatened for a time. After ineffectual efforts to save the hand, which was injured in April, it became necessary in the following July to amputate the same, which was done about two inches below the elbow. His sufferings were great, and his expenses and liabilities for medicines, nurse hire, physicians, and surgeons very heavy, amounting to something like \$2,000. At the time of the accident he was manager of the Gold & Stock Telegraph Company, which was engaged in the business of furnishing stock, grain, and provision quotations to brokers and the Merchants' Exchange of St. Louis. His salary amounted to \$144 per month, and, being an expert or first-class telegraph operator, he also sometimes earned \$50 per month extra. During his sickness his employers continued him his salary, so that he lost no wages during that time, and he continued thereafter and up to the time of trial to earn as much salary as before the accident. There is evidence to show that his value and usefulness as a telegraph operator was greatly impaired, to the extent, perhaps, of one-half. This is, we believe, the substance of the evidence bearing upon the question now before us. The case it may be observed is free from malice or wanton misconduct on the part of

defendant or its servants. The instruction given by the court, in this behalf, limits the recovery to compensating damages, and has not been objected to, and is substantially correct. The verdict was for \$12,000. As is said in the case of *Waldhier v. Railroad Co.*, 87 Mo. 37: "It is a matter of much difficulty in such cases as this to tell when the verdict is or is not excessive. The amount of damages must be left to the reasonable discretion of the jury." In that case, where the plaintiff had lost both legs, a verdict for \$25,000, after a *remittitur* for \$5,000 and the accrued interest, was suffered to stand. In the case of *Porter v. Railroad Co.*, 71 Mo. 66, where the injuries to plaintiff resulted in the amputation of one leg and two toes of the other foot, a verdict for \$10,000 was not disturbed. In these and other cases large verdicts have been allowed to stand. In the case at bar, the jury, in the exercise of their sound and reasonable discretion in the matter, might well have returned a verdict for a lower sum; but we are not prepared to say that the sum given is so large as to unmistakably evince prejudice and passion on the part of the jury, and abuse of their discretion in the matter. Some other exceptions were taken at the trial, and are urged here, which have been considered, but which we deem it unnecessary to discuss. This leads to an affirmation of the judgment of the trial court, and it is accordingly so ordered, with the concurrence of all the judges.

CARR v. LEWIS COAL CO.

(*Supreme Court of Missouri. June 18, 1888.*)

1. *LIS PENDENS—ON VESSEL—INNOCENT PURCHASER—JURISDICTION.*

Although the doctrine of *lis pendens* applies to vessels, one who purchases a steam-tug without notice of the pending litigation over his vendor's title, is not affected by the result of such litigation where it does not appear that the tug, at the time of the purchase or at any time since, was within the state. Const. U. S. art. 4, § 1, requiring full faith and credit to be given to the judicial proceedings of other states, and Rev. St. U. S. § 4192 *et seq.*, relating to the registry of vessels, have no application to such case.

2. *CREDITORS' BILL—LIABILITY OF DEBTOR'S VENDEE.*

One who purchases personal property without notice of a pending creditors' bill to set aside his vendor's title, which title is subsequently set aside therein, cannot be charged with a personal judgment in a supplemental bill to subject the property to the satisfaction of the former judgments.

Appeal from St. Louis court of appeals.

Action brought by James Carr in the St. Louis circuit court against the Lewis Coal Company and others, to subject a tug-boat belonging to the company to the satisfaction of a judgment held by Carr against one Thomas Parker. After a dismissal as to the other defendants, judgment was rendered against the Lewis Coal Company. This judgment was reversed by the St. Louis court of appeals; and Carr appeals to this court.

H. D. Wood and *James Taussig*, for appellant.

The doctrine of *lis pendens* applies to every description of property, whether real or personal, except negotiable notes not past due, and bonds, where the specific thing can be pointed out, so as to warn the whole world that they meddle with it at their peril. The doctrine is not based upon presumptions of notice, but upon a public policy, imperatively demanded to give effect to the proceedings of courts of justice. *McCauley v. Rogers*, 10 Bradw. 562; Freem. Judgm. (3d Ed.) §§ 191-194; stock, *Buford v. Packet Co.*, 3 Mo. App. 159, affirmed 69 Mo. 611; Bisp. Eq. § 274; slave, *Bolling v. Carter*, 9 Ala. 921; slave, *Lewis v. Mew*, 1 Strob. Eq. 182; chattel, *Scott v. McMillen*, 1 Litt. 309; chattel, *Edgell v. Haywood*, 8 Atk. *357; *Watson v. Wilson*, 2 Dana, 408; boat, *Thoms v. Southard*, Id. 480; furniture, *Scudder v. Van Amburgh*, 4 Edw. Ch. 29; 1 Story, Eq. Jur. § 406; *Newman v. Chapman*, 2 Rand. (Va.) 93; *McCutchen v. Miller*, 31 Miss. 88; patent, *Tyler v. Hyde*, 2 Blatchf. 308; personal property, *Tabb v. Williams*, 4 Jones, Eq.

352; slaves, *Fletcher v. Ferrel*, 9 Dana, 376; bonds, *Diamond v. Lawrence Co.*, 37 Pa. St. 353; promissory note, *Kellogg v. Fancher*, 23 Wis. 21; *McIlwraith v. Hollander*, 73 Mo. 112; Adams, Eq. *157, cases cited, note 1; furniture, etc., *Wills v. Whitmore*, 9 Baxt. 198; *Dovey's Appeal*, 97 Pa. St. 153; *Kimberling v. Hartly*, 1 McCrary, 186.

Given Campbell and Joseph Dickson, for respondent.

SHERWOOD, J. In 1877, Carr brought suit in the St. Louis circuit court against Thomas Parker, Sr., upon a note, and recovered judgment. Execution was issued and levied upon the steam-tug now in controversy, called the "Alice Parker," as the property of Thomas Parker, Sr.; but Thomas Parker, Jr., in whose name the boat was fraudulently registered as owner, claimed the boat; and, Carr not being able to give an indemnification bond to the sheriff, the levy was released. This was in 1878, and the cause was numbered 43,734. In 1879, Carr filed his petition in said court against the Parkers to set aside the conveyance of the father to the son as fraudulent, and was successful; a decree as prayed being entered February 18, 1880. This cause was numbered 49,832. Prior to the entering of this decree, however, and on January 8, 1880, the Lewis Coal Company, having no actual notice of the suit, bought the tug of Thomas Parker, Jr., paid him its full value, \$5,800, in cash, and immediately took possession of her. Upon the entry of the decree aforesaid, an order was issued directing that defendant Thomas Parker, Jr., deliver the tug Alice Parker to the sheriff, and that, upon receiving it, the sheriff sell the tug. The sheriff made return upon this order to the effect that Thomas Parker, Jr., refused to deliver the tug, saying it was not in his possession or under his control. No bond was given in the proceeding; and, although in the petition a restraining order was asked to enjoin the Parkers from disposing of the tug, none was granted until final decree. It is admitted that the Lewis Coal Company is a corporation; but whether foreign or domestic, or where its place of business is, or at what place the tug was bought, or where it has been since or was at the time the decree was entered, nowhere appears. The present proceeding, in the nature of a supplemental bill, was instituted to reach and subject to the satisfaction of the judgment aforesaid the steam-tug as having been sold *pendente lite*; and the Lewis Coal Company was made a party defendant. Subsequently a dismissal was entered as to the Parkers. Upon the hearing of this last-named cause, the court found the issues for the plaintiff, and entered a decree against the Lewis Coal Company as follows: "That plaintiff recover his costs of defendant; that the total amount of judgment and costs in cases No. 43,734 and No. 49,832 [that is, the original suit against Parker, Sr., and the creditors' bill against father and son] are a lien on the interest of the Lewis Coal Company in the tug-boat Alice Parker, on the 6th of September, 1880; that the Lewis Coal Company forthwith deliver the boat to the sheriff; that the sheriff forthwith proceed to sell the same for cash, in the manner provided for execution sales; that out of the proceeds the sheriff pay the costs of this suit, and the costs of the cases 43,734 and 49,832, and then pay to plaintiff his judgment in 43,734, with interest, and pay the remainder to the Lewis Coal Company. And in the event said tug-boat be not delivered to said sheriff within five days after demand by him therefor of defendant, pursuant to this decree, then defendant shall pay to said plaintiff the said amount of said judgment, with interest and costs, in said cases numbered 43,734 and 49,832 of this court, hereinbefore adjudged a lien against said tug-boat; and said sheriff shall thereupon proceed forthwith to collect the said amount thereof, as well as the costs of this suit, of said defendant, by levy upon the goods, chattels, and real estate of said defendant, or otherwise, in conformity to law, in like manner as upon general *fiert facias*; and that plaintiff have execution, and such other final process as may be necessary and proper to carry into full effect this decree."

This decree was reversed in the court of appeals, (15 Mo. App. 551,) and the plaintiff has appealed here. The judgment of reversal was based upon two grounds: one as to jurisdiction, the other as to the scope and nature of the decree.

As to the first. The agreed statement of facts in this cause, upon which it was determined, occupies the same footing and stands in lieu of a special verdict, and the court pronounces its conclusions upon such agreed facts precisely as if a jury had found a verdict in that form. Hence, if there be any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment cannot be allowed to stand. *Gage v. Gates*, 62 Mo. 412; *Munford v. Wilson*, 15 Mo. 540; *Lecompte v. Wash*, 9 Mo. 551. In this case, as before noted, it does not appear where the tug—the *res* which the plaintiff seeks to subject to the satisfaction of his judgment—was when defendant bought it, nor where it was at the time the last decree was rendered. In other words, no jurisdiction of the court appears to have existed over the tug at the time of the entry of either of the decrees. As a general rule, to which this case forms no exception, it is needless to say that, in order directly to subject particular property to the judgment or decree of any court, the suit brought for that purpose must be brought where the thing is. *Wells*, Jur. § 117; *La Trobe v. Hayward*, 13 Fla. 190; *Austin v. Bodley*, 4 T. B. Mon. 484; *Story*, Conf. Laws, § 539; *Carrington v. Brents*, 1 McLean, 167. If it be conceded, in accordance with the ruling of the lower court as well as that of the court of appeals, that the property in question is of that nature as would form the subject of a *lis pendens*, still it does not appear where the property was at the time it was sold to the defendant, nor at any time since. One of the bases suggested for the doctrine as to the force and effect of a pending suit is that stated by an eminent writer: "For it is presumed that legal proceedings, during their continuance, are publicly known throughout the realm." *Adams*, Eq. *157. By this term "realm" is meant "the state or sovereignty where the property is," as is explained in a note by the writer just cited; and the term "the whole world" he also explains as simply meaning "all men in that jurisdiction or state." The true basis of the doctrine of *lis pendens* is that of an imperious public policy and necessity which will not admit the judgments or decrees of courts to be frustrated or set at naught by transfers, which, if sanctioned, would render litigation interminable, and thus defeat the ends of justice. *Freem. Judgm.* § 191, and cases cited. *Newman v. Chapman*, 2 Rand. (Va.) 98, 14 Amer. Dec. 766, and notes. But a *lis pendens* should not have any force or operation beyond the boundaries of the state where the suit is pending. To thus extend its operation would certainly be giving the judgments and decrees of courts an extraterritorial effect—one in violation of the familiar maxim, *extra territorium jus dicenti impune non paretur*. *Story*, Conf. Laws, § 539. "No sovereignty can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." *Picquet v. Swan*, 5 Mason, 35, and cases cited. If the process itself cannot be extended or be served beyond the territorial limits of the sovereignty whence issued, certainly a mere incident of the service of such process as is a *lis pendens* can have no greater force or further-reaching operation. The principle of the rule being discussed is the prevention of the judgments and decree of courts from being frustrated by transfers while matters are yet *in fieri*, and thus balking such judgments and decrees of their customary operation after they are rendered. But where can such obstructions be cast in the way of such adjudications? Obviously only in the sovereignty where the adjudications are had. If the property be eloiigned,—taken beyond the confines of the jurisdiction where litigation is in progress,—to say that it shall bear with it, no matter

where taken, the effects and consequences of previous litigation, and conclusively bind any purchaser, however innocent of wrong, though the property has no history or ear-marks of litigious strife about it, would be carrying the doctrine of *lis pendens*—a harsh doctrine at best, and one not favored by the courts, as all the authorities agree—to a most extraordinary and pernicious length. These views find support in the case of *Shelton v. Johnson*, 4 Sneed, 672, 70 Amer. Dec. 268. See, also, *Powell v. Williams*, 48 Amer. Dec. 108; 1 Story, Eq. Jur. (13th Ed.) § 405; *Thomas v. Southard*, 26 Amer. Dec. 467. Of course, these remarks are limited to a case where personal property of a movable nature is, pending litigation concerning it, withdrawn from the jurisdiction where such litigation is pending to another state, and there sold to a *bona fide* purchaser. It is a very harsh presumption and rule which force the citizens within the same state to take notice, at their peril, of all matters being adjudicated within its borders,—a rule only justified by imperative necessity. But to say its operation shall be extended to every portion of the United States would be a very startling extension of a rule already sufficiently odious and oppressive. *Ex. gr.*, would it not be preposterous that a suit brought in a territorial court of Alaska to subject a ship to a lien should prevent the valid transfer of such ship when subsequently found sailing off the coast of Maine? This question furnishes its own answer. Nor do I see that article 4, § 1, of the federal constitution, as to full faith and credit, etc., being giving to the records and judicial proceedings, etc., has any bearing upon the point whether a *lis pendens* in one state shall have any extraterritorial effect. The obvious meaning of that provision goes only to the operation such records shall have when complete and subsequently offered in evidence, as establishing that certain facts have been adjudicated, and has no reference as to what shall be the incidental effect of a suit which results in such records being made.

As to whether the steam-tug in question belongs to that class of property which may be the basis of a *lis pendens*, I incline to think that it does. This point was so ruled, as to a steam-boat, in *Thoms v. Southard*, *supra*. Treating of this matter, a writer already cited observes: "Every consideration of necessity and of public policy which demands and justifies the law of *lis pendens* as applied to real estate also demands and justifies the application of the same law to personal property. In fact, the ease with which personalty could be transferred to parties having no notice of the litigation is much greater than in the case of real estate. The probability of the defendant's entirely defeating the object of the suit by a transfer of the property *pendente lite* is rather greater in the case of personal than of real estate, and the necessity of some law prohibiting such transfer, to the prejudice of the prevailing party, is therefore greater in the former case than in the latter. But the necessity of preserving the negotiable character of negotiable paper not due, so as to require no inquiry beyond inspection of the paper itself in relation to its ownership, has properly been considered paramount to the necessity of avoiding transfers *pendente lite*, and that class of paper, therefore, is the only property not liable to be affected by the doctrine of *lis pendens*." Freem. Judgm. § 194, and cases cited. And it is thought that section 4192, Rev. St. U. S., or its associate sections, as to the registry of vessels, has no effect on the doctrine just discussed.

Now, as to whether the decree which the lower court entered was the correct one, concluding that court had jurisdiction over the *res* in controversy, such decrees or judgments are possibly authorized against the fraudulent donees or grantees of property. *Murtha v. Curley*, 90 N. Y. 372; *Ferguson v. Hillman*, 55 Wis. 181; *Kramer v. McCaughey*, 11 Mo. App. 426; *Clements v. Moore*, 6 Wall. 312. But I find no sanction in the authorities for such a decree against a mere purchaser *pendente lite*, holding him liable to respond to the plaintiff in the action in a personal judgment. In *Murray v. Ballou*,

1 Johns. Ch. 565, the leading case on this subject, the chancellor, while he decreed that such a purchaser should pay the amount of the consideration which he was to pay for the land, yet declined to tax him with costs. These considerations induce an affirmation of the judgment of the St. Louis court of appeals; and it is so ordered.

RAY, J., absent. The other judges concur.

STATE v. GRAHAM.

(Supreme Court of Missouri. June 18, 1888.)

1. BRIBERY—INDICTMENT.

Under Rev. St. Mo. § 1470, making it a felony to give money or other valuable consideration to any officer with intent to influence him to give or procure any appointment, office, or trust, an indictment for bribing a mayor to appoint defendant to a municipal office is sufficient, that charges, in the usual form, that a certain person held the office of mayor, and had the power to appoint to the office sought, and that defendant did feloniously give him \$25 to corruptly influence said mayor to appoint and procure for him a certain office; and it is not necessary that it aver that defendant was eligible to the office.

2. SAME—INSTRUCTIONS.

At the trial of an indictment for bribing a mayor to appoint defendant to a municipal office, it was error to refuse an instruction for defendant, in substance, that, in order to convict, the state must prove affirmatively, and by competent evidence, that defendant, within three years of the finding of the indictment, did pay, or offer to pay, the mayor money, gratuity, reward, or other valuable consideration with intent to induce him to appoint defendant to the office, and at the time the person bribed was an officer, and had authority to make such appointment.

Appeal from criminal court, Pettis county; JOHN E. RYLAND, Judge.

Indictment against Isaac Graham for bribing the mayor of the city of Sedalia to appoint defendant to an office. Defendant was found guilty, and appeals.

L. L. Bridges, for appellant. *B. G. Boone*, Atty. Gen., for the State.

NORTON, C. J. Defendant was tried and convicted in the criminal court of Pettis county, and sentenced to five years' imprisonment in the penitentiary under the following indictment: "The grand jurors for the state of Missouri, impaneled, sworn, and charged to inquire within and for the body of the county of Pettis and state of Missouri, upon their oaths present and charge that heretofore, to-wit, on the 1st day of June, 1884, at the county of Pettis and state of Missouri, Isaac Graham wickedly, advisedly, corruptly, feloniously, and unlawfully, did solicit, urge, and endeavor to procure John B. Rickman, he, the said John B. Rickman, being then and there the legally and duly elected mayor of the city of Sedalia, a municipal corporation then and there being, and having the power to appoint certain officers of said city, subject to the confirmation of the city council thereof, and, among other officers, one known and designated as engineer of the steam fire-engine of the city of Sedalia, being an officer of said city, to appoint him (the said Graham) as such officer, and did unlawfully, wickedly, corruptly, and feloniously give the said John B. Rickman, as such mayor, a large sum of money, to-wit, the sum of twenty-five dollars, the same being then and there a gratuity and reward, with the intent then and there to corruptly influence and induce such officer, as mayor of said city, to give and procure for him, by his act, influence, and interest, to-wit, by his official appointment, and by his official influence and interest as such mayor, the office and appointment of engineer of the steam fire-engine of the city of Sedalia as aforesaid, the office being then and there a place of trust in said city; the said sum, so as aforesaid given, being feloniously and corruptly given as a bribe, present, and reward, in contempt of the laws in such cases made and provided, and to the evil example

of others in like cases offending, and against the peace and dignity of the state."

The action of the court in overruling a demurrer to the indictment is assigned for error. The indictment is based on the following statute: "Sec. 1470, Rev. St. *Bribing Officer to Appoint to Office, etc.* Every person who shall directly or indirectly give, or engage to give, any sum of money or other valuable consideration, gratuity, or reward to any officer,—*First*, with intent to influence or induce such officer to give or procure for him, or any other, by his act, interest, influence, or other means whatever, any appointment, office, or place of trust, or any preferment or emolument, or assist, by any means whatsoever, to procure the same; or, *second*, in consideration of any office or appointment, preferment or emolument, act, interest, or influence, or any aid or assistance in procuring, or attempting to procure, such appointment, office, or place of trust, or any emoluments, shall, on conviction, be adjudged guilty of bribery, and punished by imprisonment in the penitentiary for a term not exceeding seven years." The indictment in question alleges every fact necessary to constitute the offense defined by the statute. It charges that Rickman was the mayor of the city of Sedalia, and as such had the power to appoint defendant to the office of engineer of the steam fire-engine of said city, subject to the confirmation of the city council, and that defendant did feloniously, etc., give to said Rickman \$25, with the intent to corruptly influence said Rickman as mayor to appoint and procure for him the office of engineer of said engine. It was not necessary, under this statute, in order to make a valid indictment, to aver that defendant was eligible to the said office, for the purpose of being appointed, to which he gave the bribe. The *gravamen* of the offense interdicted by the statute is the intention to influence the official action of the officer by giving him a bribe, and this is sufficiently set forth in the indictment. *Schircliff v. State*, 96 Ind. 369; *Rex v. Vaughan*, 4 Burrows, 2494; *Watson v. State*, 89 Ohio St. 128.

Defendant asked, and the court refused to give, the following instruction: "In order to convict defendant in this case, it devolves upon the state to prove affirmatively, and by competent evidence, that defendant, within three years prior to the finding of the indictment, offered to pay, or did actually pay to John B. Rickman money, gratuity, reward, or some other valuable consideration, with the intent to induce or procure him, the said Rickman, to appoint defendant to the office of city engineer of the steam fire-engine of the city of Sedalia, and that, at the time of paying such money, gratuity, reward, or other consideration, the said Rickman was an officer of the city of Sedalia, and authorized to make such appointment." We cannot see upon what grounds this instruction was refused, and for the error committed in refusing it the judgment is reversed, and cause remanded.

All concur, except RAY, J., absent.

STATE v. GILMORE.

(Supreme Court of Missouri. May 21, 1888.)

Appeal from St. Louis criminal court; J. C. NORMILE, Judge.

Indictment of one Gilmore for murder in the first degree. Conviction of murder in the second degree, and defendant appeals. For opinion of the court, see 8 S. W. Rep. 359.

A. W. Alexander and D. Castleman Webb, for appellant. Atty. Gen. A. C. Clover and C. O. Bishop, for respondent.

SHERWOOD, J., (*concurring*.) Under some of the former rulings of this court, which are cited in the above dissenting opinion, the iron rule that, if the accused "brought on the difficulty, or voluntarily entered into the same, that

then there was no self-defense in the case, and, if death ensued, that then the accused was guilty of murder, no matter what his intention may have been in bringing on the difficulty," etc., was the iron rule which was laid down by this court,—a rule which was unflinchingly applied to every case of homicide which was preceded by a quarrel, however sudden or however great the provocation. This statement is fully borne out by the cases cited in the dissenting opinion, and therefore the statement made therein to the contrary finds no support in those cases. It was the fact that all cases of homicide were treated precisely alike in this particular that induced a minority of this court to question and to combat the monstrously unjust rule in *Culler's Case*, 82 Mo. 623, and finally induced a majority of this court to overthrow that rule in *Partlow's Case*, 4 S. W. Rep. 14, in *Berkley's Case*, Id. 24, and in the present one. In *State v. Christian*, 66 Mo. 138, the rule is laid down by NORTON, J., with emphasis, that the court should decline "to instruct the jury as to any degree of manslaughter," where "every fact in the case goes to show that the defendant sought and brought on the difficulty." Similar enunciations can be found scattered through our Reports ever since the sound and wholesome principle laid down in *State v. Hays*, 23 Mo. 287, and *State v. Packwood*, 26 Mo. 340, was departed from in subsequent cases; where the question of intent in cases of homicide was regarded as wholly immaterial, if the accused "brought on the difficulty." In view of these latter decisions, the statement made in the dissenting opinion, as to the rule of law prevailing in this court in reference to the effects and consequences of bringing on a difficulty, is somewhat singular.

RICHIE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 16, 1888.)

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES.

Upon trial for forging certain letters of recommendation, the only controversy was whether defendant had shown witness the letters produced at the trial, and admitted to be genuine, or other spurious letters, as claimed by the witness, which were not produced. There being no pretense that the parties had written such letters as witness claimed were shown him, it was not prejudicial to the defendant to refuse a continuance to procure the attendance of witnesses in another state, to prove the genuineness of the letters produced.

2. SAME—ADJOURNMENT OF JURY—SUBMITTING CASE IN DEFENDANT'S ABSENCE.

A felony case being submitted to a jury, who were placed in charge of a sheriff, and so remained until the return of their verdict, their adjournment from their consultation room to their meals and sleeping apartment, and return to the consultation room, were not a resubmission of the case at each return, and did not constitute a submission in the absence of the prisoner.

Appeal from circuit court, Franklin county.

P. D. Richie was indicted for the crime of forgery. Richie, wishing to buy some horses of great value from R. P. Pepper, presented to him letters of credit from Gibson, cashier of a bank, and Evans, a circuit clerk, recommending Richie as a man of wealth and good financially for his contracts. On trial, Gibson and Evans testified that they had never written or signed such letters, but admitted the signing of certain other letters that Richie produced at trial, and which Richie claimed were the ones he presented to Pepper. Pepper testified that the letter produced by Richie were not the same as previously shown him by Richie, and which Richie afterwards told him (Pepper) he had lost. Defendant was convicted, and he appeals.

Scott & Violett, for appellant. *P. W. Hardin*, for the Commonwealth.

BENNETT, J. The appellant was indicted and convicted in the Franklin circuit court of the crime of forgery. He has appealed to this court. The three letters of recommendation—two from Gibson, the cashier, and one from Evans—which he introduced in evidence as the letters that he exhibited to

Mr. Pepper, were proven beyond question to be genuine. Therefore the refusal of the court to postpone the case for the purpose of allowing the appellant to procure the attendance of witnesses from the state of Missouri to prove the genuineness of these letters was not prejudicial to the rights of the appellant; besides, he was not convicted for forging these letters. He was convicted for forging two other letters, purporting to have been written by Evans and Gibson, and addressed to Mr. Pepper, in which the appellant was recommended as a man of wealth, and financially good for any contract that he might make. The appellant, in his evidence, denied having received or presented these letters to Pepper. Pepper says that he did. Therefore, as it was an admitted fact by the appellant that said parties had written no such letters, we fail to see what good the proposed proof would do him. The court did not err to his prejudice in refusing to postpone the case. The appellant also contends that the case was submitted to the jury to consider of their verdict in his absence, which he assigns as an error to his prejudice. The case was not submitted to the jury in the appellant's absence. When the case was submitted to the jury they were put in charge of the sheriff, and remained in his charge until they returned their verdict. Their adjournment from the consulting room to the hotel for the purpose of taking their meals, or to their sleeping apartment, and then returning to their consulting room, cannot be considered a resubmission of the case every time they may do these things. They all constitute but one submission. The cases of *Allen v. Com.*, 6 S. W. Rep. 645, and *Bretter v. Com.*, ante, 389, are unlike this case. The judgment of the circuit court is affirmed.

PARK *et al.* v. BOLINGER.

BOLINGER v. HANSON'S ADM'R.

(Court of Appeals of Kentucky. May 31, 1888.)

1. APPEAL—REVIEW—MATTER NOT SHOWN BY THE RECORD.

When a judgment is based upon accounts between the parties, and on appeal the transcript is but a partial one, the judgment will be affirmed, as any errors appearing might be cured by a complete transcript.

2. JUDGMENT—VACATION—INFANCY.

Under Code Pr. Ky. § 391, providing that "an infant, other than a married woman, may, within twelve months after attaining the age of 21 years, show cause against a judgment;" and sections 520-522, providing that any such proceeding shall be by petition; that a judgment shall not be vacated until it is found that there is a valid defense to the action, or, if plaintiff asks its vacation, that there is a valid cause of action; that the court may pass upon the grounds to vacate or modify the judgment before deciding upon the validity of the defense or cause of action; and that "on the petition the proceedings shall be the same as those in the action in which the judgment was rendered,"—a defendant in such proceeding is not limited, as under the old practice, to a demurrer, or plea of release of error, but may, by answer, controvert the allegations of such petition where it brings in question matters of fact considered by the court at the time the judgment was rendered.

3. SAME.

Such sections do not require an infant to wait until her majority before bringing an action to annul a judgment affecting her rights.

Appeals from circuit court, Graves county.

Code Pr. Ky. §§ 520-522, provide that any proceeding by an infant to set aside a judgment rendered during his minority and affecting his rights shall be by petition; that a judgment shall not be vacated until it is found that there is a valid defense to the action, or, if plaintiff asks its vacation, that there is a valid cause of action; and that the court may pass upon the grounds to vacate or modify the judgment before deciding upon the validity of the defense or cause of action.

Hugh Rodman and *D. G. Park*, for Park and Hanson's administrator.
W. W. Tier, *W. Lindsay*, and *H. W. Hines*, for Bolinger.

HOLT, J. L. A. Hanson died in 1869, leaving an infant daughter, Nellie by name, as his only heir. The same person became his administrator and her guardian, and, styling himself in both these capacities, brought an action soon after the intestate's death, seeking the sale of a certain mill property upon the ground that the interest of both the estate and the ward required it. She was not made a party to the suit. The petition averred that W. E. Bolinger had loaned certain sums of money to her father to aid in paying for the property, and he was made a defendant, and called upon to answer as to the transactions between them. He did so, claiming that he had advanced certain sums towards the payment of the land and mill under an agreement with Hanson that this money, with interest, was to be returned to him from the profits of running the mill, and then they were to become joint owners of the property. Subsequently J. L. Bolinger was joined as a defendant upon the petition of both the Bolingers, stating that W. E. Bolinger had made the advances under an agreement with J. T. Bolinger that whenever he returned the same to him, with interest, he was to have all his (W. E. Bolinger's) rights under the contract; that he had repaid him; and that Hanson knew of and was a party to the entire arrangement. Such a state of pleading was made up by the parties that they believed an issue had been fully and properly made as to whether Bolinger was a mere creditor or a partner of Hanson. All the parties to the action consented to the sale of the property, and it was sold, leaving the proceeds as the subject of contention. Testimony was taken upon the question whether the relation of creditor or partner existed; and on November 19, 1874, a judgment was entered declaring that there was a partnership between the parties; that J. T. Bolinger was substituted to W. E. Bolinger's rights, and entitled to the money advanced, with interest, disallowing the claim for Hanson's services, but not charging him with what he used of the firm assets for living, and providing that after repaying to either party any advances, with interest, the surplus of the firm's assets should be equally divided between Hanson's administrator and J. T. Bolinger, the commissioner to report on such basis. He did so, and the report was confirmed; and on May 13, 1876, another judgment was entered, appointing a receiver to settle with the commissioner, collect the firm assets, pay its creditors, including the advances made to it by the partners, and then divide any balance between Hanson's administrator and J. T. Bolinger. The receiver complied with this judgment. The assets were distributed accordingly. He filed his report, and it was confirmed. By way, however, of equalizing what had been paid to J. T. Bolinger and Hanson's administrator, another judgment was rendered on May 21, 1879, in favor of the latter, and against the former, for \$448.60; and from this judgment J. T. Bolinger has appealed. In May, 1878, Nellie married D. G. Park; and in April, 1881, they brought an action to vacate the judgment of November 19, 1874. The petition sets forth, in detail, the history of the other suit, and seeks to annul the said judgment upon the ground that, upon the pleadings of the Bolingers themselves, the relation of creditor, and not of partner, existed between her father and Bolinger; also because the testimony did not show a partnership, because incompetent evidence was admitted, and because she was not made a party to the suit. It also avers that Bolinger was, by way of account, considerably indebted to her father, and asks that this indebtedness, less the \$448.60 judgment, be credited on the amount advanced by Bolinger to her father, and that they have judgment for the difference between the balance of the advancement or loan and what Bolinger has been paid as a partner under the decrees in the other suit. The record of the other suit was referred to as a part of the petition. The plaintiffs denied the right of the defendants to answer, and moved for a judgment in accordance with the prayer of their petition. This motion was based upon the ground that the record of the former suit showed the non-existence of a partnership, and what Bolinger had advanced and what he had received; that

the court must act upon the record as then made up; and that the defendant could only demur to the petition or plead a release of the errors complained of, or some similar matter of defense. The court overruled the motion, and permitted the defendants to answer. They did so by a denial, in the main, of the averments of the petition, and also set up affirmative matter, which, undenied, was sufficient to prevent a recovery by the plaintiffs. They declined to plead further, and thereupon the action was dismissed, and Park and wife have appealed. Their appeal and that of Bolinger are now heard together.

The superior court reversed the \$448.60 judgment against him, upon the ground that the judgment of November 19, 1874, was merely interlocutory, and that the pleadings failed to show a partnership between him and Hanson. He appealed upon the ground that the statement of the accounts by the commissioner upon the theory of a partnership, and the judgment based upon it, were erroneous; and, if corrected, it would appear that no judgment should have been rendered against him. As this record now stands, although the judgment is reversed upon his appeal, yet the reversal is prejudicial to him, because if he is to be treated merely as a creditor, and not as a partner, of Hanson, then he will fall more largely in debt to his estate. In effect, at least, the judgment was not reversed because it was prejudicial to him. There was no cross-appeal. It is unnecessary to determine, however, whether, in the absence of one, such a reversal is proper, because the judgment of November 19, 1874, holding that a partnership existed, taken in connection with that of May 13, 1876, effectuating it, was clearly final. One was but in execution of the other, and certainly, upon the rendition of the one last named, either party could have appealed. Relief of a final character was given by them in and of themselves. No further action of the court was necessary to make them effective. They decided that there was a partnership, and distributed the assets upon that theory. *Freem. Judgm.* §§ 23-25. Park and wife have so treated them by filing their bill of review. In fact, both sides concede in argument their final character, and there is no appeal from them. The judgment in question must be affirmed—*First*, because it is based upon the accounts between the parties, and the transcript is but a partial one. Any error now appearing might be cured by a complete record. *Second*, various issues of fact were involved, and the assignment of errors is too general to admit of their examination. *O'Reagan v. O'Sullivan*, 14 Bush, 184.

We now turn to the consideration of the other case. Under the old chancery practice, a bill of review would lie for error of law appearing in the body of the decree, or upon the discovery of new matter of fact, material in character, and which the party could not, by reasonable diligence, have discovered before; and, where it was brought to review or vacate a decree for error of law, nothing could be considered but the decree; and therefore, unlike our present practice, all of the pleadings and facts proven were embodied in the decree. The defendant to the bill could, in such a case, demur, or plead a release of error, or some similar matter of defense. Infants to a decree were then given a day after arriving at age to show cause against it. These rules have been modified by our Code of Practice. Section 391 provides: "An infant other than a married woman may, within twelve months after attaining the age of twenty-one years, show cause against a judgment." And section 518 says: "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it * * * (5) for erroneous proceedings against a person under disability, except coverture, if the condition of such defendant do not appear in the record, nor the error in the proceedings; * * * (8) for errors in a judgment shown by an infant within twelve months after arriving at full age, as is prescribed in section 391." Subsequent sections provide that any proceeding upon these grounds shall be by petition; that a judgment shall not be vacated until it is

found that there is a valid defense to the action, or, if the plaintiff asks it, that there is a valid cause of action; and that the court may pass upon the grounds to vacate or modify the judgment before deciding upon the validity of the defense or cause of action. And section 520 says: "On the petition the proceedings shall be the same as those in the action in which the judgment was rendered." The proceeding thus authorized is in lieu of the bill of review under the old practice; and the revisory power of the trial court over its judgment, after the expiration of the term at which it was rendered, is now restricted to the cases enumerated in the Code. *Anderson v. Anderson*, 18 B. Mon. 95. If it appears that the party was an infant when the judgment was rendered; that, according to the facts presented, an injustice has been done him; and that he has applied for relief within the time limited,—then it should be afforded. *Allen v. Troutman's Heirs*, 10 Bush, 61. This is so whether the error is one of law merely, and apparent from the record, or is one of fact. The material question is, has a substantial injustice been done him? An inquiry of such a character implies the right to form an issue as to any material fact, and this can only be done by pleading. The burden is upon the infant to show the injustice, and that his substantial rights have been prejudiced by a judgment, which is to be regarded as *prima facie* correct. The appellants Park and wife are not seeking to set aside the sale of the property. They have confirmed it. Mrs. Park was an infant when the judgment of November 19, 1874, declaring the existence of a partnership, was rendered. It must be regarded as final for the purposes of this suit. It was certainly so as effectuated by the judgment of May 18, 1876. This action to annul it was brought while she was yet under age. She was not bound to wait until she arrived at majority before bringing it. She has presented herself properly, and the question arises whether the other side had the right to join issue by an answer to her petition. It seeks to vacate the judgment of May, 1874, for both error of fact and of law. It not only asserts the existence of legal error apparent upon the record of the former suit; but, in the face of the fact that the petitioners have accepted the judgment for \$448.60 rendered against Bolinger, it seeks to credit him therewith, correct the statement of accounts between the parties as made in the former suit, and any errors of the court in reaching conclusions of fact. It is unnecessary to decide whether, under the present practice, if the appellants were proceeding alone upon the ground of error of law apparent upon the record of the former suit, the appellee would be limited to a defense by demurrer or a plea of a subsequent release of error. They are not doing so, but relying both upon error of law and of fact. Their petition brings in question matters of fact that were in existence when the judgment which they seek to annul was rendered, and which were then considered by the court. Undoubtedly, this may be done under the present practice; but, when done, it would be an anomaly in jurisprudence if the adverse party were denied the right to answer. If so, the one party would be given his "day in court," but it would be denied to the other. The right of a party to answer, in such a case, is unquestionable. *Allen v. Troutman's Heirs*, *supra*. The appellee having done so, and the appellants having declined to plead to it, the judgment dismissing the action was proper, and must be affirmed. The judgment in each case is affirmed.

SLAUGHTER v. CITY OF LOUISVILLE. GODA v. SAME. MILLER v. SAME.

(Court of Appeals of Kentucky. June 12, 1888.)

1. TAXATION—ASSESSMENT AND LEVY.

Act Ky. Feb. 17, 1866, provided that a board of tax commissioners should be appointed to hear and determine complaints of improper assessments; notice of its sittings to be given by said board by public advertisement. *Held*, that a notice

given by the city assessor in his own name, he being an *ex officio* member of said board, was insufficient, and taxes assessed for the year for which notice was so given could not be collected.

2. **SAME.**

Said board for the year 1882 gave such notice in due form, but failed to meet at the time fixed by law for its meetings. *Held*, that the levy for that year was invalidated thereby.

3. **SAME.**

By act Ky. March 29, 1883, the city assessor of Louisville was directed to reassess any real estate not previously assessed, or upon which taxes had not been paid; and a board of commissioners was provided for, consisting of the auditor, treasurer, and chairman of the committee on assessments, whose duty it was to be in continuous session to hear appeals, etc. This board never having met or organized, any reassessments made under said act were void.

4. **SAME.**

Act Ky. April 8, 1882, provided for assessments in said city for each year, of date September 1st, requiring the books to remain in the assessor's office from the 15th to the 30th November for tax-payers to complain of erroneous assessments. The act also provided for a board of equalization, with power to hear appeals from assessments, to be appointed by the mayor, with the consent of the board of aldermen, the appointment to be made in September. In November, the mayor, without the approval of the aldermen, appointed such board. *Held* that, the appointment and sittings of the board being without authority, tax-payers were not required to file complaint, as required by said act, and an assessment under such circumstances was invalid.

5. **SAME.**

Act Ky. April 19, 1884, attempted to legalize the appointment of said board by the mayor without the consent of the aldermen, and to validate the acts of said board, the act further providing that the board, during the months of June and July, should have power to reduce any unpaid assessments for 1883 and 1884 upon petition by the aggrieved party filed with said board. *Held*, that the board's failure to meet on the 1st day of June was equivalent to a refusal to act, and a meeting on the 10th was not a compliance with the act, and tax-payers were not required to take notice of it.

6. **CONSTITUTIONAL LAW—LEGISLATIVE POWERS—TAXATION.**

The legislature, by acts passed April 28, 1884, and May 12, 1884, provided that all persons whose property was attempted to be assessed for the years from 1876 to 1882, inclusive, "in the sense that assessments were extended upon the assessor's books, and who have not paid those assessments, are, as far as such prior levies or assessments were inoperative and void, assessed now, upon the extended value of such property as appearing on said books, at the following rates." *Held*, that the assessments therein sought to be validated, being void and not merely defective, could not be cured, and that the act amounted to an assessment of *ad valorem* taxes by the legislature, which was an unconstitutional attempt to exercise judicial power.

Appeals from Louisville law and equity court.

Dodd & Grubbs, Lane & Burnett, and *R. W. Woolley*, for appellants. *L. N. Dembitz*, for appellee.

BENNETT, J. As these cases involve the same questions, they, by agreement, are to be heard together. They will be disposed of in the order in which they stand.

Slaughter v. City of Louisville. The appellee, by its action in the Louisville law and equity court, sought to subject the real estate situated in the city of Louisville belonging to the appellant, Mrs. Slaughter, to the payment of *ad valorem* taxes alleged to have been assessed against the same by the appellee for the years 1877 to 1885, inclusive. The appellant resisted the appellee's right to recover these taxes upon the ground that there was no assessment for any one of said years, and upon the ground of errors committed in the election, organization, and official transactions of the various boards provided by law for the hearing of appeals from the alleged assessments. By an act approved February 17, 1866, a board of tax commissioners was provided for, whose duty it was to hear the tax-payers' complaints of improper assessments, etc. This board was required to give notice of its sittings by public advertisement. In the case of *Ormsby v. City of Louisville*, 79 Ky. 197, (decided by this court in 1880,) it was held that the publication of this notice was a condition precedent to the city's right to collect *ad valorem* taxes. In the case

of *Dumaniel v. City of Louisville*, 4 Ky. Law Rep. —, (decided by this court in 1882,) it was held that a newspaper advertisement, signed by the city assessor, he being *ex officio* a member of the board, was not a notice published by the board. The appellee fails to show publication of notice in any other way. It therefore fails to manifest a right to recover of the appellant any of the taxes that might have been assessed prior to 1882. The notice for 1882 appears to have been given in due form. But the board failed to meet at the time fixed by law for its meeting; therefore the levy for 1882 was invalidated.

By an act approved March 29, 1882, the city assessor was directed to reassess any real estate upon which taxes had not been paid, and to assess all property not previously assessed. This act also provides a board of commissioners, consisting of the auditor, treasurer, and chairman of the committee on assessments, whose duty it shall be to be in continuous session for the purpose of hearing appeals, etc. This board never met or organized. According to the decisions of this court, through the failure of said board to organize and meet, the reassessments, if any there were, fell to the ground.

By an act approved April 8, 1882, it was made the duty of the assessor to reassess any real estate that had been erroneously assessed. This reassessment was required to be made as of the 1st day of September, in each year; but the assessor was required to give written notice by mail to each person whose property he proposed to assess before making the assessment. It is not contended that any reassessment, as required by this act, was made, or attempted to be made. Therefore the appellee still shows no right to collect taxes from the appellants up to and including 1882.

The act of April 8, 1882, also regulated the assessments made after its date. These assessments were required to be made on the 1st day of September, 1882, and annually thereafter. The assessment books were required to remain open in the office of the assessor from the 15th to the 30th day of November in each year, during which time any tax-payer dissatisfied with his assessment might file his complaint with the assessor. This act abolished the board of commissioners, and in its stead provided for the appointment of board of equalization, whose duty it was to hear appeals, etc. This board was to be appointed by the mayor by and with the consent of the board of aldermen. The act provided for the appointment of this board in September, 1882; but it was not appointed until November of that year, and the appointment was made without the consent and approval of the board of aldermen. The sittings of this board of equalization in November, 1882 and 1883, were therefore without authority; hence the tax-payers were not called upon to file any complaint with the assessor in reference to erroneous assessments, for the reason that there was no legally appointed board to act upon them. This defect was fatal to the taxes of 1883 and 1884.

By an act approved April 19, 1884, it was attempted to legalize the act of the mayor in appointing the board of equalization without the consent and approval of the board of aldermen. This act attempts to validate the acts of said board. This act also provides that said board "shall have full power, during the months of June and July, 1884, to correct, increase, or reduce any unpaid assessment for the years 1883 and 1884; and any tax-payer delinquent for said years may appear before said board of equalization, by petition in writing, for correction of his tax-bills, as in said act provided." We construe this act to mean that the tax-payer, in order to entitle him to a hearing before said board, was required to file a petition before it, setting forth his complaint, and that it was the duty of said board to be in session during the months of June and July, in order to afford the tax-payer the entire two months in which to file his petition; also that the session, in order to be legal and valid, should have commenced on the first day of June, and continued until the last day of July. The board was created for a special purpose. Its life was fixed for two months, commencing on the 1st day of June, during which time the tax-payer had the

right to file his petition setting forth his complaint; and a failure of the board to begin its session on the 1st day of June was equivalent to a notice to the tax-payers that the members of it had declined to act as such; and a subsequent meeting of the board, to-wit, on the 10th of June, was not a compliance with the terms of the act, and the tax-payer was not required to take notice of it.

By an act approved April 28, 1884, which was amended and re-enacted by an act approved May 12, 1884, it is enacted, by the third article of the latter act, that all persons whose property was attempted to be assessed for the years from 1876 to 1882, inclusive, "in the sense that assessments against them were extended upon the assessor's books, and who have not paid those assessments, are, as far as such prior levies or assessments were inoperative and void, assessed now, upon the extended value of such property as appearing on said books, at the following rates," etc. The act *supra* does not attempt to cure merely defective assessments. The appellee's petition does not disclose that the alleged assessments for the years from 1876 to 1882, inclusive, were merely defective and irregular. Its petition alleges that said alleged assessments were defective; but no fact is alleged showing that they were merely defective. It is settled beyond question that, where assessments are merely defective by reason of some mistake or omission of the officer, such defects may be cured by subsequent legislation. If the appellee wished to maintain its action upon the ground that the alleged assessments were merely defective and not void, it was incumbent upon it to allege such facts, in connection with the assessments, as would show that they were merely irregular and defective, and not void. The simple allegation that the assessments were defective is not sufficient. The third article of the act of the 12th of May, 1884, does not attempt to validate assessments that were merely defective; for it expressly declares that said assessments, in so far as they were inoperative and void, are now assessed. It is also to be observed that said act recites no fact that shows that said assessments were merely defective, and not void; so, if the appellee can maintain its action at all, it must be upon the ground that the assessments extended in the assessor's books for said years were inoperative and void, and that the legislature made the assessments for those years, and authorized an action upon them. So the question to be decided is whether the legislature has the constitutional power to assess *ad valorem* taxes. By the constitution of this state, the powers of the state are divided into three distinct departments: the legislative, executive, and judicial. It is a fundamental principle that neither department can exercise the powers belonging to the other. It is well settled that the valuation or assessment of property for the purpose of *ad valorem* taxation is in its nature a judicial act. *Cooley, Tax'n*, 288. In the case of *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, it is said: "But where a tax is levied on property, not specific, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially." The valuation or assessment of property is not only a judicial, but an indispensable, act, in order to levy *ad valorem* taxes upon it. In the nature of the thing, there must be an assessment. On this subject *Cooley*, in his work on Taxation, (page 259,) says: "Of the necessity of an assessment, no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment, they have no support, and are nullities. It is therefore not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity." Can the legislature, in order to authorize the collection of *ad valorem* taxes, fix the valuation upon the property to be taxed? It seems to be well settled that the legislature, as the

law-making department of the state government, has no constitutional power to fix the valuation of property which is to be taxed upon *ad valorem* principles. The reason for this rule is that the legislative department has no judicial or executive power; and, as the valuation is judicial, it follows that the legislature has no constitutional power to make the valuation. Taxes are not debts. "Debts are obligations founded upon contracts, express or implied;" but taxes are impositions levied for the support of the state government, or for county or city purposes. When they are imposed by authority, they operate on the tax-payer *in invitum*. When they take the form of a per centum, there must be a valuation as a basis of the power to levy and collect them. The tax-payer is entitled to be heard in fixing this valuation. The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation would be the taking of his property without due process of law. The valuation is the due process of law by which the right to take his property for taxes is begun; and, the legislature having no judicial or executive power, it cannot make the valuation; but the valuation must be made by some person authorized to exercise judicial power, and such person is an assessor. But it is said that an assessment had been made by an assessor. If so, the act says that such assessment was "inoperative and void." Therefore it was not merely defective, but was an absolute nullity. It had not the shadow of an existence. It was treated by the act as if no assessment whatever had been made. In such a state of the case the legislature had no constitutional power to make the assessment,—not even as a curative act; for, as the assessment was void, there was nothing to cure. In the case of *People v. Hastings*, 29 Cal. 453, where the assessor for the city of Sacramento had made a void assessment of property, and the legislature, by its own act, made an *ad valorem* assessment, taking as a basis said assessor's attempted assessment, the court said: "By recurring to the act of 1858 to incorporate the city and county of Sacramento, it will be seen that the assessor who made the assessment for the year 1860 was elected by the qualified electors of the city and county of Sacramento, which is in a different district from that of the city of Sacramento. The insufficiency of that assessment as the basis for taxation for the year 1863 is apparent on several grounds. It was not made by the assessor elected by the qualified electors of the district in which the property to be taxed was situated; the city and county of Sacramento not being the same district as that of the city of Sacramento. The making of the certified copy of the assessment roll for the year 1862 so as to include property within the city of Sacramento cannot be regarded, in any sense, as the making of an assessment of such property by the assessor. The copying by one officer of a valuation made by another officer is not a valuation made by the first officer. If it is a valuation, in any sense, for the year 1863, it is a valuation made by the legislature; and, in view of the division of the powers of the government into three departments,—the legislative, executive, and judicial,—it will not be claimed that the legislative department was competent to perform the purely executive functions of an assessor. The objection is not obviated by the finding that the assessment was duly and regularly made in accordance with the statutes, for the only assessment that was provided for by the statutes was the adoption of a previous assessment; and, if any other than such an assessment had been made, the valuation would not have been ascertained as directed by law." In the case of *People v. Union*, 81 Cal. 138, it was held: "A valuation is the very foundation of proceedings for apportioning and collecting a tax upon property. It is essential to the validity of a property tax. If the assessor has failed to make an intelligible valuation, that duty cannot be performed or the defects remedied by the auditor, nor can the legislature make the valuation." Where an assessment has been in fact made by the assessor, which assessment, by reason of some irregularity in his proceeding, is merely defective,

but not void, such defect may be cured by legislation. In such case the curative statute relates back to the assessment, and makes it sufficient, for the purpose of collection, by virtue of said assessment. The power of the legislature to pass a valid curative act consists in the fact that there was an assessment having some elements of vitality, to which more strength may be given for the purpose of making it enforceable. The assessment must have some vitality in order to give the legislature jurisdiction of it. If it has no vitality, but is void, the legislature has no jurisdiction of it. In the nature of things, there can be no jurisdiction over a thing that does not exist, and an act that is void has no legal existence whatever. The assessment being void, the legislature had no jurisdiction over it. It could not cure the act of assessment because there was nothing to be cured. All it could do was to provide for a reassessment, and its collection. The act, in so far as it attempted to assess the appellant's property, is without constitutional authority, and is therefore void.

Miller v. Louisville. The appellee sought, in this action, to recover back taxes for the year 1880. The principles announced in the case of *Slaughter v. City of Louisville, supra*, apply in this case.

Goda v. City of Louisville. The appellee sought in this action to recover of the appellant taxes for the years 1882, 1883, and 1884. The principles announced in the case of *Slaughter v. City of Louisville, supra*, in reference to the taxes for those years, apply to this case.

The judgment of the lower court, in each of the above-named cases, is reversed, with directions to dismiss them.

COATES v. CALDWELL *et al.*

(*Supreme Court of Texas. May 29, 1888.*)

1. HOMESTEAD—ACQUISITION—WHEN DESIGNATION UNNECESSARY.

A tract of less than 200 acres becomes a homestead by the owner's living upon the land with his family, and it is unnecessary that he should have "designated" it as a homestead in the mode provided for by Rev. St. Tex. art. 2344, which provides that "the head of the family shall, by filing with the clerk of the county court a description, by metes and bounds, designate that portion of the larger tract which is to be the homestead," since such statute applies to those exemptions of tracts of land which exceed the limit of 200 acres allowed by the constitution and laws.

2. EXEMPTIONS—CROP GROWN ON HOMESTEAD.

A matured crop grown upon a homestead, and not severed from the land, is exempt from execution.

3. SAME.

Under Const. Tex. 1876, art. 16, § 49, which gives the legislature the power, and makes it its duty, "to protect by law from forced sale a certain portion of the personal property of all heads of families," the provision of Rev. St. Tex. art. 2335, which exempts from forced sale "all provisions and forage on hand for home consumption," does not contemplate that gathered crops, merely because they have grown upon the homestead, should be exempt from seizure.

4. INJUNCTION—LIABILITY FOR WRONGFUL ISSUE—MEASURE OF DAMAGES.

Damages for wrongfully enjoining the levy of an execution on property, part of which is exempt, are measured by the value of that portion which is not exempt.

5. SAME—HOW DAMAGES RECOVERED—SURETIES.

The defendant, in an injunction suit, may recover judgment against the sureties on the injunction bond for his damages caused by the wrongful issue of the writ, upon proper pleadings and proof, without serving citations on the sureties.

Appeal from district court, Dallas county.

The provisions of the Revised Statutes respecting homesteads are as follows: "Art. 2343. When the homestead of a family, not being in a town or city, is a part of a larger tract or tracts of land than is exempted from forced sale as such homestead, it shall be lawful for the head of the family to designate and set apart the homestead, not exceeding two hundred acres, to which the family is entitled under the constitution and laws of this state. Art. 2344. The party desiring so to designate and set apart the homestead shall file for

record, with the clerk of the county court of the county in which the land or a part thereof may be, an instrument of writing containing a description, by metes and bounds, or other sufficient description to identify it, of the homestead so claimed by him, stating the name of the original grantee, and the number of acres, and, if more than one survey, the number of acres in each."

Marshall & Gillespie and Stemmons & Field, for appellant. *S. W. Caldwell and W. M. Mann*, for appellees.

GAINES, J. This suit was brought by appellant Coates to restrain the sale of certain cotton levied upon under execution against him. The writ was issued upon a judgment rendered in a justice's court for \$70 in favor of appellee Caldwell, and was levied upon the cotton by appellee Massie, who was constable of the precinct. The property levied upon consisted of about 1,800 pounds of cotton picked but not removed from the field, and about 1,050 pounds matured but not picked. The petition alleged that the cotton was raised upon the homestead of plaintiff, and claimed that it was exempt from levy and sale on that ground. The defendants denied in their answer that the land upon which the cotton was grown was the homestead of the plaintiffs; denied also the exemption in any event, and pleaded in reconvention the loss of the debt as damages for the wrongful suing out of the injunction. The sureties upon the injunction bond were not cited to answer the plea in reconvention, but upon final hearing the court dissolved the injunction, and gave judgment in favor of Caldwell against them, as well as against the plaintiff for his damages to the amount of his debt, as claimed by him. All the defendants in the judgment appeal. It is assigned that the court erred in dissolving the injunction; and also in rendering judgment against the sureties on the injunction bond, without service of citation of the plea in reconvention. As bearing upon the question of the exemption, appellees insist that the testimony does not show that the land upon which the cotton was grown was the homestead of plaintiff. The plaintiff testified that the land consisted of 160 acres, upon which he lived with his family, (a wife and five children;) that it constituted his home both at the time the cotton was grown and when the levy was made, but that he "had never had designated it as such;" and that he owned another tract of 90 acres in another county, which was not fully paid for. Appellees claim that he must have designated his homestead before he could claim his place of residence as exempt. We think, however, that by living upon the land with his family, as his home, the plaintiff designated this property as his homestead. There being less than 200 acres, it was not necessary to define the boundaries. We presume the witness meant to say that he had never designated his homestead in the mode provided for by the statute, (Rev. St. art. 2343 *et seq.*;) but the statute applies to cases in which exemptions are claimed in tracts of land which exceed the limit allowed by the constitution and laws.

The levy upon the cotton presents two questions which have not been decided in this court: (1) Is cotton which has been grown upon the homestead subject in any event to the levy of an execution? (2) Is a matured crop not severed from the homestead so subject? In *Alexander v. Holt*, 59 Tex. 205, it is held that the crops upon a homestead while growing are exempt from execution; but nothing is said as to those which are ripe, but not harvested or gathered. Conceding, for the sake of the argument, that an unsevered crop not upon the homestead is subject to levy and sale, we have quite a different question here. Upon a levy upon such property the officer must either take possession of the land to gather the crop or must sell it ungathered. In the latter case, the right would pass to the purchaser at the sale to go upon the land and take off the crop. In order to complete a sale or to make it effective, possession must be taken of the land upon which the crop is found, and for a time at least the officer or purchaser must exercise dominion and control over it. This,

in our opinion, is an invasion of the homestead right, and cannot be permitted. It may be that, as between the execution creditor and the owner of the homestead, the crops, until severed, should be deemed a part of the land. But this we need not decide. The reasons given in *Alexander v. Holt*, *supra*, for holding crops growing upon the homestead exempt, apply to matured crops, but not with the same degree of force. We conclude that the unpicked cotton was not subject to levy. As to the cotton which had been picked, we are of opinion that it was not exempt. We are cited in no case in which the question has been directly passed upon in this court. The decisions in other states are not numerous; but the weight of the authority is that crops which have been grown upon a homestead are not exempt merely for that reason. Such is the ruling in California, (*Horgan v. Amick*, 62 Cal. 401,) and in North Carolina, (*Bank v. Green*, 78 N. C. 247.) The supreme court of Georgia holds the contrary doctrine. *Marshall v. Cook*, 46 Ga. 301; *Wade v. Weslow*, 62 Ga. 562. The latter case goes the extreme length of holding that live-stock purchased with the proceeds of crops grown upon the homestead is also exempt. We think the framers of our constitution intended to go no further in that instrument than to exempt the homestead itself. They gave the legislature the power, and made it its duty, "to protect by law from forced sale a certain portion of the personal property of all heads of families." Const. 1876, art. 16, § 49. It is evident that it was not intended by the constitution itself to exempt any personal property. The legislature has provided a most liberal protection, and, among numerous other articles, exempts "all provisions and forage on hand for home consumption." Rev. St. art. 2335. Nothing is said as to crops which have been produced upon the homestead; and we think this plainly shows that it was not contemplated they should be protected from forced sale merely upon the ground that they were so produced. The same intention is manifested by the exemptions to be set apart to the widow and children in the administration of estates. Rev. St. art. 1993 *et seq.* The exemption laws of California are similar to ours, though we infer they are wholly statutory. The construction placed upon them by the supreme court of that state is based upon considerations similar to those by which we have reached our conclusions upon this question. It follows, we think, that the court below erred in not holding the unpicked cotton exempt from execution. There was only 1,800 pounds of that which had been gathered, which, at 2½ cents per pound, (the only estimate placed upon it in the testimony,) was worth but \$45. The injunction only forbid the officers interference with the cotton, and did not otherwise restrain the writ. The value of the cotton subject to the levy was the limit to which the defendant Caldwell was entitled to receive for the wrongful suing out of the writ. The error of the court has therefore operated to the prejudice of appellants, and the judgment must be reversed. The authorities from other states seem to hold that, in the absence of an express provision, a statute authorizing judgment to be rendered against the sureties on an injunction bond for the damages for wrongfully suing out the writ, the sureties must be cited or an independent action must be brought on the bond. 2 High, Inj. § 1642, and cases cited; also *Elder v. New Orleans*, 31 La. Ann. 500; *Henley v. Cliborne*, 3 Lea, 213; *Hayden v. Keith*, 32 Minn. 277, 20 N. W. Rep. 195. But it is held by this court in *Sharp v. Schmidt*, 62 Tex. 263, that the defendant may receive his damages for the wrongful issue of the writ of injunction upon proper pleadings and proof, without serving citation upon the sureties. We think this practice was clearly contemplated by the laws existing at the time the Revised Statutes were adopted. Pasch. Dig. art. 8996. The commissioners who made the revision say in their report, in effect, that in preparing the title on injunctions they had carefully preserved the substance of the former laws. 2 Sayles' Tex. Civil St. 728. This title was adopted by the legislature as reported by the commissioners. Under these circumstances, we feel con-

strained to adhere to the ruling in the case last cited, and to hold that a citation to the sureties was not necessary in this case. For the error pointed out the judgment is reversed, and the cause remanded.

GENTRY v. STATE.

(Court of Appeals of Texas. June 18, 1888.)

1. CRIMINAL LAW—APPEAL AND ERROR—OBJECTION WAIVED.

Where, on trial for theft of horses, evidence is adduced showing that defendant took a horse not mentioned in the indictment, the court should instruct the jury that defendant cannot be convicted of the theft of any horse not mentioned in the indictment; but where defendant took no exception at the trial, and asked no special charge, and his rights were not injured, an omission to give such an instruction is no ground for reversal.

2. LARCENY—EVIDENCE.

Where the evidence shows the contemporaneous disappearance of defendant and certain horses, and where defendant, when arrested, had the horses in his possession, and was trying to sell them, a conviction for larceny of the horses will be sustained, though defendant committed the crime in company with another, and there is evidence that defendant was of a very weak mind, and easily influenced.

Appeal from district court, Falls county; EUGENE WILLIAMS, Judge.

Indictment for larceny. Sam Gentry was convicted of stealing horses. The evidence proved the contemporaneous disappearance from the same neighborhood of the defendant, one Homer Smith, the two horses described in the indictment, and another horse, the property of one Morgan. The defendant and Smith were seen in possession of the horses on the night of the day that the said animals were missed, and were followed to a distant county by peace-officers, and arrested in possession of the horses, which they were then trying to sell. Smith, on arraignment, pleaded guilty, and was sentenced to a term in the penitentiary. The defense relied upon was the mental incapacity of the defendant to distinguish right from wrong. Upon that issue his father testified that defendant was mentally very weak; that his sister, older than he, was similarly afflicted, but that his younger brother was mentally quick and bright; that one of his maternal aunts was a mental nonentity or wreck; that defendant had no independent will of his own. W. H. Black, who was defendant's school-master, and who had boarded in defendant's father's family with the defendant, and saw defendant daily for a year, testified: "I would liken defendant's mind to a vessel of still water that did not move till it was moved. Defendant's mind moved only as it was moved. He did not seem to have any mind or thought of his own. In school he would sit for hours with his head bowed down on his knee, and, when I would get after him, he would straighten up and look, but would soon lapse back. I tried hard, but could teach him little or nothing. About the play-ground or at home he would rarely speak unless he was spoken to. Would do nothing till he was told. He was very obedient and trusting in those about him. When he had confidence in any one, he would believe any miraculous thing that was told him. Judging from what I know of him, I think, while under the influence of one he confided in, he would not know right from wrong. I mean, if told to commit a particular crime, he would not consider, know, or appreciate the nature or quality of the act, but would look solely to the fact that he was directed to do it, and would do it with the confidence that he would do an innocent act. I believe that it would not occur to him that he was doing wrong. I do not think he would steal if let alone. In this sense, he does not know right from wrong. Around the house he would do whatever he was told to do; attend stock, work in the field, and he seemed to do it well. He is about 17 years old, but has not the mind of an ordinary boy of 10." Defendant appeals.

Goodrich & Clarkson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. Evidence was adduced on the trial tending to show that, at the same time and place that defendant took the horses mentioned in the indictment, he took a horse not mentioned in the indictment, the property of one Morgan. In the charge to the jury the court failed to instruct them as to the purpose of such testimony, and that they could not convict the defendant of the theft of any other horse than those named in the indictment. There was no exception made to the charge, at the time of the trial, because of such omission, nor did the defendant ask a special charge with reference thereto. It was unquestionably error to omit instructing the jury as above indicated; and, had such error been excepted to at the time of the trial, the conviction would have to be set aside. But it has never been held that such an omission in the charge is fundamental error which is necessarily fatal to the conviction. When such error is for the first time called to the attention of the trial court in a motion for new trial, this court will not reverse because of it, unless it appears, from the whole evidence adduced on the trial, that the defendant's rights may have been injured in consequence of it. *House v. State*, 16 Tex. App. 25; *Kelley v. State*, 18 Tex. App. 262; *Thornton v. State*, 20 Tex. App. 529; *Alexander v. State*, 21 Tex. App. 406; *Davis's Case*, 23 Tex. App. 210, 4 S. W. Rep. 590; *Carter's Case*, 23 Tex. App. 508, 5 S. W. Rep. 128; *Mayfield's Case*, 23 Tex. App. 645, 5 S. W. Rep. 161. After a careful consideration of the whole evidence, it does not appear to us that the defendant could probably have been injured in his rights by reason of the failure of the court to give the instruction mentioned, and we must hold, therefore, that said error in the charge is immaterial, and cannot operate to reverse the judgment. In the particulars in which the charge of the court was excepted to we find no error. We regard the charge, when considered as a whole, excepting the error of omission above discussed, as a full, fair, and correct exposition of the law applicable to the facts proved. That the conviction is amply sustained by the evidence there can be no doubt. Finding no material error in the conviction, the judgment is affirmed.

HENNERSDORF v. STATE.

(*Court of Appeals of Texas.* June 23, 1886.)

SUNDAY—WORKS OF NECESSITY—ICE FACTORY.

Under Pen. Code Tex. arts. 183, 184, which prohibit laboring on Sunday, except "works of necessity and charity," operating an ice factory on Sunday is a work of necessity; it appearing that to close the factory over Sunday would result in losing from 24 to 30 hours after resuming operations, that time being required to reduce the temperature after such an interruption.

Appeal from Brown county court; R. P. O'CONNOR, Judge.

Indictment against H. Hennersdorf for laboring on Sunday. Judgment of conviction, and fine of \$10 assessed, from which defendant appealed. Articles 183, 184, Pen. Code Tex., prohibit laboring on Sunday, with the exception of works of necessity and charity.

Bell & Drane, for appellant. *W. L. Davidson*, Asst. Atty. Gen., for the State.

HURT, J. Appellant was convicted in the county court for laboring on Sunday. Pen. Code, art. 183. Works of necessity are excepted from the operation of this article; and the only question for decision is, does the evidence in this record bring this case within this exception? We must look to the facts, which are these: The Brownwood ice factory was operated on Sunday, as alleged. The defendant had the management and control of said factory, and was present superintending and directing its operation on Sunday. If said factory was closed from Saturday night at 12 o'clock until Sunday night at 12 o'clock, it would require from 24 to 30 hours to reduce the temperature

so that ice could be drawn. The first ice drawn from the moulds would be spongy, unsaleable ice. The machinery is very sensitive to the heat of the sun, and during the summer the temperature in the brine-vats would rise from 16 to 20 deg. in a day, and it requires more labor and time to recover a degree above 10 deg. than below. Do these facts present a case of necessity? What is meant by works of necessity? Under very similar statutes to the one under which this prosecution is had, we find this definition: By the word "necessity" we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may be deemed "necessity," within the statute. *Flagg v. Millbury*, 4 Cush. 243; *Com. v. Knox*, 6 Mass. 76; *Pearce v. Atwood*, 13 Mass. 354. "Nor will it do to limit the word 'necessity' to those cases of danger to life, health, or property which are beyond human foresight or control. On the contrary, the necessity may grow out of, or indeed be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act; for it is no part of the design of the act to destroy or impose onerous restrictions upon any lawful trade or business, and hence, under a similar statute, it has been held, in a sister state, that it is lawful to keep a blast fireman at work on Sunday because it is a work of necessity. So, too, it has been held that, under special circumstances, a mill may grind on that day, and I think it will hardly be questioned that a gas company may supply gas, a water company water, and a dairyman milk, to their respective customers on that day." *McGatrick v. Wason*, 4 Ohio St. 566, per THURMAN, C. J. In line with these principles, it is held that such labor on Sunday as is a necessary incident to the accomplishment of a lawful purpose, such as the manufacture of malt beer, is not a violation of the statute. *Crocket v. State*, 33 Ind. 416; *Morris v. State*, 31 Ind. 189. Applying the principles of these cases to this, it is evident that the labor in operating an ice factory is a "work of necessity," and comes within the exception. The judgment is reversed, and the cause remanded.

NELSON v. STATE.

ASHBRANDT v. SAME.

(Court of Appeals of Texas. June 16, 1886.)

SUNDAY—WORK OF NECESSITY—SHOEING HORSES.

Under Pen. Code Tex. arts. 188, 184, prohibiting labor on Sunday, works of necessity excepted, it is a work of necessity for a blacksmith on Sunday to shoe horses used by a stage company which was engaged in the transportation of the mail, the horses arriving at their destination late Saturday, lame, and with loose shoes; schedule time, as arranged by the post-office department, requiring the mail coach to leave Monday morning before 4 o'clock, there being no other horses available for the journey, and it being impossible to make the trip on schedule time without the horses being shod.

Appeal from Llano county court; E. C. BONHAM, Judge.

Indictment for laboring on Sunday. Defendants were convicted, and appeal. The proof showed that the appellants, employed in the same blacksmith shop, on Sunday, June 10, 1887, shod certain horses which belonged to a stage company, which company, being engaged in the transportation of the United States mail, used the said horses to draw its stages. It further showed that the horses arrived in Llano town late on Saturday, lame in the front, and with loose shoes on the hind, feet; that the schedule time of departure from the town of Llano, as provided by the post-office department, was between 3 and 4 o'clock on Monday morning; that the company had no other horses available for service; that the horses could not have drawn the stage from Llano on Monday morning, on schedule time, without being shod; that the driver of the stage, on Saturday night, notified the defendants to have the

horses shod by 3 o'clock Monday morning; and that defendants had no other time than Sunday in which to shoe the said horses.

Asst. Atty. Gen. Davidson, for the State.

HURT, J. Appellants were convicted for laboring on Sunday. Pen. Code, art. 183. The labor consisted in shoeing stage-horses. Was this a work of necessity, under the facts of these cases? If so, there was no offense. *Id.* art. 184. We think so. See *Hennersdorf's Case*, *ante*, 926; *Flagg v. Inhabitants of Millbury*, 4 Cush. 243; *Pearce v. Atwood*, 13 Mass. 354; *McGatrick v. Wason*, 4 Ohio St. 566; *Crocket v. State*, 33 Ind. 416; *Morris v. State*, 31 Ind. 189. Reversed and remanded.

CHILDERS *et al.* v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

CRIMINAL LAW—APPEAL—DISCHARGE OF SURETIES ON APPEAL-BOND.

When the county court dismisses an appeal from a conviction in a justice's court, because of insufficiency of the appeal-bond, and remands appellant to the custody of the sheriff until the fine imposed by the justice is paid, as provided for in Code Crim. Proc. Tex. art. 816, the sureties on the appeal-bond are discharged.

Appeal from Jack county court; H. P. JONES, Judge.

W. E. Taylor and *H. N. Bell*, for appellants. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Childers was tried for a misdemeanor in the justice's court, and was convicted. He appealed to the county court. On April 4th, when the case was called for trial in the county court, a motion to dismiss the appeal was made by the county attorney, and was sustained by the court, and the appeal was dismissed because the appeal-bond was insufficient in amount, and Childers, who was present in court at the time, was remanded into the custody of the sheriff until the fine of one dollar and costs, as imposed in the justice's court, was paid. After the appeal was thus dismissed in the county court, to-wit, on April 8th, four days thereafter, the county attorney filed a petition in the county court praying a forfeiture of and judgment *nisi* upon the appeal-bond, which had been declared insufficient and quashed as aforesaid, and he asked for *scire facias* to the sureties. On April 9th the bond was declared forfeited, and judgment *nisi* was rendered against the principal and sureties. On the same day the sheriff placed Childers in jail, and Childers made oath that he was too poor to pay the fine and costs, in order that he might get the advantage of his imprisonment at so much per day until the said fine and costs might in that manner be discharged and satisfied, as provided for by article 816, Code Crim. Proc. He was kept in jail 16 days, and then was released and discharged from custody by the sheriff. When the *scire facias* was called for trial at the following June term, the principal and sureties answered thereto, setting up the above facts, and claiming that the appeal-bond became *functus officio* when it was quashed for insufficiency by the county court, and the appeal dismissed, and was no longer of any validity or binding force upon them; and they also pleaded that the imprisonment of the defendant was a full satisfaction and discharge of the judgment of the justice, under the provisions of article 816, Code Crim. Proc., and the decisions construing and applying the same. *Ex parte Stubblefield*, 1 Tex. App. 757; *Page v. State*, 9 Tex. App. 466; *Ex parte Godfrey*, 11 Tex. App. 34; *Ex parte Bogle*, 20 Tex. App. 127. Upon the motion of the county attorney, these answers were stricken out upon the ground that they presented no defense, and the judgment *nisi* was made final. This was error. The answer presented a sufficient defense, and the motion to strike out should not have prevailed. The judgment is reversed, and the cause remanded.

PHIPPS *et al.* v. STATE.

(Court of Appeals of Texas. June 16, 1888.)

CRIMINAL LAW—APPEAL—DISCHARGE OF SURETIES ON APPEAL-BOND.

Where, on appeal to the county court from a conviction in the justice's court, appellant pleads "guilty," is fined, and remanded to jail, as provided for in Code Crim. Proc. Tex. art. 816, where he remains until released by the sheriff, the sureties upon his appeal-bond are discharged. Following *Childers v. State*, ante, 928.

Appeal from Jack county court; H. P. JONES, Judge.

W. E. Taylor and *H. N. Bell*, for appellants. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant appealed from a conviction in the justice's court to the county court, and executed his appeal-bond. In the county court, on his appeal, he pleaded guilty, and was fined five dollars and costs, was remanded to the custody of the sheriff, and by him was placed in jail, where he remained for some time, and until released by the sheriff. Subsequently the county attorney made a motion to have his appeal-bond forfeited, with judgment *nisi*, and *scire facias*, to the sureties; which motion was granted by the court. In response to the *scire facias* the sureties pleaded that the appearance, fine, and imprisonment of their principal by the judgment of the county court, until the fine and costs were paid, rendered the appeal-bond *functus officio*, and of no further binding force upon them, and that they were discharged from any further liability upon the same. The county attorney moved to quash and strike out the answer; which motion was sustained by the court, and judgment final was rendered against them upon the appeal-bond. This ruling was erroneous. *Childers v. State*, ante, 928. The judgment is reversed, and the cause remanded.

HOWARD v. STATE.

(Court of Appeals of Texas. June 20, 1888.)

1. HOMICIDE—BY NEGLIGENCE.

Where a husband, on trial for the murder of his wife, was shown to have been in a quarrel with a neighbor in the former's door-yard, and was waving a pistol, and threatening, without any apparent intention, to shoot, and his wife was shot upon coming to the door, and urging him to come in, and her dying declarations were that the shooting was accidental while trying to take the pistol from her husband's hand, it was error to refuse to instruct the jury on the law of negligent homicide, under Pen. Code Tex. arts. 584, 585, providing that, "to bring the offense within the definition of homicide by negligence, there must be no apparent intention to kill. The homicide must be the consequence of the act done or intended to be done."

2. SAME—EVIDENCE—THREATS.

At the trial of a husband for the murder of his wife, the previous threats of the husband, and difficulties between the parties, may be given in evidence to show the state of the accused's mind, and his malice.

3. SAME—TRIAL—INSTRUCTION—WITNESS.

In a trial for murder, where evidence was introduced by defendant to show that the principal witness for the prosecution had given contradictory testimony on the examining trial, it was error to instruct the jury that the evidence was not for the purpose of proving that the witness had sworn falsely, but to enable them the better to judge of the credibility and worthiness of belief of the witness, as the very object of such evidence is to discredit and falsify the witness.

Appeal from district court, Colorado county; G. McCORMICK, Judge.

Indictment against Chubb Howard for the murder of Easter Howard, his wife. He was found guilty in the second degree, and appeals.

W. L. Adkins, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. The appellant was tried for the murder of his wife, and was convicted of murder in the second degree, with penalty at seven years in the penitentiary. Of the many questions so ably discussed by his counsel,

we select for examination those which we consider of most importance. It was not error for the court to admit the evidence objected to, of former difficulties which had occurred between the parties, and of previous threats made by the defendant against the deceased. Antecedent menaces, former grudges and quarrels are admissible to show the state of mind, and malice of the accused, at the time of the offense. *Davis v. State*, 15 Tex. App. 477; *Carr v. State*, 41 Tex. 543.

Three theories are presented by the evidence in this case: (1) An intentional killing; (2) an accidental killing; and (3) homicide by negligence of the second degree. In his charge to the jury the trial judge submitted the law applicable to the first two theories, but did not submit any instruction upon the third. Homicide by negligence of the second degree is that which occurs in the performance of an unlawful act. Pen. Code, art. 578. To constitute this offense there must be an apparent danger of causing the death of the person killed, or some other. Id. art. 586. To bring the offense within the definition of homicide by negligence of the first or second degree, there must be no apparent intention to kill, and the homicide must be the consequence of the act done, or attempted to be done. Id. arts. 584, 585. The defendant had just returned from a church festival, to which he had carried a pistol on or about his person, which was an unlawful act. In coming back from the festival, he got into a quarrel with Alf Parker, Jr., during which he drew and held the pistol in his hand, not so much, perhaps, with a view of shooting Alf with it (for it appears there was nothing to prevent his doing so had he desired) as to intimidate him. When Alf Parker, Sr., came out, defendant was cursing, and still had the pistol in his hand. This witness says: "I spoke to him, telling him that was no way to be acting, and to stop it. Defendant kept on cursing, and replied to me that he would burn my shirt tail off if I did not go back into the house. Defendant then rode to a tree near by, and hitched his horse, and started to his own house, which was about twenty-five or thirty steps from my house, and his wife came to the door, and said to him: 'Chubb, come into the house, and don't be out there fussing with grandpa.' Defendant said: 'I will raise a smoke around you all;' and, as he said this, the pistol fired." This witness, in his testimony given at the examining trial, held recently after the homicide, testified that "he did not know whether Chubb Howard shot Easter intentionally or not. * * * Easter grabbed at the pistol Chubb had in his hand, and said: 'Chubb, you let grandpap alone;' and about that time the pistol went off." The deceased's dying declarations, made to three different persons, were introduced in evidence, and in each she stated that she was accidentally shot. In one of the statements so made, she said: "I heard Chubb and grandpa quarreling outside, [of the house,] and went to the door, and pulled it slightly open, and told Chubb to let grandpa alone. Chubb said: "'Well, as soon as I put up my horse;' and just as he turned I grabbed his pistol, and jerked it back over his shoulder, and it went off, and shot me; and if I die I don't want Chubb punished." We think it fair to presume from the evidence that, if defendant intended killing the two parties with whom he had quarreled, he could have done so, or, at all events, he could have shot at either of them before the interference of his wife, since there was nothing to prevent. He did not fire at either. While he had had previous difficulties with his wife, they appear to have been on good terms that night, and defendant's conduct, after he found she was shot, showed his grief, and tended strongly to evidence an unintentional and accidental shooting. With regard to negligent homicide, these facts, we think, warranted and required a charge of the law upon that subject. In waving his pistol, and cursing and endeavoring to intimidate young Parker in the first instance, and his father in the second, defendant unquestionably was engaged in an unlawful act. That such conduct might and did produce apparent danger of causing death if the pistol did go off, is equally apparent.

That there was no apparent intention on his part to kill, is a conclusion which might have been arrived at by the jury from the other facts, had it been submitted to them. That the homicide was the consequence of his illegal act, in having and waving his pistol, is most clear. We are of opinion that the evidence called most loudly for a charge upon negligent homicide of the second degree, and that it was error in the court to ignore and fail to instruct upon this phase of the law. *Robins v. State*, 9 Tex. App. 667; *Robins v. State*, Id. 671; *Aiken v. State*, 10 Tex. App. 610; *McConnell v. State*, 13 Tex. App. 390; *Clark v. State*, 19 Tex. App. 495; *Curtis' Case*, 22 Tex. App. 227. 3 S. W. Rep. 86.

It was attempted, upon the part of the defense, to impeach the principal state's witness, by showing that he had given contradictory testimony on the examining trial. Upon this matter the court instructed the jury as follows: "A witness may be impeached by proving that he has sworn differently from what he does before you. This is not done for the purpose of proving that such witness has sworn falsely before you, but to enable you the better to judge of the credibility and worthiness of belief of such witness." We are of opinion that this instruction is erroneous. "A witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statements on the trial." Whart. Crim. Ev. (8th Ed.) § 482; 1 Greenl. Ev. (13th Ed.) § 462. "The legitimate object of the proposed proof is to discredit the witness." Mr. Webster defines "discredit" to mean "to refuse credence to; not to accept as true; to disbelieve." If this definition be correct, then the object of the impeaching or contradictory statements is to make the jury disbelieve, and not accept as true, and to refuse to give credence to, the testimony he has given before them. In other words, its object is to disprove and falsify the testimony of the witness as sworn to before them. Such evidence goes both to the discredit of the witness and the falsity of the testimony which is contradicted. And it is for the jury to say whether such contradictory statements do or do not absolutely disprove and falsify his evidence given on the trial.

For errors in the charge of the court above pointed out, the judgment is reversed, and the cause remanded.

TOMLIN v. STATE.

(Court of Appeals of Texas. June 20, 1888.)

1. RAPE—EVIDENCE.

At a trial for rape, where the indictment charged the commission of the crime by force, evidence that defendant had said five years before that he had a drug that would cause any woman who took it to yield to his desire, was irrelevant and improper, as tending to prejudice the jury.

2. CRIMINAL LAW—APPEAL AND ERROR—BILL OF EXCEPTIONS—PRESUMPTIONS.

Where the record shows that a bill of exceptions was approved and filed in term-time, more than 10 days after the trial, in the absence of contrary proof the presumption arises that the bill was regularly presented to the judge within the 10 days for his approval, as required by law.

Appeal from district court, Ellis county; A. RAINEY, Judge.

Indictment against Henry Tomlin for rape. Defendant was found guilty below, and appeals.

Asst. Atty. Gen. Davidson, for the State.

HURT, J. Appellant, on March 28, 1888, was tried and convicted for rape; the punishment being assessed at imprisonment in the penitentiary for life. On April 5, 1888, his motion for new trial was overruled by the court, and on that day sentence was passed on him. On April 18, 1888, appellant's bills of exception were filed, and by these are the only questions presented for revision, except as to the sufficiency of the evidence and the correctness of the charge of the court.

The bills of exception being filed in term, it is contended by counsel for appellant that they may have been presented to the judge within the 10 days, and that, if this was the case, appellant complied with the law. This position is correct, the presumption being that the trial judge would not approve the bills unless presented within the 10 days.

The motion to quash the special *verdict* is not well taken.

There are facts in this record strongly tending to show rape. There are also facts tending to show that, if appellant had carnal knowledge of the prosecutrix, it was with her consent. This being the state of case, it is of the first importance to the rights of appellant that no facts be admitted in evidence except such as are competent, especially if they were calculated to work injury to him.

The state proved by one Cordele that, five years before the trial, appellant told witness that he, appellant, had a medicine which, if administered to a woman, would make her yield to his desires. To the introduction of this matter the defendant objected, on the ground that it was irrelevant and illegal. The objection was overruled, and defendant excepted, reserving his bill. The indictment alleges that the carnal knowledge was effected by force, and the state relies alone upon proof of force for conviction. There is no evidence tending, remotely or otherwise, to show that, five years ago, the defendant knew or had ever heard of the prosecutrix. It is impossible to perceive the bearing this matter could legally have upon this case or any issue involved in the trial. That a party on trial for horse-theft had said that he was a thief, and was thoroughly equipped for the theft business, is as competent as the fact that appellant, "five years ago, had a medicine which would cause women to yield to his lust." The facts in the one case might prove the accused so completely depraved as to be a confirmed horse-thief; in the other, that the accused was so thoroughly under the dominion of his lust as to be disposed to commit rape under any and all circumstances,—still in neither case would the fact be legal evidence. Under the only vital issue of the case, "consent *vel non*," this irrelevant matter was evidently, to the mind of the writer, calculated to prejudice his case with the jury. He stood before his triers a confessed rake and libertine,—capable of any crime to which he might be prompted by his ungovernable passion. This evidence being incompetent, and strongly calculated to prejudice appellant with the jury, under the peculiar facts of this case, the conviction should be set aside, and a new trial granted. We will not discuss the sufficiency of the evidence to support the conviction; believing, however, that if the case is tried properly, and defendant is convicted, we would not reverse because of insufficiency of the evidence. The criticism upon the charge made by counsel for appellant is not just. It is not intimated in the charge that all the force necessary to commit rape is involved in that which constitutes an assault or an assault and battery. For admitting in evidence the matter above noticed, the judgment is reversed, and the cause remanded.

RANKIN v. STATE.

(Court of Appeals of Texas. June 28, 1888.)

1. HIGHWAYS—OBSTRUCTIONS—EVIDENCE.

Proof that defendant permitted a fence to remain after a public road had been established over the land, but not opened, is insufficient to support a conviction for obstructing a public road.

2. SAME—PENAL STATUTE.

A count in an information for obstructing a public road, charging that defendant "did unlawfully * * * prevent the free use of said public road, said prevention not being expressly authorized by law," charges no crime; being formulated under Code Crim. Proc. Tex. art. 124, providing that, whenever any road is made a public

highway, no person shall obstruct, or prevent the free use thereof, except when expressly authorized by law, which article is inoperative because it provides no penalty.

Appeal from Lemestine county court; L. B. COBB, Judge.

Indictment against J. D. Rankin for obstructing a public road. He was found guilty in the court below, and appeals. The indictment seems to have been based upon the following statute, (Code Crim. Proc. Tex. art. 124:) "Whenever any road, bridge, or the crossing of any stream is made, by the proper authority, a public highway, no person shall place an obstruction across such highway, or in any manner prevent the free use of the same by the public, except when expressly authorized by law."

T. J. Gibson and Jackson & Rucker, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. By the first count in the information the defendant is charged with unlawfully and willfully obstructing and injuring, and causing to be obstructed and injured, a public road. This count is not sustained by the evidence; the facts being that the obstruction complained of, a fence, was on defendant's land at the time said road was established. The said road was never opened after it was established. It could not be obstructed, within the meaning of article 405 of the Penal Code, until it had been opened. It was the duty, and within the power of the commissioners' court to have the road opened. Rev. St. art. 4360. It was not the legal duty of the defendant to open it, and he violated no law in permitting his fence to remain where it was before the road was laid out.

A second count in the information charges that the defendant "did unlawfully and willfully prevent the free use of said public road; said prevention not being expressly authorized by law," etc. We find no authority in the Penal Code for this count. It charges no offense known to the Penal Code. It was doubtless framed under article 124 of the Code of Criminal Procedure, but that provision is without a penalty, and a prosecution cannot, therefore, be maintained under it. A general verdict of guilty, without specifying upon which count, was returned by the jury, and judgment was rendered and entered accordingly. Because the evidence does not support the conviction under the first count, and because the second count charges no offense against the law, the judgment is reversed, and the cause remanded.

BENNETT v. STATE.

(Court of Appeals of Texas. June 28, 1883.)

LARCENY—EVIDENCE.

A yearling calf was killed without the consent of the owner. The hide was found by the owner at the place of killing. A search warrant was sued out and served upon defendant, and fresh beef found in his possession, which the officer thought was the beef of a yearling. Defendant told him he could show the hide of the animal from which it was taken, but, on being told to produce it, he could not, but said he had sold it to a certain person. The person referred to testified that he never, at any time, purchased a hide from defendant. *Held*, that the evidence, though strongly inculpatory, was not sufficient to support a conviction.

Appeal from district court, Guadalupe county; JOHN IRELAND, Judge.

Indictment of Arch Bennett for larceny of a yearling calf. It had been killed without consent of the owner, and he had found the hide at the place of the killing. A search warrant was issued and served upon defendant. Fresh beef was found in his possession, which the officer thought was that of a yearling. Defendant said he could show the hide of the animal from which it was taken, but, on being told to produce it, he said he had sold it to a certain person. That person testified that he never at any time purchased a hide from defendant. Judgment of conviction, and defendant appeals.

James Greenwood and W. R. Neal, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. While the circumstances proved are strongly inculpatory, they are not, in our judgment, of that conclusive nature required by law to warrant conviction of crime. They are not inconsistent with every other reasonable hypothesis than that of the defendant's guilt. Each and all of them may be true, and yet the defendant's guilt does not follow with moral certainty. Each and all of them may be explained reasonably and consistently with the defendant's innocence, and we must therefore set aside the conviction, because not supported by the evidence. We are inclined to the opinion that the statements made by the defendant to the officer after said officer had read and explained to him the search-warrant, should not have been admitted against him. We think the testimony shows, not very clearly, however, that the defendant, at the time he made said statements, was virtually, though not ostensibly, under arrest. *Nolen v. State*, 9 Tex. App. 419. This question, however, on another trial, may be clearly settled by a more thorough development of the circumstances under which said statements were made, and we leave the question open for such investigation. The judgment is reversed, and the cause is remanded.

TERRY v. STATE.

(*Court of Appeals of Texas. June 23, 1888.*)

MALICIOUS MISCHIEF—WHAT CONSTITUTES.

The destruction of a buggy harness is not an offense within Pen. Code, Tex. art. 683, providing a penalty for the willful and mischievous injury or destruction of "any growing fruit, corn, grain, or other agricultural product or property," nor within any other statute of that state.

Appeal from district court, San Saba county; A. W. MOURSUND, Judge.

Indictment for malicious mischief under Pen. Code, Tex. art. 683, which provides that "if any person shall willfully and mischievously injure or destroy any growing fruit, corn, grain, or other agricultural product or property, real or personal, of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for by this Code, he shall be punished by fine not exceeding \$1,000."

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was indicted for malicious mischief; the malicious mischief as charged consisting in the injury to and destruction of certain personal property, to-wit, one set of buggy harness. A motion to quash the indictment because it charged no offense against the law of this state was overruled by the court, and the correctness of this ruling is the only question on this appeal. Error in the ruling is confessed by the assistant attorney general. If the charge does not come within the provisions of article 683 of the Penal Code, then there is no statute which embraces it. To come within the provisions of said article, the property must be an agricultural product or property. Now, while it is true that, under our general exemption laws, a buggy is exempt, as is also all harness necessary for the use of the family, (Rev. St. art. 2335,) still it cannot be said that the buggy or harness is agricultural property. Under previous adjudications of this court discussing and construing the object, intent, extent, and purposes of article 683, the charge in the indictment does not come within its terms or purview, and we know of no other statute making the matter alleged a penal offense. *Murray v. State*, 21 Tex. App. 620, 2 S. W. Rep. 757; *Beeson's Case*, 23 Tex. App. 406, 5 S. W. Rep. 118. Because the indictment charges no offense, the judgment is reversed, and the cause is remanded.

WILLIAMS v. STATE.

(Court of Appeals of Texas. June 27, 1888.)

EMBEZZLEMENT—WHEAT CONSTITUTES—INTENT.

Defendant purchased a mule, which was delivered to him, and which he agreed not to remove from the county until paid for, or the payment secured. It was understood that he was to give a note, with a certain person as signer. Defendant removed the mule to the county where he lived, without giving the note or paying for the mule. There was no evidence that he intended to deprive the seller of the mule, or its value, and the seller did nothing for several months to assert his rights, though he knew that the mule had been removed and where it was. He then had defendant arrested. *Held*, that the evidence did not support a conviction for embezzlement.

Appeal from district court, McLennan county; E. WILLIAMS, Judge.

J. W. Williams, *alias* Wells, was indicted and convicted for the embezzlement of a mule, and the penalty assessed was a term of five years in the penitentiary. In addition to the proof summarized in the opinion, the record shows that, when Ashburn delivered the mule to defendant, it was upon the understanding that Mr. Mays, of Wharton county, was to sign the note as surety, and that a Mr. Monroe, acting for Ashburn and defendant, drew up the note, and sent it to Mays. Among the letters introduced in evidence was a letter from Mays to defendant, agreeing to sign the note as surety, and advising him that he had so written to Ashburn; another from Mays to Monroe, asking him to tell defendant that the price agreed upon for the mules was too high, and directing him not to buy; another one from Mays to Monroe, informing him that he (Mays) had received the note, but returned it to defendant without signing it; and another letter from defendant to Monroe, from Wharton county, explaining to Monroe that he had not had an opportunity to arrange the note since his return to Wharton county, and that he would remit the money as soon as he was through ginning cotton. It was also proved that the letter of Mays, inclosing the note to J. W. Williams, the defendant's name, was taken from the post-office by mistake by another J. W. Williams, who lived in Waco.

R. I. Munroe, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. There are two counts in the indictment: the first charging theft of a mule, the property of E. J. Ashburn; and the second, embezzlement of the same mule. The conviction is upon the second count. The facts are, in substance, as follows: Ashburn owned two mules, one of which was in McLennan county, and the other in Wharton county. Ashburn lived in the former and defendant in the latter county. Defendant, being in the former county, bought the two mules of Ashburn, agreeing to pay \$155 therefor, payable October 1, 1888, and to give his note, with security, for said amount, and was not to remove the mule in McLennan county, from said county until he had paid therefor, or had given said note, with security. Said mule, however, was delivered to him, and he did remove it to his home in Wharton county, without paying for it, or without giving said note, with security. Ashburn was well acquainted with defendant, knew where he lived, and knew he had removed said mule to Wharton county, and took no legal steps to assert his rights in the premises for several months after said removal, when he instituted this prosecution, and had the defendant arrested, and at the same time he took possession of the said mules, and sold them in Wharton county. In our judgment these facts do not constitute either theft or embezzlement, or any other offense against the Penal Code of this state. They show simply a breach of contract on the part of defendant, for which Ashburn had his civil remedy. Instead of showing that the defendant was actuated by a fraudulent intent in the transaction, the evidence shows that no such intent existed in his mind. He violated the contract in removing the

mule from McLennan county, but it is very clear that by this act he did not intend to fraudulently convert said mule to his own use, or to deprive Ashburn of its value. His correspondence, and other circumstances in evidence, show that his intention in relation to the mules was not fraudulent, but that he intended and expected to pay Ashburn therefor before the payment under the contract was due, and doubtless would have done so if he had not been prevented by the acts of Ashburn. Because, in our opinion, the evidence fails to show that any offense against the law has been committed by defendant, the judgment is reversed, and the cause remanded.

JONES v. STATE.

(Court of Appeals of Texas. June 27, 1888.)

HOMICIDE—MURDER—EVIDENCE.

In a trial for homicide, the dying declaration of the deceased showed that he came with a snake in his hands to where defendant was, and said he would throw it on him; that defendant said he would kill him if he did, and got up and went to a tent; that deceased followed him part way, when he came out with a pistol in his hand, when deceased said, "Well, let us throw the snake into the pond," and as he started to throw it defendant shot him; that, when deceased fell, defendant ran to him exclaiming, "Mr. Browning, have I hurt you?" When defendant fired he did not raise his hand above his hip. After deceased fell, he tried to get defendant to go for his wife, who lived a mile away, and for a neighbor, who lived about 400 yards away; but defendant did not go, but went away somewhere, and did not return until others had reached deceased, when he said to him: "Mr. Browning, has there ever been any hard feelings between us? It was an accident. You know I did not intend to hurt you." Deceased replied: "Frank, I don't know what your intention was." Deceased stated that there had never been any previous hard feeling or difficulty between them. *Held*, that the evidence did not support a conviction of murder in the second degree.

Appeal from district court, Rains county; J. A. B. PUTNAM, Judge.

Frank Jones was convicted in the second degree for the murder of R. S. Browning, and the penalty was assessed at eight years in the penitentiary. From the judgment entered in the case defendant appealed.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for murder of the second degree, and is based upon the following evidence: Deceased made a dying declaration as follows: "I had been in the woods, and picked up a snake, and came to the tent with it in my hands. Defendant was lying on a pallet under a tree, with a book and pencil in his hands. I said to him: 'Frank, I have brought you a pet, and will throw it on you.' Defendant said: 'If you throw that snake on me I will kill you;' and then ran around the tree, and into the tent. I followed to where there were some boxes, near the tent, and stopped, when the defendant came out of the tent holding a pistol in his hands behind him. I told him to put his pistol up. I still had the snake in my hand, and said: 'Well, let us throw the snake into the pond;' and, just as I started to throw the snake into the pond, defendant shot me." When the deceased fell, the defendant ran to and caught him, and said: "Mr. Browning, have I hurt you?" When defendant fired the fatal shot he did not raise his hand above his hip. After the deceased fell, he tried to get the defendant to go after his (deceased's) wife, a distance of one mile, and also tried to get him to go for Mr. Woodson, who lived about 400 yards distant; but he would not go, but went off somewhere, the evidence does not disclose where, returning in a short while, after some other persons had reached the deceased. When he returned defendant said to deceased: "Mr. Browning, has there ever been any hard feelings between us. It was an accident. You know I did not intend to hurt you." Deceased replied: "Frank, I don't know what your intention was." The deceased stated that there never had been any previous difficulty or hard feeling between him and defendant. No one was present when the

shooting occurred, but the deceased and the defendant. We have thus stated substantially all the facts connected with the homicide. The charge of the court was very full, embracing instructions upon murder in both degrees, manslaughter, and negligent homicide, and also homicide by accident. No objection was made to the charge in the trial court, and none is made here. There is but one question for our determination, and that is the sufficiency of the evidence to support the conviction. This question we must determine in favor of the defendant. We do not think the evidence shows that the act of killing was accompanied by malice on the part of defendant, but that, on the contrary, it disproves the existence of malice. Malice is not imputed by the law when the evidence tends to show justification, excuse, or mitigation; and in this case the evidence, in our judgment, very strongly tends to mitigate, if not excuse, the homicide.

Because, in our opinion, the conviction is not supported by the evidence, the judgment is reversed, and the cause remanded.

BRYANT v. STATE.

McFARLAND v. STATE.

(Court of Appeals of Texas. June 27, 1888.)

1. LARCENY—EVIDENCE—NEW TRIAL—CONTINUANCE.

On a trial for stealing a steer, where it appears that defendant was seen driving the steer, and that shortly afterwards a hide resembling that of the steer was seen hanging on defendant's fence, the court should grant defendant a new trial, where it had refused his motion for a continuance for the absence of a witness, who, defendant alleged, would testify that he spent the night of the day on which defendant was seen driving the steer at defendant's house, and that no animal was killed there that night; that the hide was not on the fence when he and defendant left the house, on the next morning; that they did not return until late that evening, when they for the first time found the hide on the fence; and that defendant expressed surprise thereat, and disclaimed all knowledge as to the hide.

2. SAME—FRAUDULENT INTENT—INSTRUCTIONS.

On a trial for stealing a steer, where the only evidence as to the taking is that of a witness, who testifies that he saw defendants driving the steer towards their pen, and that one of them told him that they were taking the steer for the purpose of fastening a board over its face to keep it out of the fields, and other witnesses testify that they saw the steer the day after "loose on the range," with a board tied over its face, the jury should be instructed that, to constitute theft, the taking must be with fraudulent intent, and that if the steer was taken and driven away for the purpose mentioned, though without the owner's consent, it would not be theft.¹

3. SAME—POSSESSION OF STOLEN PROPERTY.

On a trial for stealing a steer, where it appears that the hide of the stolen animal was found on defendant's fence, about 100 yards from his house, and in a thickly settled neighborhood, but defendant at the time repudiated all knowledge of or claim to the hide, there is nothing from which defendant's possession of the hide can be inferred, and consequently there can be no inference of guilt, although upon the owner of the steer identifying the hide defendant remarked that he "did not see how he [the owner] could be so positive, as he [defendant] had a red-speckled heifer just like his, [the owner's]."

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

Jesse Bryant and Bev. McFarland appeal from separate convictions for stealing the same steer. Bryant's application for a continuance set out that May would testify that he spent the night of the day on which appellants were seen driving the steer at Bryant's house, and that no animal was killed on Bryant's premises during that night; that the hide was not on the fence when he and Bryant left the latter's house on the next morning; that he and Bryant did not return to Bryant's house until late in the evening, when they for the first time discovered the hide on the fence; that Bryant expressed surprise on dis-

¹ See, also, *Boyd v. State*, (Tex.) 6 S. W. Rep. 853, and note.

covering the hide, and disclaimed all knowledge of how or when or by whom it was placed there.

T. S. Henderson, for McFarland. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. These parties were indicted in separate bills for stealing the same animal, the property of Ed Cosby. They were tried separately. When Bryant was called on for announcement, he presented his application for a continuance for want of the testimony of George May, Joel Evans, and Mrs. Delilah Blankenship. May resided in Bell county. Evans lived in Milam, but was temporarily absent in Bell, county. Mrs. Blankenship resides in Milam county. She was subpoenaed, and afterwards attached. It is not questioned by the state that diligence was shown. These witnesses were all in attendance except May, and the contest is as to the materiality and probable truth of his testimony. By reference to the statement of facts, it will very clearly appear that May's testimony is material, and not improbable; and the judgment as to Bryant must be reversed because of the error of the court in overruling the motion for a new trial based upon this matter. The facts of both of these cases required of the court a distinct charge that the fraudulent intent must exist at the time of the taking. Nathan Cook is the only witness who testified concerning the taking. He said: "On the 22d of July, 1887, Friday before the barbecue at Buckholt's, my father sent me out in the evening as usual, about an hour before sundown, to drive our cattle to their pen, and I did not find the Cosby beef with our cattle, and, seeing Jesse Bryant and defendant driving some cattle, I went to them, and saw defendant and Jesse Bryant driving Ed Cosby's red and white speckled beef down the lane in the direction of Jesse Bryant's pen. They were driving it down the public road about one-half mile from our house. The sun was about an hour high. I rode to where they were, and defendant, McFarland, told me they were going to take it down to Jesse Bryant's house, and fasten a board over its face to keep it from getting in the fields. As I left they drove it on towards Bryant's house. I never saw the animal again. I knew the animal well. It was a bad fence breaker, and Cosby had told my father he could not keep it out of the fields, and to put it in his pen at night. We had put it in our pen almost every night during the cropping season for two years. On Tuesday morning after the barbecue I passed by Jesse Bryant's, and saw a fresh hide hanging on his lot fence, and I thought I could recognize it as the hide of Ed Cosby's beef." J. B. Secrist, John Smith, and William Deer, for defendant, all testified that they saw the said Cosby beef on the day of the barbecue at Buckholt's, which was the day after Nathan Cook saw defendant and Bryant driving it, and that when they saw it it was loose on the range, and had a board tied over its face. Nathan Cook saw appellants with the steer. It was not their property, and they had no authority from the owner to take the animal. Jurors might believe that these facts constitute theft. Here is a taking of property which does not belong to the parties taking,—a taking without the consent of the owner. Hence the necessity, when viewed in connection with the positive evidence of Secrist, Smith, and Deer, that they "saw the Cosby beef on the day of the barbecue at Buckholt's, which was the day after Nathan Cook saw the appellants driving it, and that the steer was loose on the range," of informing the jury that the taking must be fraudulent, etc.; that, if the animal was taken and driven to Bryant's for the purpose of fastening a board over its face to keep it from getting into the fields, such taking, though without the consent of the owner, would not be theft.

When the searching party went to defendant's premises they found a red and white speckled hide hanging on the fence of the lot. Defendant Bryant was at the lot when the hide was examined, and said he knew nothing about the hide; that he did not know who put it there, nor where it came from. The lot was 100 yards from the defendant's house, about 100 yards from the school-

house, 60 yards from Blankenship's, and in a thickly settled neighborhood, through which two roads ran in view of the pen, and a traveled road ran just past the pen. George May was at the lot when the hide was examined. Now, while the fact that the hide of the stolen animal was found on the fence of a lot about a hundred yards from the house of the defendant, Bryant, is a circumstance against him, though slight, indeed, yet, to warrant the inference of guilt from possession alone, it must be a personal one, and must involve a distinct and conscious assertion of claim by the accused, and must be recent and unexplained. The possession in this case was recent; but, as the hide was not in the personal possession of nor claimed by the accused, there was no reason for explanation. Appellant repudiated any and all connection with the hide. But it may be contended for the state that the personal possession or claim to the hide may be inferred from a remark made by Bryant. When Cosby, the owner, identified the hide positively, Bryant said he did not see how he (Cosby) could be so positive, as he (Bryant) had a red speckled heifer just like Cosby's. At the same time Bryant said he knew nothing about the hide,—did not know who put it there, nor where it came from. Now, from this remark about Cosby being positive that the hide was that of his beef, this, accompanied by the other statements of Bryant, it is presumed that Bryant was consciously in possession of the hide, claiming the same. And thus presuming possession, it is finally presumed he stole the steer. These conclusions do not logically follow, the error being in the first conclusion; for it is not a reasonable deduction from the remark under notice. Upon this subject we would most earnestly call attention to the observations of Mr. Burrill in his work on Circumstantial Evidence, pp. 135, 136, beginning with the last paragraph on page 135. We are of opinion that the evidence in neither case supports the verdict, and the judgments are reversed, and the causes remanded.

WALKER v. STATE.

(*Supreme Court of Arkansas. June 30, 1888.*)

1. LARCENY—HOG-STEALING—INDICTMENT—ALLEGATION OF VALUE.

An indictment for stealing a hog need not, in Arkansas, allege the value of the animal, as hog-stealing is there a statutory crime.

2. SAME—IMMATERIAL ERROR.

An indictment charging that defendant "feloniously did steal, take, and away" one hog is not fatally defective, because it omits words of asportation, as the omission would not mislead persons of common understanding; and Mansf. Dig. Ark. § 2107, provides that "no indictment is insufficient, nor can the trial, judgment, or other proceedings therein be affected, by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

Appeal from circuit court, Conway county; G. S. CUNNINGHAM, Judge.
Walker, pro se. D. W. Jones, Atty. Gen., for the State.

COCKRILL, C. J. The sufficiency of the indictment is the only question presented by the record. Omitting the formal parts, the indictment charges that Walker, the appellant, "feloniously did steal, take, and away," one hog, the property of P. H. James, against the peace and dignity of the state. After conviction and sentence, defendant moved to arrest the judgment, upon what ground the record does not disclose.

1. There is no allegation of the value of the hog alleged to have been stolen; but as hog-stealing is a statutory felony, without regard to the value of the animal, no allegation as to value is required. Bish. St. Cr. § 427; 2 Bish. Crim. Proc. § 713; 1 Bish. Crim. Proc. § 541; *State v. Daniels*, 32 Mo. 558; *Sheppard v. State*, 42 Ala. 531; *Adams v. Com.*, 23 Grat. 949; *Wells v. State*, 11 Neb. 409, 9 N. W. Rep. 552; *Davis v. State*, 40 Tex. 134; *People v. Townsley*, 39 Cal. 405. *Houston v. State*, 13 Ark. 66, is not in conflict with this rule. In that case the value of the animal was alleged in the indictment,

and the court, without ruling that it was or was not surplusage, held only that the value was in fact proved on the trial. *Shepherd v. State*, 44 Ark. 39, merely follows *Houston v. State*, *supra*.

2. The formal allegation in an indictment for this offense would be that the defendant "did steal, take, and drive (or carry) away" the hog. The verb to be joined to and qualified by the adverb "away" is omitted in this indictment. That this is a clerical error is evident. If the omission would not mislead a person of common understanding, it will not vitiate the indictment. 1 Bish. Crim. Proc. § 357. If it would not mislead, the accused would not be prejudiced by the omission; and the rule prescribed by statute is that "no indictment is insufficient, nor can the trial, judgment, or other proceedings therein be affected, by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits," (Mansf. Dig. § 2107;) and this court is prohibited from reversing a judgment of conviction for any but prejudicial errors, (Id. §§ 2454, 2468; *State v. Ward*, 48 Ark. 36, 2 S. W. Rep. 191.) In *Green v. Com.*, 111 Mass. 417, the indictment, found in pursuance of a statute similar to ours, charged that the defendant "did feloniously take and steal" the articles mentioned, omitting the allegation of carrying away altogether; but the court held that the omission was formal merely, the use of the word "steal" in the indictment, which was used in the statute, being sufficient for all practical purposes to prevent a misunderstanding of what was meant. Mr. Wharton thinks that is carrying the doctrine too far. Whart. Crim. Pl. § 266, note. However that may be, it is not necessary to go the length of that ruling to sustain this indictment; for here the intention to charge the asportation is evident, and any word that can be supplied to conform to the sense of the context will complete the allegation of asportation. "If the sense be clear, nice exceptions ought not to be regarded," is language appropriate to the subject, attributed to Lord ELLENBOROUGH, (*State v. Edwards*, 19 Mo. 674;) and even Sir MATTHEW HALE was of opinion that the great strictness demanded by the courts in indictments was "a blemish and inconvenience in the law, and the administration thereof," (2 Hale, P. C. 193.) The remedy for this "disease of the law," as he termed it, has been applied by the legislature sufficiently to cure the infirmity of this indictment, whatever other necessity for extension of the remedy may be wanting. If the reasons for sustaining the judgment needed strengthening, support is found in the fact that the record does not show that the formal defect now objected to was specifically assigned as error in the circuit court. There is no error in the record for which the judgment should be reversed, and it is affirmed.

BLACKMORE v. STATE.

(*Supreme Court of Arkansas. June 30, 1888.*)

1. GRAND JURY—APPOINTMENT OF FOREMAN.

By permitting the grand jury to select its foreman, and report its action to the court, and directing the member selected to be sworn as foreman, the court, in effect, appoints the foreman; and an indictment found by such grand jury is not objectionable on the ground that the foreman was selected by the jury, and not by the court.

2. CRIMINAL LAW—CONTINUANCE—APPLICATION.

Where five months elapse between indictment and trial, and defendant makes no effort to have witnesses summoned until the second day of the term at which he is tried, and a few days before the trial, and his affidavit for a continuance on the ground of absence of witnesses does not show that the witnesses are not absent by his consent, connivance, or procurement, as required, in case it is demanded by the opposite party, by act Ark. Feb. 21, 1887, the refusal of the continuance is a proper exercise of the discretion of the court.

Appeal from circuit court, Cleveland county; C. D. WOOD, Judge.
D. H. Rousseau, for appellant. D. W. Jones, Atty. Gen., for the State.

BATTLE, J. Hugh Blackmore was indicted for and convicted of murder in the first degree in the Cleveland circuit court, and sentenced to death. It is now contended that the judgment of the court below should be set aside for two reasons: *First*, because the court refused to set aside the indictment against him on the ground that the foreman of the grand jury which found it was selected by the jury, and not by the court; *second*, because the court refused to grant him a continuance.

It appears that the court permitted the grand jury to retire, and select its foreman, and report its action to the court, which it did, and the court then directed the member of the jury selected to be sworn as such foreman, then the remainder of the jury, and then instructed it as to its duties. We see no error in this. It was the duty of the court to appoint the foreman, and in legal effect it did so.

The indictment was filed in court on the 17th of September, 1887. On the 16th of March, 1888, the defendant moved for a continuance on account of absent witnesses, which was denied, and he was tried on the same day. He shows in his motion that he had caused subpoenas to be issued for the absent witnesses, and that the subpoenas had not been returned. But it appears that these subpoenas were not issued until the second day of the term at which he was tried, and that the absent witnesses resided, respectively, in the counties of Lincoln and Columbia. Motions for continuances are addressed to the sound discretion of the court. In order for it to appear that a party moving for a continuance on account of absent witnesses is entitled to it, he must show that he has used due diligence to procure their attendance or testimony. In this case, the defendant had about five months after the indictment was found in which to have his witnesses summoned, but he made no effort to do so until a few days before his trial. By an act entitled "An act to amend section 5108, chapter 119, of Mansfield's Digest of the Statutes of Arkansas, entitled 'Pleadings and Practice,'" approved February 21, 1887, it is enacted that a motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made upon affidavit showing, if it be for an absent witness, among other things, that the witness "is not absent by the consent, connivance, or procurement of the party asking the postponement." In the affidavit in this case no allegation of the kind is made. After reading the entire transcript in the case, and carefully considering the evidence adduced in the trial, we do not think the court abused its discretion in denying the motion for a continuance. There is no objection to the instructions given to the jury. The verdict is sustained by sufficient evidence; and the judgment of the court is affirmed.

SMITH v. STATE.

(*Supreme Court of Arkansas. July 3, 1888.*)

HOMICIDE—TRIAL—INSTRUCTIONS.

Upon trial for murder, it appeared that deceased had suddenly died soon after the operation of probing the wound inflicted by defendant, although he was in fair strength when it began. The physician who did the probing was jointly indicted with defendant for waylaying and shooting deceased, and the proof tended to show his guilt, and that he committed the act to aid in getting the property of deceased. *Held*, that there was sufficient evidence that the death was not caused by the wound to entitle defendant to an instruction for a less offense than murder.

Appeal from circuit court, Scott county; JOHN S. LITTLE, Judge.

Indictment of Josh Smith, B. B. and A. T. Walker, for the murder of S. B. Cauthran. Defendant Smith was tried and convicted. He asked, and the court refused, the following instruction: "If the jury believe from the evidence beyond a reasonable doubt that defendant participated in the shooting of the deceased, but fail to find that death resulted from said wound, they may

find defendant guilty of an assault with intent to kill, but not of murder or manslaughter." Whereupon he appeals.

J. H. Evans, E. Hiner, and T. C. Humphry, for appellant. *D. W. Jones*, Atty. Gen., for the State.

COCKRILL, C. J. It is most probable from the testimony that Cauthran died from pneumonia or congestion of the lung caused by the wound afflicted by the appellant, or so aggravated by it as to hasten death. In either event, the wound should be regarded as the juridical cause of death, and the prisoner held to the consequences. *Kee v. State*, 28 Ark. 155; 1 Hale, P. C. 428; 1 Whart. Crim. Law, § 159.

This principle is also deducible from the cases that one who maliciously inflicts a serious wound upon another, from which, as the mediate but not immediate cause, he dies, is responsible for the death. *Crum v. State*, 1 South. Rep. 1. But, in determining whether the court ought or ought not to have instructed the jury on the question of a lower offense included in the greater charge, we look to the record only to see if there is any testimony to base it on. *Fagg v. State*, ante, 829. We do not stop to weigh it, and thus try to ascertain what effect, if any, it might have had with the jury. Where the defendant is shown to have inflicted a malicious wound, and the proof shows that death ensues from it, and he seeks to evade the consequences by showing that his act was not the cause, nor the cause of the cause, of death, the evidence should be very plain to warrant the jury in agreeing to his version. But, if there is any evidence to sustain his theory, it must be submitted to the jury under proper instructions from the court. The court has no discretion to withhold instructions appropriate to any theory of the cause sustained by competent evidence. Now, we cannot say there was not some evidence, even though we may regard it as less than a jury ought, in conscience, to hang a verdict on, to the effect that the wound was not the juridical cause of death. Dr. James' testimony casts a doubt—a slight one, it may be—as to whether the wound either caused or aggravated pneumonia. One of the attending surgeons was jointly indicted with the defendant for waylaying and shooting the deceased, and the proof tended to show his guilt, and that he committed the act to aid in getting the property of the deceased. He was not suspected of complicity in the offense when called in by the deceased. Some suspicion was cast upon his conduct in his method of treating the wound, and the patient died suddenly, almost under his operation of probing the wound, though he was in fair strength when it began. No one testified directly as to the cause of death, but the jury were left to their common knowledge and experience to draw conclusions from what they had heard. How can we say that they might not have concluded that the prisoner was guilty of the shooting, but that death did not follow as the result of that act, if the court had submitted the question to them? The case of *Bush v. Com.*, 78 Ky. 268, is one in which the court reversed a judgment of conviction because of the refusal of the trial court to instruct the jury that they might, under circumstances like those here presented, find the prisoner guilty of willfully and maliciously shooting and wounding the accused. See, too, *Davis v. State*, 45 Ark. 464. For the error indicated the judgment is reversed, and the cause remanded for a new trial.

RITCHIE v. JOHNSON et al.

(Supreme Court of Arkansas. July 3, 1883.)

EJECTMENT—WRIT OF POSSESSION—CLAIM BY THIRD PARTIES.

One who enters premises, pending an action of ejectment, under a conveyance from defendant, is in privity with and presumed to hold under defendant, and after recovery, and in a proceeding for a writ of possession against the person so enter-

ing, an answer by her alleging that she then holds under an independent title is insufficient; the burden of proof to show the validity of such independent title, in a separate proceeding, resting upon her.

Original proceeding by Lucy Ritchie against H. S. and Jane R. Johnson on application for an *alias* writ of possession.

John B. Jones, for petitioner. *U. M. & G. B. Rose* and *L. A. Byrne*, for respondents.

VALENTINE, Special Judge.¹ On the 24th of October, 1878, James Ritchie brought suit by ejectment, in the Miller circuit court, against Bero Berliner and Sarah L. Berliner, his wife, for the recovery of lot No. 5, in block No. 73, in the town of Texarkana, Ark. Pending the subsequent litigation, Ritchie died, having previously conveyed the property to his wife, Lucy Ritchie. The case was afterwards transferred to the equity docket, and at the July term, 1885, a decree was rendered in favor of the defendant, Sarah L. Berliner, as the owner and party in possession of the property. On appeal to this court, and at the May term, 1887, the decree was reversed, and a judgment entered in favor of Lucy Ritchie for the recovery of the premises in controversy. *McLain v. Burliner*, 49 Ark. 218, 4 S. W. Rep. 768. Upon this judgment a writ of possession was issued, directed to the sheriff of Miller county, commanding him to take the possession from the defendants, Bero and Sarah L. Berliner, and deliver the same to the plaintiff, Lucy Ritchie. The sheriff returned this writ unserved, alleging as his reason therefor that he did not find the defendants in possession, but found them in possession of H. S. Johnson and Jane R. Johnson, his wife, who claimed title under a deed from the defendant Sarah L. Berliner to Jane R. Johnson, dated October 13, 1885, and also under bond for title from J. F. and J. C. Kirby, dated November 29, 1887, the Kirbys claiming title under a patent from the state of Arkansas. Thereupon Lucy Ritchie filed her petition in this court, reciting her recovery here, the issue of the writ of possession, and refusal of the sheriff to execute it, and praying that an *alias* writ be issued, commanding him to take the possession of the premises from H. S. and Jane R. Johnson, and deliver them to petitioner. Mrs. Johnson filed a response, alleging that she was not a party to the suit, or in any way bound by its determination, and claiming that she holds the possession under a conveyance made by the state of Arkansas to J. F. & J. C. Kirby on the 25th of September, 1888, and under a bond for title from them to her on the 29th of November, 1887. Copies of these deeds are filed as exhibits. To this response Mrs. Ritchie filed an answer, denying that Mrs. Johnson claimed title under the Kirby deed, and alleging that, until the determination of this suit in June, 1887, her only claim of title was under a deed from the defendant Sarah L. Berliner, executed October 13, 1885, and during the pendency of this suit. This deed is exhibited with the answer. These are all the material facts in the case as presented by the pleadings and and exhibits.

There is no evidence as to the time when Mrs. Johnson actually went into possession. The only positive statement with regard to possession at all is in Mrs. Johnson's answer, filed January 30, 1888, in which she says she holds possession under the Kirby deed. Several weeks before this, the sheriff, when proceeding to execute his writ, had found her in possession. The law presumes that she was holding under the defendant; and if this was not the case, and she really held by an independent title, it is incumbent upon her to show it. *Sampson v. Ohleyer*, 22 Cal. 200; *Leese v. Clark*, 29 Cal. 664; *Wetherbee v. Dunn*, 36 Cal. 147; *Freem. Ex'ns*, § 475. The mere statement, made several weeks afterwards in an unsworn pleading, that she was then holding by such title, would scarcely be sufficient to rebut the legal presumption. This,

¹BATTLE, J., disqualified.

together with the fact that she had obtained a deed from the defendant Mrs. Berliner since the commencement of the suit, forces us to the conclusion that she acquired the possession under her. It is settled beyond controversy that, in an action of ejectment, a party who goes into possession under the defendant is liable to be turned out by the writ. *Hanson v. Armstrong*, 22 Ill. 442; *Wallen v. Huff*, 3 Sneed, 82; *Howard v. Kennedy*, 4 Ala. 592; Freem. Judgm. § 171, and cases cited; Freem. Ex'ns, § 475, and cases cited. It is equally well settled that a party holding by independent and paramount title will not be turned out. *Long v. Morton*, 2 A. K. Marsh. 39; *Clark v. Parkinson*, 10 Allen, 183; *Ford v. Doyle*, 37 Cal. 346; *Garrison v. Savignac*, 25 Mo. 47; *Powell v. Lawson*, 49 Ga. 290. This case presents both phases. Mrs. Johnson went in under Mrs. Berliner, the defendant, and now holds under an outside and independent title which has never been adjudicated. Can she do this? In other words, conceding the Kirby title to be good, can she tack her possession, acquired from the defendant under a bad title, to the subsequently acquired good title, and thus bid defiance to the writ? This is an entirely new question in this court. Freeman on Judgments (section 171) says: "The action of ejectment being purely a possessory action, a number of persons are considered as in privity therein to the extent that they must yield up the possession to the prevailing plaintiff, though their title to the property remains unadjudicated, and is capable of being successfully asserted against the now successful party in some subsequent controversy. When considering the form of a judgment in ejectment, privies 'are those who entered under, or acquired an interest in the premises from or through, or entered without title by collusion with, defendants subsequent to the commencement of the action.'" This, and the authorities cited in support of it, fully sustain the position that Mrs. Johnson entered in privity with Mrs. Berliner, and stands in her shoes. If the statement by Mr. Freeman that "the action of ejectment is purely a possessory action" be correct, this ends the controversy; for it would be absurd to say that an action exclusively for one purpose could be thwarted by circumstances entirely extraneous and independent. But it is not necessary to concede, without qualification, that the action of ejectment is "purely possessory." It is sufficient to say that, as modified by our statute, and though based upon title, it is still essentially a possessory action. *Hill v. Plunkett*, 41 Ark. 465. Mrs. Johnson's grantor, Mrs. Berliner, might, had she chosen to do so, have set up the Kirby title as a defense to Mrs. Ritchie's suit; and, if successful, Mrs. Johnson would have reaped the benefit. She failed to do this, and her grantee ought not now to be heard to complain if the burden is thrown upon her, and not upon the successful plaintiff. *Montgomery v. Whitting*, 40 Cal. 294. In *Kercheval v. Ambler*, 4 Dana, 166, Forman and Ambler, at the same term of court, recovered separate judgments in ejectment for the same land against Kercheval. Forman entered under a writ of possession, and at once leased to Kercheval. Afterwards, under a writ issued under the Ambler judgment, the question arose whether Kercheval could be dispossessed. The court, while conceding that Kercheval held under Forman, and that Forman himself, if in actual occupancy, could not be dispossessed, held that Kercheval could not set up his actual possession, acquired from a stranger, against a writ under a judgment to which he was himself a party. This is a stronger case than the case now before the court, because Mrs. Johnson can, with regard to the possession, occupy no better position than her grantor, Mrs. Berliner, while Kercheval did actually occupy the better position of his lessor, Forman, who could himself have successfully resisted the writ. As we decide the case adversely to Mrs. Johnson, it becomes unnecessary to discuss the apparent validity or invalidity of her deed from the Kirbys, and on this we decline to express an opinion. A writ of possession is awarded, as prayed for.

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NOTE. A star (*) indicates that the case referred to is annotated.

ABATEMENT AND REVIVAL.

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Although the damages to be recovered for personal injuries to a married woman would be community property, the cause of action does not cease on the death of the husband pending the action.—*Fordyce v. Dixon*, (Tex.) 504.

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APPEAL.

I. APPELLATE JURISDICTION.

II. REQUISITES.

III. PRACTICE.

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VI. DECISION.

See, also, *Exceptions*, *Bill of*; *New Trial*.

Costs on appeal, see *Costs*, 3, 4.

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I. APPELLATE JURISDICTION.

Appealable order.

1. An order on a rule requiring money to be paid back by one who, not being a party to the suit, has withdrawn the same on application, is an appealable judgment.—*City of Louisville v. Kaye*, (Ky.) 889.*

Jurisdictional amount.

2. Where plaintiffs sue for \$7,211, and defendants set up a counter-claim for \$3,000, and the trial court find \$4,720 due plaintiffs on their claim, and \$2,766 due defendants on their counterclaim, and render judgment for plaintiffs for the difference between those sums, and defendants appeal, the amount in dispute is the sum found to be due plaintiffs, which being in excess of the jurisdiction of the St. Louis court of appeals, the appeal should be taken to the supreme court.—*State v. Lewis*, (Mo.) 770.

Appeals from inferior courts.

8. Under Rev. St. Tex. art. 2031, which gives the decisions of the probate courts approving or disapproving claims against estates the force of judgments, and allows the claimant, or any person interested in the estate, to appeal to the district court as from other judgments of the county court in probate matters, the heirs of an estate may appeal from the al-

lowance of a claim against the estate, without giving notice of such appeal, though they did not appear and contest the claim in the probate court.—*Glenn v. Kimbrough's Estate*, (Tex.) 81.

4. When the heirs of part of an intestate estate appeal from the allowance of a claim against the estate, the whole question is opened, the same as if all the heirs had joined in the appeal.—*Id.*

5. When the allowance of a claim against an intestate estate is appealed from by parties claiming to be heirs of the estate, and the claim is disallowed by the district court on appeal, if there is no statement of facts in the record, it will be presumed, in support of the judgment, that the evidence showed that such parties were heirs of the estate.—*Id.*

6. An action for forcible entry and detainer, not involving title to land, begun before a justice of the peace for Greene county, and appealed to the circuit court, should, on appeal from that court, go to the St. Louis court of appeals, and not to the supreme court.—*Ford v. Fellows*, (Mo.) 791.

II. REQUISITES.

Filing bond.

7. A motion for a new trial filed within five days after judgment rendered, but not acted on within ten days after judgment rendered, is considered overruled on the tenth day, and ten days remain thereafter for filing an appeal-bond.—*Jones v. Collins*, (Tex.) 681.

III. PRACTICE.

Assignment of errors.

8. Under rule 29, regulating the practice of the supreme court of Tennessee, which provides that assignments of error shall point out definitely the errors complained of, and cite the specific testimony relied on, designating the page of the record, assignments stating that it was error to allow the withdrawal of an answer, to sustain a demurrer, though followed by references to particular testimony in the record, are fatally defective unless they contain the reasons why such decisions are held to be error, and citations of fact on which the decisions were based.—*Wood v. Frazier*, (Tenn.) 148.

9. Under the Texas act of March 8, 1887, (Gen. Laws, p. 17,) providing that, when a statement of facts on appeal is not filed within the time allowed by the court, the party omitting so to do must show that he used due diligence to obtain the signature of the judge thereto, and to file it within the time prescribed, and that the failure was the result of causes beyond his control, he is not excused by sickness, when it appears that he was in court at the time, and the statement was agreed to in the presence of the trial judge.—*Spencer v. State*, (Tex.) 648.

10. Where an attorney neglected to file a statement of facts on appeal, and in excuse of the neglect, files an affidavit stating that he prepared and signed the statement, and delivered it to his opponent's counsel, with the request that he get the approval of the trial judge, and such affidavit is denied by a counter-affidavit of the opponent's counsel, the lat-

ter neutralizes the former; and, the burden of proof being on the party guilty of the neglect, his excuse fails.—*Id.*

11. Under court rules Texas No. 121, which provides that the party prejudiced by a violation of the rules may reserve a bill of exceptions and assign the same as error, an assignment of error based upon an alleged violation of the rules will not be considered when no exception has been reserved.—*Glenn v. Kimbrough's Estate*, (Tex.) 81.

12. An assignment that "the court erred in each and every paragraph of his charge, and said charge was not applicable to and warranted by the evidence, nor is said charge authorized by the law when applied to the facts of this case," is too general to be considered.—*King v. Harter*, (Tex.) 308; *Mason v. Stapper*, (Tex.) 598.

13. An assignment of error, that "the judgment of the court is contrary to the law and the evidence," is too general to be considered.—*Talbert v. Dull*, (Tex.) 530.

14. An assignment that "the court erred in its charge to the jury" is too general to require attention.—*Low v. Tandy*, (Tex.) 630.

15. Where a motion for a new trial sets forth many grounds for granting a new trial, an assignment of error that the court erred in overruling the motion is too general to be considered.—*Bumpas v. Morrison*, (Tex.) 596.

16. On appeal, it is immaterial that no exception was taken to the findings of the court, when an exception is taken to the judgment, and the record discloses that the findings of fact do not support such judgment.—*Voight v. Mackie*, (Tex.) 623.

17. Under Texas supreme court rule 97, requiring an assignment of error to be signed by the party or his counsel, one not so signed cannot be considered.—*Fordyce v. Dixon*, (Tex.) 504.

18. The court will not refuse to consider assignments of error because they were filed after the filing of the writ of error bond, where it will not prejudice the opposite party.—*Texas W. Ry. Co. v. Gentry*, (Tex.) 98.

Briefs.

19. Under Rules Sup. Ct. Tex. 29, providing that appellant shall file a brief of the points relied on, confined to distinct specifications of error contained in the assignments of error, each ground of error being separately presented and numbered as are the assignments of error, the judgment of the lower court will be affirmed, where the assignments in the record do not contain such "distinct specifications," and the propositions in the brief are not numbered as such assignments are, so that it is impossible to tell under which assignment either or any proposition is made.—*New England Land & Live-Stock Co. v. Chamberlain*, (Tex.) 116.

Records.

20. Under Rev. St. Tex. 1879, art. 1879, providing that the statement of facts shall be filed within the term, or 10 days thereafter, and the act of March 8, 1887, that a statement, although filed after such 10 days, will be considered on appeal if the party tendering the same show that the delay was not due to fault or laches of his, and that such failure was the

result of causes beyond his control, *held*, a statement sent by mail to the judge for approval 5 days after adjournment of the term, but not filed until 24 days thereafter, and 49 days after the trial, will not be considered, as there was clearly laches.—*George v. State*, (Tex.) 25.

21. Where the motion for a new trial is not preserved either in the bill of exceptions or transcript, the supreme court can examine only the record proper, under act Mo. 1885, providing that a motion for a new trial need not be copied into the bill of exceptions when it is copied by the clerk into the record.—*State v. Martin*, (Mo.) 217.

Rehearing.

22. Where a decree reforming a deed on account of a mutual mistake of fact, when there is no imputation of fraud, or evidence tending to prove the same, is affirmed, a motion for a rehearing will be denied.—*Clark v. Root*, (Ark.) 569.

IV. REVIEW.

Points not in issue.

23. In trespass to try title, where there was a plea of limitation, and the answer showed coverture in plaintiff's grantor before the period of limitation, and discovery at a time within the period, not stating when the coverture ceased, there being no replication as to that fact, no benefit can follow to plaintiff on appeal from testimony in relation thereto.—*Heflin v. Burns*, (Tex.) 48.

Objections not raised below.

24. Where, on cross-examination to impeach a witness, extracts from his evidence are read, and questions predicated thereon, and excepted to by defendant without assigning grounds for his objection, he cannot, on appeal, give as a reason for his objection that the witness ought not to be required to answer until the whole of his evidence has been read.—*State v. West*, (Mo.) 354.

25. An objection to the competency of a witness, on the ground that the other party to the transaction testified to be dead, will not be considered by the appellate court, when that specific objection was not expressly raised in the lower court.—*Carney v. Carney*, (Mo.) 739.

26. A defendant who was not present at the trial, either in person or by attorney, cannot, on appeal, object to the suppression of a deposition at the trial on motion of plaintiff.—*Brooks v. Pegg*, (Tex.) 595.

27. An objection to evidence not made on the trial, or on motion for a new trial, will not be regarded in the appellate court.—*Orr v. Wilmarth*, (Mo.) 258.

28. The conduct of an attorney which is not excepted to at the time, and passed on by the lower court, cannot be considered on appeal.—*Smith v. Commonwealth*, (Ky.) 192.

Presumptions.

29. Where a demurrer is sustained, and two amended petitions, afterwards made a part of the bill of exceptions, are tendered and rejected, and the action then dismissed, the averments of both petition and amended petitions are to be taken as admitted on appeal.—*Rogers' Adm'r v. Hughes*, (Ky.) 16.

30. In ejectment it is immaterial that the

record does not affirmatively show the land in question to have been in the county wherein the action was brought; the court, having general jurisdiction, will be presumed to have rightfully exercised it.—*Schad v. Sharp*, (Mo.) 549.

31. The ruling of the trial court, excluding certain records and papers of the probate court, will be presumed to be correct where there is nothing in the record to identify or show what those papers were.—*Carney v. Carney*, (Mo.) 739.

32. Where the record shows no objection to the admission of evidence, it must be presumed that none was made.—*City Nat. Bank v. Martin*, (Tex.) 507.

Weight and sufficiency of evidence.

33. Where, in an action against the president of a packet company, to recover money received by him for the company, the trial court gave credence to his testimony that all money received by him for the company had been paid into the treasury, and dismissed the action, the appellate court will not disturb the judgment, no reason for discrediting such testimony appearing.—*Clubb v. Davidson*, (Mo.) 545.

34. In an action to enforce a trust deed of personal property to secure a debt as against other creditors, where the instructions cover every phase of the testimony and the law, and the jury pass on all the facts in evidence, the verdict will not be set aside though the court might from the evidence have reached a different result.—*Jackson v. Harby*, (Tex.) 71.

35. Where the testimony is conflicting as to whether a written contract contains the whole agreement of the parties, the decree of the lower court, finding that their full intention was expressed therein, will not be disturbed.—*Cookrill v. Sanders*, (Ark.) 831.

36. The special findings of a jury, like a general verdict, cannot be disturbed upon appeal upon the ground that they are against the weight of the evidence, unless the error is flagrant.—*Louisville & N. R. Co. v. Mitchell*, (Ky.) 706.

37. In actions at law, the supreme court, on appeal, will not pass upon the weight of the evidence.—*Schad v. Sharp*, (Mo.) 549.

38. When the evidence is conflicting, a verdict will not be set aside.—*Gulf, C. & S. F. Ry. Co. v. Greenlee*, (Tex.) 129; *Fennell v. Seguin St. Ry. Co.* (Tex.) 466.

Objections to evidence.

39. Where defendant puts in his evidence, after interposing a demurrer to plaintiff's evidence which was overruled, and the evidence as a whole entitles plaintiff to go to the jury, the demurrer will not be considered on appeal, though it should have been sustained when it was interposed.—*Shawwood, J., dissenting*.—*Bowen v. Chicago, B. & K. Ry. Co.*, (Mo.) 230.

40. Where the grounds of an objection to evidence are not stated at the time it is made, they will not be considered in the appellate court.—*State v. Brannum*, (Mo.) 218; *State v. Havens*, (Mo.) 219.

Matters not apparent of record.

41. Where the record shows no exceptions taken, at the time, to the action of the court

in giving and refusing instructions, such instructions will not be reviewed in the appellate court.—*State v. Brannum*, (Mo.) 218.

42. Where the record contains no statement of facts, and there is nothing to show that the evidence excluded is relevant and material to appellant's case, judgment will not be reversed for such exclusion.—*Harris v. Spence*, (Tex.) 818.

43. When a judgment is based upon accounts between the parties, and on appeal the transcript is but a partial one, the judgment will be affirmed, as any errors appearing might be cured by a complete transcript.—*Park v. Bolinger*, (Ky.) 914.

Harmless error.

44. Where a witness was permitted to testify, in regard to the value of lands covered by mortgages, that one of the tracts was, at the time of their execution, the subject of litigation, and had since been lost to the assignors; that this tract was worth \$12,000; and that, when the mortgages were executed, the title was regarded as good, its admission could not prejudice the plaintiffs, as, whether the excess was greater or less, they would be entitled to it.—*Simmons Hardware Co. v. Kaufman*, (Tex.) 983.

45. In an action where a judgment in a former suit is sought to be set off, it is no ground for reversal that parol evidence was introduced to contradict the recitals of the judgment, it having been found that it had been fully satisfied.—*Sheldon v. Martin*, (Tex.) 61.

46. An erroneous instruction cannot be taken advantage of when the same error is committed in an instruction given at the request of the opposing party.—*Hazell v. Bank of Tipton*, (Mo.) 178.

47. Improper language of counsel when addressing the jury, not objected to at the time, and not prejudicial to the opposite party, is no cause for reversal.—*Gulf, C. & S. F. Ry. Co. v. Greenlee*, (Tex.) 129.

Objections waived.

48. An affidavit for attachment, made by an attorney on belief that the matters set forth are true, is not a nullity, and, by failure to object, the irregularity is waived, and cannot be taken advantage of on appeal.—*Landfair v. Lowman*, (Ark.) 188.

49. When exceptions are filed to the competency of evidence, but are not called up by the exceptant to be acted upon by the lower court, they will be considered waived, and exceptant cannot complain, on appeal, of their non-disposition.—*Dickinson v. Gray*, (Ky.) 876.

50. A mere clerical error in the entry of a judgment cannot be assigned as error on appeal, when no motion is made in the lower court to correct it.—*Id.*

V. EFFECT OF APPEAL.

Appeal from injunction.

51. The allowance of an appeal to the supreme court, on affidavit and bond from a final decree granting an injunction, does not have the effect of dissolving the injunction, and the lower court has jurisdiction to punish a violation of such decree after the appeal.—*State v. Dillon*, (Mo.) 781.

VI. DECISION.

Affirmance.

52. Where the appellant fails to furnish the supreme court with a clear statement of the case, and of the points to be insisted on in argument, and also fails to prepare an abstract of the record setting forth so much thereof as is necessary to a decision, and the points relied on are not thus preserved, in compliance with the statutes and rules of court governing appeals, the court will not examine the transcript of the record, and give judgment thereon, but, acting on the presumption that the judgment of the circuit court was correct, will affirm it.—*Long v. Long*, (Mo.) 766.

Dismissal.

53. Upon appeal from a decree dismissing a bill for an injunction to restrain the execution of an ordinance for the paving of a street, the supreme court will not consider affidavits to the effect that, since the appeal was taken, the paving has been completed, and will not for that reason dismiss the bill, but will act upon the record as it came from the court below.—*Dennison v. City of Kansas*, (Mo.) 429.

54. Mill & V Code Tenn. § 3877, (Thomp. & S. § 8160), providing that "no appeal shall be dismissed by the appellate court for failure to assign reasons for the appeal," has reference to courts of original jurisdiction only; and the supreme court, in making rules regulating its own practice, is not subject thereto.—*Wood v. Frazier*, (Tenn.) 148.

Modification of judgment.

55. Where the verdict is for a certain sum, with interest thereon at 8 per cent., and the judgment is for such sum, with interest at 10 per cent., on appeal, the judgment will be reversed, and rendered in the supreme court in accordance with the verdict.—*Goldberg v. McCracken*, (Tex.) 676.

Proceedings below.

56. In ejectment, where the sheriff's deed and other evidences of defendant's title have been before the appellate court in a former case, and held sufficient to pass title from the plaintiff, and where the rulings of the court below have been in direct opposition to what was ruled by the appellate court, the judgment will be reversed, and the cause remanded, that it may be disposed of in conformity with our former opinion, and defendant restored to possession of the premises.—*Dollarhide v. Ruby*, (Mo.) 553.

Appearance.

Effect of, see *Attachment*, 6.

Army and Navy.

Right of soldier to carry weapons, see *Carrying Weapons*, 2.

ARSON.

Indictment.

1. In an indictment for arson, the *locus in quo* of the house burned is alleged sufficiently,

the allegation being "a certain house then and there occupied, owned, and controlled by defendant;" "then and there" referring to the time and county previously stated.—*Baker v. State*, (Tex.) 28.

2. An indictment that defendant burned his own house, thereby endangering the safety of houses belonging to other persons, is sufficient without giving the names of such other persons.—*Id.*

3. An indictment charging that defendant burned his own house, the said house being at the time insured, is sufficient, without alleging the facts in relation to the insurance.—*Id.*

ASSAULT AND BATTERY.

Indictment.

1. Under an indictment for an aggravated assault, defendant may be convicted of a simple assault.—*Foster v. State*, (Tex.) 664.

2. An information charging that defendant, a female, in connection with an adult male, committed an aggravated assault and battery upon a female, is good, under Pen. Code Tex. art. 490, providing that "an assault and battery becomes aggravated * * * when committed by an adult male upon the person of a female;" as in assaults all present and participating are principals, and therefore a female acting with an adult male in an assault upon a female is guilty of an aggravated assault.—*Kemp v. State*, (Tex.) 804.

Evidence.

3. Under such information, unless the proof shows that one of the participating parties was an adult male, the case is not an aggravated assault.—*Id.*

4. Defendant, a woman, being engaged in an assault upon another woman, a man, without solicitation, encouragement, or preconcert with defendant, joined in the assault. *Held* that, although the person joining in the assault was an adult male, defendant was guilty of a simple assault only, under said statute.—*Id.*

5. Under Pen. Code Tex. art. 485, providing that, in injuries caused by violence, the intent to injure shall be presumed, if the person injured, being the only witness to show the commission of the offense, testify that defendant did not intend to injure her, and did not hurt her, and that she made the complaint because she was mad at him, the evidence will not support a conviction.—*McConnell v. State*, (Tex.) 275.

6. Intent to injure is an essential element of assault and battery, defined by Pen. Code Tex. art. 484, to be the use of unlawful violence on the person of another with intent to injure him.—*Id.*

Former conviction.

7. Upon an information of aggravated assault and battery, after a plea merely of "not guilty," defendant was convicted of simple assault. The bill of exceptions states that before the mayor the defendant pleaded guilty of simple assault "growing out of the same difficulty." *Held*, that as a number of assaults may grow out of the same "difficulty,"

and as under Code Crim. Proc. Tex. art. 525, providing that "the only special pleas * * * for defendant are (1) that he has been before convicted, legally, in a court of competent jurisdiction, upon the same accusation," and article 526, that "every special plea shall be verified," former conviction must be specially pleaded, and the plea be verified, judgment will be affirmed.—*Samuels v. State*, (Tex.) 666.

ASSIGNMENT.

See Orders.

Rights of assignee, see *Railroad Companies*, 11.

Validity.

Where money is due on a building contract, and the contractor verbally assigns part of his claim to a material-man for valuable consideration, and notice of the assignment is given to the owner of the building, the assignee acquires a right to and interest in the fund remaining in the owner's hands due the contractor, which is valid against a lien afterwards established thereon by statutory proceedings.—*Clark v. Gillespie*, (Tex.) 121.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, *Fraudulent Conveyances*.

Attachment lien, see *Attachment*, 5.

Requisites and validity.

1. An assignment for the benefit of creditors was not defeated, or the lien thereof affected, because a creditor sued out an attachment, and served a garnishee process on the assignee before the latter had given bond and taken the oath for the faithful performance of his duties, as required by Gen. St. Ky. c. 109, § 1; as a trust will not be allowed to fail for want of a trustee. And the same was true where the assignee was an incorporated trust company, with a provision in its charter that in such cases its capital should be the only security required, unless requested by the parties, or required by the court.—*Bank of Commerce v. Payne*, (Ky.) 856.

2. A general assignment by a firm of all partnership and individual property, for the benefit of all firm creditors accepting it, is not void, as against creditors of the individual members of the firm, as they can, though not named in the assignment, enforce their rights by suit against the assignee, without having the assignment declared void.—*Moody v. Carroll*, (Tex.) 510.

3. An assignment is not void because it directs the assignee to pay, at first, all expenses, rents, taxes, and assessments due and to become due on lands until sold.—*Id.*

4. A deed of assignment, requiring the residue of the estate, after all debts of every kind have been paid or satisfied, to be returned to the assignors, reserves no benefit in fraud of creditors, and is not void.—*Id.*

5. Under the Texas statute of 1883, relative to assignments for the benefit of creditors, which provides that no fraudulent act, intent,

or purpose of assignor or assignee shall defeat the assignment, an assignment is not void because it authorizes the assignee to sell on a credit.—Id.

6. Under said act, a power conferred on the assignee, by a deed of assignment, to pay any balance in his hands after discharging the debts of accepting creditors to the other creditors *pro rata*, although void, does not render the assignment void.—Id.*

7. When one in embarrassed circumstances assigns all his property for the benefit of his creditors, intending only such delay and hindrance to his creditors, as are incident to the assignment, such intent does not invalidate the same.—*Hazell v. Bank of Tipton*, (Mo.) 178.

Preferences.

8. The delivery of lumber by an insolvent vendor, shortly before an assignment for the benefit of creditors, under contracts on which the vendees had, as required, advanced the entire purchase money to enable him to comply with the contract, is not a preference within the Kentucky insolvent act of 1856, which provides that every sale made in contemplation of insolvency, and with the intention to prefer some creditors, shall operate as an assignment, and inure to the benefit of all his creditors.—*Vincent v. McAlpin*, (Ky.) 872.

9. In order to avoid a transfer or preference on the ground that it is made "in contemplation of the assignment," etc., under section 9 of the Texas assignment act, (*Sayles*, Civil St. art. 65.), the transfer must have been executed, or the preference given, with intent then formed to make the assignment, and it is not sufficient that the assignor at the time had the assignment under consideration.—*Simmons Hardware Co. v. Kaufman*, (Tex.) 288.

10. The word "purchaser," in section 9 of the Texas assignment act, providing that "if it shall appear * * * that the purchaser of any such property bought the same of the assignor in good faith," etc., includes mortgagees for value.—Id.

Fraud.

11. Where a creditor corporation procured from its debtor a trust deed to secure its claim, and on this being discovered by other creditors, they threatened proceedings in bankruptcy unless such trust deed was released, and thereupon, by consent of all parties, the creditor and the debtor conveyed all the latter's assets to an assignee, who was to act for the creditors, and who gave bonds for the faithful performance of the trust, and who afterwards made distribution of all assets realized, but who was not able to dispose of the land for nearly three years, a suit by such creditor to set aside the said conveyance, and for the enforcement of its trust deed, on the ground that the conveyance was obtained on false and fraudulent representation, should be dismissed.—*Moline Plow Co. v. Wenger*, (Mo.) 404.

12. In an action by the assignee to set aside a mortgage made shortly before the assignment, the court, on the issue of fraud, found that the notes for which the mortgage was given were for a valid indebtedness; that the value of the land mortgaged was not much in excess of the debt; that it did not appear that

the excess, if any, after paying the debt, was to be reserved; and that the mortgagees acted in good faith. *Held*, that the findings on the issue of fraud were full and sufficient.—*Simmons Hardware Co. v. Kaufman*, (Tex.) 283.

13. Defendants, commission merchants, disposed of a large amount of goods for their own benefit, on which they had given warehouse receipts as collateral security for money borrowed, and, when the debts were due, procured an extension for the ostensible purpose of enabling them to sell, and, during the consideration by the creditors of a proposition for a composition, left their place of business to prevent inquiry as to the condition of the business, and afterwards assigned and left the county. *Held*, that the assignment was a scheme to obtain an advantageous settlement, and evade the penalty of the criminal law, and fraudulent and void, and not affected by the facts that it made a ratable distribution of the property, and the assignees and creditors were free from fraud. *PRYOR, C. J.*, dissenting.—*Bank of Commerce v. Payne*, (Ky.) 35d.

14. Where plaintiff bank sent its president to a meeting of defendant's creditors very soon after an assignment had been made by defendants, plaintiff was not estopped from attacking the assignment as fraudulent, thereafter, because the president at the meeting assented to a resolution directing the assignee to proceed to collect and apply the property under the assignment, when it was shown that the creditors at the time were not fully advised of the fraudulent conduct of the debtors.—Id.

Liabilities of third persons.

15. Vendees who advanced money to enable their vendor to comply with a contract for the sale of lumber, but received lumber in excess of that contracted and paid for, are, on insolvency of the vendor, accountable to his creditors for so much as they received in payment of an old account.—*Vincent v. McAlpin*, (Ky.) 872.

Rights of creditors.

16. Certain creditors of one who had made an assignment for the benefit of creditors brought an action in the name of the assignee, who had refused to bring it, to set aside certain mortgages executed by the assignor. Subsequently the assignee was removed, and another appointed, who intervened in the suit as a party plaintiff, and adopted the allegations and joined in the prayer of the creditors' petition. Thereupon the court dismissed the creditors from the case, and allowed it to proceed in the name of the substituted assignee. *Held*, that as the assignee was authorized by statute to prosecute the suit, and to represent the interest of the creditors, the court did not err in dismissing as to them.—*Simmons Hardware Co. v. Kaufman*, (Tex.) 283.

17. Where creditors of one who had made an assignment for the benefit of creditors had taken a mortgage to secure notes which they held against him, the fact that they presented to the assignee a claim for a balance due on an open account, and received a dividend, did not constitute a relinquishment or discharge of their security for the notes.—Id.

18. Property transferred to an assignee by

a valid assignment for the benefit of creditors cannot be reached by garnishment until the trust has been fully executed.—*Moody v. Carroll*, (Tex.) 510.

ATTACHMENT.

Affidavit, see *Appeal*, 4.
Property subject to, see *Homestead*, 4, 5.

Grounds.

1. Where debtors, in failing circumstances, left their place of business, and went into another county for two months, to prevent inquiry and investigation by creditors as to the true condition of their affairs, and to await the action of creditors on a proposition to make a composition settlement, and, upon its rejection, assigned, and at once went to Canada, the case was within the meaning of Civil Code Ky. § 194, subsec. 4, providing for an attachment against defendants who have left the county of their residence to avoid service of summons.—*Bank of Commerce v. Payne*, (Ky.) 856.

2. Where defendants, commission and warehouse merchants, sold, for their own benefit and without their creditors' consent, goods for which warehouse receipts had been given as collateral security for money borrowed, it was ground for an attachment, under Civil Code Ky. § 194, subsec. 7, providing for an attachment against one who disposes of his property with the fraudulent intent to cheat, hinder, or delay creditors.—*Id.*

Affidavit.

3. Where an affidavit for attachment contains the essentials of a complaint, the absence of the separate complaint required by the statute is not a defect that goes to the jurisdiction or power to issue the order of attachment, but is an irregularity only, subject to be cured by amendment.—*Lehman v. Lowman*, (Ark.) 187.

Lien.

4. Where debtors make an assignment, and exempt therefrom such property as they are entitled to under the exemption laws, and a creditor subsequently sues out an attachment, and the debtors make no claim to the exempt property, the court should apply it to plaintiff's debt, the assignee having no interest therein.—*Bank of Commerce v. Payne*, (Ky.) 856.

5. An attachment levied on defendant's land after an assignment of all his estate for the benefit of his creditors creates no lien as against the creditors.—*Nethercutt v. Herron*, (Ky.) 13.

Appearance of defendant.

6. In an action wherein an attachment was issued, where there was no personal service of process, but where defendant appeared by counsel, and answered, not controverting plaintiff's claim, the latter was entitled to personal judgment, whether the attachment was sustained or not.—*Bank of Commerce v. Payne*, (Ky.) 856.

Intervention.

7. A petition on intervention in an attachment suit by a portion of the subsequent attaching creditors, which seeks to have the

claim of the first attaching creditor declared fraudulent as to all subsequent attaching creditors, and to have the fund distributed among the latter according to priority of their liens, does not warrant a judgment declaring the claim of such first attaching creditor fraudulent as to creditors, and directing that a sufficient amount of the fund that would otherwise have gone to the full payment of his claim be applied to the satisfaction of the claims of the intervenors, and the remainder applied to the claim of such first attaching creditor, as such judgment ignores the non-intervening attaching creditors.—*Cook v. Pollard*, (Tex.) 512.

8. All creditors whose interests are to be affected by the decree should be made parties to an intervention in an attachment suit which seeks to have the claim of the attaching creditor therein declared fraudulent as to all subsequent attaching creditors, and to have the fund distributed among the latter according to priority of their liens.—*Id.*

Wrongful attachment.

9. In an action against a sheriff for wrongfully attaching goods, where the attaching creditors are made parties, and they had given an indemnifying bond against all "loss, costs, charges," etc., that might arise or be incurred by the levy of such attachment, it is not error to enter, for the sheriff, a judgment for \$100 against such creditors for attorney's fees expended by him in defending the suit before the creditors appeared.—*Schmick v. Noel*, (Tex.) 83.

10. In an action for damages for wrongful attachment of property claimed by defendant to have been conveyed to plaintiff in fraud of creditors, the burden of proving fraud rests on defendant.—*Freiberg v. Elliott*, (Tex.) 322.

11. When exemplary damages are claimed, the materiality of allegations as to actual damages contained in the complaint will not be considered on demurrer, as the allegations may be looked to, to show aggravating circumstances.—*Id.*

12. In an action for damages for wrongful attachment of property claimed by defendant to have been conveyed to plaintiff in fraud of creditors, the court, instructing that sales of property by insolvent debtors to defraud creditors are void, does not err in defining insolvency; that being a material issue.—*Id.*

13. In an action for damages for wrongful attachment, a charge is not erroneous in stating, merely in a general way, what facts would furnish a basis for actual damages, and instructing the jury, if they believe plaintiffs entitled to such damages, to find for them the value of the goods at the time of the seizure, with interest; defendant having made no request to the court to charge differently.—*Id.*

BAIL.

When allowed.

1. Evidence, in a murder trial, that defendant and deceased had a quarrel resulting from defendant's fondness for deceased's wife; that the two met on the sidewalk, and, after loud words, defendant shot deceased four times, the latter also firing; the testimony be-

ing conflicting as to which drew his weapon first,—does not authorize the refusal of bail.—*Ex parte Suddath*, (Tex.) 479.

2. A woman and her son, who had dispossessed relator's tenant from a house claimed both by her and relator, were in the evening forcibly expelled therefrom, and led off by two masked men personating officers, and a few days afterwards found murdered, and relator was arrested and held without bail, though he proved an *alibi* by several witnesses. *Held*, that relator was entitled to bail.—*Ex parte Gallaher*, (Tex.) 481.

Release of surety.

3. The surrender of the principal in a forfeited recognizance, after entry of judgment *nisi* thereon, will not release the sureties from the penalty of such recognizance.—*Lee v. State*, (Tex.) 377.

4. Under Code Crim. Proc. Tex. art. 455, providing that if, before final judgment is entered against the bail, the principal in a forfeited bond appear or be arrested, and lodged in jail, the court may remit the whole or part of the sum specified in the bond, the court may, when such principal appears after judgment *nisi* thereon, remit a portion of the penalty, and enter judgment for a part thereof.—*Id.*

5. Sureties on a bail-bond cannot, in an action thereon, defend on the ground that the indictment against their principal was bad.—*Id.*

Bailment.

See *Carriers*.

BANKS AND BANKING.

Collections.

1. Where a note is left with the teller of a bank for collection, and the bank receives the money therefor, but the teller deposits the amount in his own name, the bank has notice as to the ownership of said note through its teller, and is liable to the true owner, although said note was payable to the order of said teller.—*City Nat. Bank v. Martin*, (Tex.) 507.

Liability of directors.

2. In an action by depositors in a bank against the directors personally for loss occasioned by a defaulting cashier, who owned a one-fifth interest, and was the leading spirit in the bank, a man of recognized business ability, and, as was supposed, of the highest integrity, it appeared that for nine years he had been making false entries, and had embezzled a large amount; that the services of the directors were gratuitous; that at the merger of an old bank in a new one no new books had been opened, thus enabling the cashier to conceal his former defalcations, but there was nothing to excite suspicion as to the cashier's honesty, the frauds being perpetrated by false entries, which made the weekly statements apparently correct; that the duties of cashier, book-keeper, and teller were all performed by the defaulting cashier. *Held*, that the directors were not liable.—*Savings Bank of Louisville's Assignee v. Caperton*, (Ky.) 835.

3. In such case, the fact that bonds belonging to one of the directors were used, in his absence, by the cashier, in his statement as to the condition of the bank, as bank assets, the bank being accustomed to invest in like bonds, does not indicate negligence on the part of the directors in their failure to examine the books to see to whom the bonds had been charged, there being no suspicion of the cashier's integrity.—*Id.*

4. In such case, the bank being run in two departments, as a savings bank and a commercial bank, the directors are not guilty of neglect in placing certain bonds belonging to the savings side of the bank with a New York bank for the purpose of enabling the bank to draw on New York when necessary, which bonds the defaulting cashier afterwards pledges to raise money.—*Id.*

5. In an action by depositors against the directors of a bank to hold them personally liable for defalcation of a cashier, the burden is upon plaintiffs to show a want of diligence on the part of the directors in discovering the fraud.—*Id.*

National banks—Reorganization.

6. In a suit to collect taxes from a banking corporation, defendant claimed exemption by virtue of a clause in its charter. No books of the corporation proving organization under the charter were produced, but it was proved by parol that, shortly after the charter was obtained, an organization was made, and the franchise transferred by the president and directors to a purchaser, but no certificates of stock were issued. The legislature recognized the existence of the corporation by an act changing its *situs*, after which the organization was maintained, officers elected, stock-books kept, stock subscribed, certificates made out, and a banking business carried on, until interrupted by the late war. *Held* sufficient evidence to show organization under the charter, and transfer of the capital stock from the original corporators; the issuance of certificates of stock not being essential to corporate organization or to transfer of the capital stock.—*State v. Butler*, (Tenn.) 536.

7. In such case it appeared that, after the war, the stock was owned by three persons, two of whom sold their interests to the third, who transferred a portion to others to enable them to become directors; after which there were subscriptions to the stock, elections of officers and directors, and a regular banking business transacted, until the failure of the bank. It did not appear that any books for the transfer of stock were kept. The legislature again recognized the corporate existence of the institution by an act changing its name. *Held* sufficient evidence of the transfer of the capital stock to the parties reorganizing the bank, and of their right of succession to the privileges conferred by the original charter.—*Id.*

8. Said bank made an assignment, under which all its property was sold and its debts paid; the stockholders then assigned their stock to trustees for the stockholders of an insurance company, who subscribed the amount of their stock in the insurance company to the stock of the bank, paying in

thereon all the assets of the company and the residue of their subscription in cash. The insurance company was wound up, and its stock canceled, after which the bank was re-organized by the new stockholders, and business carried on under a new name, under an act passed by the legislature after the sale. *Held*, that the transaction was not that of a corporation created for one business doing another, nor the absorption of one corporation by another; but was a sale by the stockholders in one corporation of their stock therein to the stockholders of another corporation in their individual capacities, and that it vested them with all the corporate privileges conferred by the original charter. *TURNER, C. J., dissenting.—Id.*

BENEVOLENT SOCIETIES.

What are.

An association whose object is to enable members to accumulate, by small monthly contributions from their savings, a fund out of which they can secure homes for themselves and families, with a capital stock of \$1,000,000, divided into 10,000 shares of \$100 each, cannot be considered as a benevolent association, and therefore exempt from incorporation tax, under Acts Mo. 1887, § 12, providing: "As building associations are only aggregations of laborers," etc., which start without any paid-up capital, and as the members only pay monthly assessments in proportion to shares, for the purpose of furnishing a home to each in turn, which assessments stop when every member has a home, they are benevolent associations as mentioned in article 10, § 21, of the state constitution, and shall be exempt from payment of the incorporation tax mentioned in said article 10, § 21.—*State v. McGrath, (Mo.) 495.*

Bill of Exceptions.

See *Exceptions, Bill of.*

Bills and Notes.

See *Negotiable Instruments.*

Bonds.

See *Principal and Surety.*

Liability on bonds, see *Sheriffs and Constables*, 6, 7.

BOUNDARIES.

On water-courses.

1. In an action between two adjoining owners to try title to land, it appeared that the north bank of a certain stream was the boundary line between the parties. There was evidence that the parcel in controversy was an island during high water but that the main channel had been on the south side of the island at the date of the deeds under which the parties claimed, but by a sudden freshet had since been diverted to the opposite side.

Held, that the ownership of such island depended upon the location of the main channel at the time of the execution of the deeds describing the north bank as the boundary line, and was not affected by the shifting of the stream to the other channel.—*Degman v. Elliott, (Ky.) 10.*

2. A patent calling to run with the meanders of the Cumberland river passes title to the bed of the river to the middle of the stream, unless the terms of the grant clearly limit the grantee's right of property to the margin of the river, with the usufruct of the water to the middle of the stream, subject to the public easement of navigation, and to the usufructuary rights of other proprietors above and below.—*Kentucky Lumber Co. v. Green, (Ky.) 439.**

Recognition.

3. Mere occupation for 10 years by adjoining proprietors, under a mistake as to the location of a fence, is not sufficient evidence from which to infer an agreement to hold to said fence regardless of the true line.—*Schad v. Sharp, (Mo.) 549.*

Adverse possession.

4. One of two proprietors of adjacent tracts claimed title beyond the boundary line by adverse possession; his occupancy consisting merely in occasionally cutting and removing timber, and in raising one crop of turnips, without having inclosed any of the parcel in controversy. *Held* not sufficient to acquire title.—*Degman v. Elliott, (Ky.) 10.**

Evidence.

5. Where field-notes in a bond for title did not definitely cover the land conveyed, but it appeared that the grantor had no other land in the same county on a certain creek, and the surveyor on trial identified the land as described by calls, and the court based its finding, as to the identity of the land, on other evidence, an objection to such evidence and finding, without pointing out the reasons, will not be considered.—*Sickels v. Epps, (Tex.) 124.*

BRIBERY.

What constitutes.

1. A constable who arrests a person without a warrant, on an unsworn charge of theft, and then, in consideration of \$25 paid by the prisoner's father, allows him to escape, is guilty, under Pen. Code Tex. art. 136, for accepting a bribe, and punishable, under article 133, for permitting the prisoner's escape in consideration thereof, though the arrest was illegal.—*Moseley v. State, (Tex.) 652.*

Indictment.

2. Under Rev. St. Mo. § 1470, making it a felony to give money or other valuable consideration to any officer with intent to influence him to give or procure any appointment, office, or trust, an indictment for bribing a mayor to appoint defendant to a municipal office is sufficient that charges that a certain person held the office of mayor, and had the power to appoint to the office sought, and that defendant did feloniously give him \$25 to corruptly influence said mayor to appoint and

procure for him a certain office; and it is not necessary that it aver that defendant was eligible to the office.—*State v. Graham*, (Mo.) 911.

Instructions.

3. At the trial of an indictment for bribing a mayor to appoint defendant to a municipal office, it was error to refuse an instruction for defendant, in substance, that, in order to convict, the state must prove affirmatively, and by competent evidence, that defendant, within three years of the finding of the indictment, did pay, or offer to pay, the mayor money, gratuity, reward, or other valuable consideration with intent to induce him to appoint defendant to the office, and at the time the person bribed was an officer, and had authority to make such appointment.—*Id.*

Brokers.

See *Factors and Brokers*.

BURGLARY.

Evidence.

1. A store-house was burglariously entered, and certain articles of merchandise taken therefrom. Shortly thereafter similar articles were found in the possession of defendant, who explained his possession by saying he had purchased them at another store, there being proof that other merchants in the county kept similar articles. *Held*, the proof did not warrant a conviction.—*Morgan v. State*, (Tex.) 488.*

2. Proof that a house was burglariously entered, and certain articles stolen therefrom, which were soon after found in the possession of defendant, who appropriated them to his own use, and made no explanation of his possession, will warrant a conviction.—*Id.* 487.*

3. Upon an indictment alleging burglary in the night-time, there can be no conviction where the offense was committed in the day-time.—*Guynes v. State*, (Tex.) 667.

Instructions.

4. Upon trial for burglary and larceny, where it was shown that some of the stolen property was found in defendant's possession the day after the burglary, and he introduced evidence tending to show an *alibi*, an instruction that where stolen property is so found, if the possessor fails to account for his possession in a manner consistent with his innocence, he is presumed to be a thief, is erroneous, because it excludes the evidence of an *alibi* from the consideration of the jury.—*State v. North*, (Mo.) 799.*

CARRIERS.

- I. CARRIERS OF GOODS.
- II. CARRIERS OF PASSENGERS.

I. CARRIERS OF GOODS.

Liability for loss.

1. In an action against an express company for a shortage in a package of money deliv-

ered to it for transportation, where the receipt for such package contained a clause making the presentation of a written claim for any loss within 30 days from date of receipt a condition precedent to recovery therefor, and there was evidence excusing plaintiffs for their delay in making such claim, which was made as soon after discovery of the shortage as was reasonably possible, an instruction that there should be a strict compliance by plaintiff with the letter of such receipt, before he could recover, is error.—*Glenn v. Southern Exp. Co.*, (Tenn.) 182.*

Live-stock shipments.

2. A railroad company is liable for delay in transporting cattle accepted by it for carriage, regardless of a special contract made with the shipper limiting its liability to injuries resulting from willful negligence. Following *Railway Co. v. Harris*, 3 S. W. Rep. 574.—*Missouri Pac. Ry. Co. v. Cornwall*, (Tex.) 312.*

3. Whether an agreement between a railroad company accepting cattle for shipment beyond its line and the shipper, requiring the latter, as a condition precedent to his right to recover for any loss or injury, to give notice to some agent of the company before the removal of the cattle, is reasonable, depends on whether the company had an agent to whom notice could be given near the place of delivery; and an answer in an action against the company, setting up such contract, but making no allegation on this latter subject, is bad. Following *Railway Co. v. Harris*, 3 S. W. Rep. 574.—*Id.*

4. In action by a shipper against a common carrier for negligence in transporting cattle, the court properly refused to instruct the jury that "if any cattle were injured, or had died from the effects of being overheated on account of hot weather, then plaintiff could not recover," the jury having been instructed that defendant would not be liable for any loss not caused by want of care, and there being evidence of negligence by defendant in watering the cattle, such instruction might tend to mislead the jury by eliminating the condition of the weather in determining the question of want of care by defendants in supplying the cattle with water.—*Id.*

5. When live-stock is shipped on a railroad under a contract limiting the carrier's responsibility, and by agreement the consignor travels on the same train, and feeds and takes charge of the animals while in transit, the burden is on him, in suit against the company for loss of any of such animals, to show that the default or negligence of the company was the cause of such loss.—*St. Louis, I. M. & S. Ry. Co. v. Weekly*, (Ark.) 184.

6. A clause in a bill of lading of live-stock which limits the carrier's liability to the sum of \$50 for each animal lost, when based on reduced charges for their transportation, is reasonable, and will be made the measure of damages, though the animal killed was worth from \$600 to \$800.—*Id.*

Limiting liability.

7. When a railroad freight contract, limiting the company's responsibility to that of a private carrier for hire, is signed by the parties in duplicate, and one copy thereof kept by

the consignor, the fact that he signed it under a mistake as to its contents, not having read or heard it read, does not, in the absence of fraud or imposition by the company in procuring his signature, relieve him from the effects of the contract after it has been acted on by both parties.—Id.

Connecting lines.

8. A railroad company which takes freight from another company for transportation over its line, under an agreement between the latter road and the consignor, is liable to the consignor for failure to perform the contract so far as its line is concerned, and is entitled to the benefit of any limitation of liability contained therein.—Id.*

II. CARRIERS OF PASSENGERS.

Injuries to passengers.—Pleading.

9. In an action against a street railway company for an injury sustained from the sudden starting of a car on which plaintiff was a passenger, an amended complaint, setting out that the team hitched to the car was wild, untractable, and scary, as defendant's officers well knew, and that the sudden starting of the car was due to both the nature of the team and the negligent conduct of defendant's servants; this being merely a specification of negligence, embraced in other allegations in themselves sufficient, is not objectionable, as substituting or adding a new cause of action.—*Dougherty v. Missouri R. Co.*, (Mo.) 900.

Evidence.

10. In an action for injuries from the negligent starting of a street car, testimony of a former driver of the same car that there were four different teams used, one of which was apt to start with a jerk, while the others were tractable, and that though he had left the service of defendant, he knew that the same teams were employed on the car up to the time of the accident, though he could not say which team was attached to the car on that day, is admissible, though the real issue in the case was the conduct of defendant's servant in the management and control of the motive power.—Id.

Instructions.

11. Plaintiff, a passenger on defendant's train, was injured while alighting at a depot, and in an action for damages the court charged that he was entitled to recover if defendant's servants did not stop the train a reasonably sufficient time, or did not give signal of starting again, by whistle or bell. *Held* error, in that the jury would have been compelled to find for plaintiff, if no such signal had been given, even though the train may have stopped a sufficient length of time, thus inducing the belief that plaintiff might leave the train without negligence at any time before signal of intention to start again.—*Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex.) 73.

12. In an action against a railroad company for injuries sustained in getting off a train, an instruction that, if the train did not stop long enough to allow plaintiff to get off, and while she was standing on the platform defendant's brakeman pulled her off, whereby she was in-

jured, then plaintiff can recover, is not defective, where, in another paragraph, the court told the jury that, under such a state of facts, the plaintiff could not recover if guilty of contributory negligence.—*Owens v. Kansas City, St. J. & C. B. R. Co.*, (Mo.) 850.*

13. In such case, an instruction to the jury "that the absence from their posts of duty on the train of the employees of the railroad would not entitle plaintiff to recover unless such absence caused or contributed in a material degree to the accident; and that, if there were nothing in the evidence from which they might conclude that the injury was caused by some act or omission not incident to the everyday usage of the carrier, or indicating fault on the part of the employees, to find for defendant," encroaches upon the province of the jury, whose special duty it is to determine whether the acts and omissions in evidence constitute negligence, and is properly refused.—*International & G. N. R. Co. v. Eckford*, (Tex.) 679.

14. In an action against a street-railway company, an instruction that, in the transportation of passengers, defendant must exercise "the utmost human foresight, skill, and care," is proper.—*Dougherty v. Missouri R. Co.*, (Mo.) 900.*

Contributory negligence.

15. In an action against a railroad for personal injuries, defendant claiming that the injuries were not due to the railroad accident, an instruction to the jury stated that the burden was on plaintiff to show the extent of his injuries, and that he could recover only for such injuries as the jury believed, from the evidence, were the result of the accident, and not of any other cause. *Held*, that a verdict for plaintiff in accordance with the weight of evidence will not be disturbed, because such instruction did not sufficiently state that the evidence on both sides should be considered.—*Gulf, C. & S. F. Ry. Co. v. Mannewitz*, (Tex.) 66.

16. In an action against a railroad for personal injuries, plaintiff's physician testified that plaintiff could not be kept in bed, as moving about relieved his sufferings, but that perfect quiet would be the best treatment. There was no positive evidence that plaintiff did not follow his physician's directions, or that he knew that moving about was injurious. *Held*, not sufficient evidence to submit the question of plaintiff's negligence in care of his injuries to the jury.—Id.

17. A passenger on defendant's train, at midnight got off the train at a water-tank, and, in attempting to get on, was run over. *Held*, that the court should have charged that if it was not a regular passenger station, and defendant's servants in charge of the train knew that no passenger was to get on or off there that night, and did not know that plaintiff got off, it was for the jury to determine whether defendant was guilty of negligence which was the proximate cause of plaintiff's injury, and also should have defined "proximate cause."—*Galveston, H. & S. A. Ry. Co. v. Cooper*, (Tex.) 63.

18. In an action against a railroad company for personal injuries caused by falling through a trestle while alighting from a train in the

dark, it is error to take the question of negligence from the jury by instructing them that, if plaintiff alighted without directions to do so by the company's servants, and with knowledge of the locality of the station, such act constituted negligence on his part.—*International & G. N. R. Co. v. Eckford*, (Tex.) 679.

19. An instruction, in an action for injuries received on a street car, that "if the jury believe that plaintiff acted with reasonable and ordinary care in not taking hold of a strap, or in not moving further forward, though if he had done so the accident would not have happened, and as a prudent man would ordinarily have acted," he was using all the care and diligence required, being correct in itself, cannot be assigned for error, as inferentially excluding other circumstances relied on by defendant to show contributory negligence.—*Dougherty v. Missouri R. Co.*, (Mo.) 900.

20. In an action for personal injuries, an instruction that though the jury believe plaintiff was guilty of negligence, but that such negligence did not contribute to or cause the injury, or if they find defendant negligent, and that without defendant's negligence the injury would not have happened, notwithstanding plaintiff's negligence, they will find for plaintiff, is not objectionable, as in effect charging that defendant is liable, though plaintiff's negligence contributed to the injury.—*Id.*

21. In an action for personal injuries, an instruction which directs the jury, if they find certain facts showing defendant's negligence, to bring in a verdict for the plaintiff, is not fatally erroneous because ignoring the question of contributory negligence, when the doctrine of contributory negligence is given in other instructions.—*Id.*

22. Where, in an action for personal injuries, the evidence, as to the facts in dispute showing contributory negligence, is conflicting, it is not error to refer the question to the jury.—*Id.*

CARRYING WEAPONS.

What constitutes offense.

1. In Texas, one cannot be convicted of unlawfully carrying a pistol, where it appears that the pistol was found on his person when at his place of business; that he had received anonymous letters threatening an attack on his person; and that the arrest of the person threatening the attack was at the time impossible.—*Short v. State*, (Tex.) 231.

2. A United States soldier, while in the actual discharge of his duty, carrying a pistol issued to him by a superior officer to be used while on duty, is not amenable to the state law prohibiting the carrying of a pistol.—*Lann v. State*, (Tex.) 650.

3. On an indictment for unlawfully carrying a pistol, the intent being a material part of the offense, the defendant may prove his general character as a peaceable, law-abiding man.—*Id.*

Change of Venue.

See *Criminal Law*, 8,

CHARITIES.

Gift to scientific institution.

1. A gift of real estate in Missouri to the Missouri Historical Society and the Academy of Science of St. Louis, being for the promotion of science, education, and the diffusion of useful knowledge, is valid as a charity, though not so denominated in the deed.—*Missouri Historical Soc. v. Academy of Science*, (Mo.) 348.

2. Equity has power to decree a sale of real estate conveyed jointly to two charitable institutions, for the purpose of erecting a building thereon for their joint use, and to authorize each society to use its portion of the proceeds of sale in the erection of a separate building for its own purposes; it being impracticable, from the location and surroundings of the property, to build on and use it jointly, as intended by the donor, this power being the exercise of the equitable doctrine of *cy pres*, and inherent in a court of equity as part of its jurisdiction over trusts, independent of St. 43 Eliz. c. 4, concerning charities.—*Id.*

CHATTEL MORTGAGES.

Validity.

1. Where a deed of trust was given on planing-mill stock, by a manufacturing company, to secure a debt to a bank, under a parol agreement between the bank and the manufacturing company that the latter might sell the stock in trade, in the usual course of business, for its own benefit, and afterwards the company made an assignment for the benefit of all its creditors, and, with the consent of the assignee, the trustee took possession of the property, the deed of trust is valid as against creditors attaching the property after the trustee took possession.—*Dobyns v. Meyer*, (Mo.) 251.

2. Where the evidence shows an agreement with one of the trustees, before the acceptance of the trust by the other, that the control of the property is to remain with the managing partner of the firm, an instruction that if there was such an agreement, or if the managing partner remained in the control of the business, the deed would be void, sufficiently submits the validity of the deed to the jury, under Texas act, March 24, 1879, providing that a trust deed of any stock of goods exposed for sale, contemplating a continuance of possession and sale by the owner, shall be void.—*Jackson v. Harby*, (Tex.) 71.

3. Where one gave his note, and a mortgage on a stock of goods, to secure a loan, and the mortgagee permitted the sale of the goods, and the replenishing of the stock, and the mortgagor afterwards made an assignment for benefit of creditors, the mortgage is good as against creditors; but the proceeds of goods acquired subsequently to the mortgage should be distributed among the creditors generally, and the burden is on the mortgagee to show what goods are embraced by the mortgage lien.—*Rosenberg v. Thompson*, (Ky.) 895.

Clerk of Court.

Right to costs, see *Costs*, 2.

CONSTITUTIONAL LAW.

See *Eminent Domain*, 1, 5.

Legislative powers.

1. Act Mo. March 4, 1837, § 1, granting corporate authorities power, when authorized by a majority of the legal voters, to permit the opening of establishments for the sale of refreshments of any kind (except distilled liquors) on any day of the week, is not unconstitutional, in that it is a delegation of legislative power, as it only gives the corporation the right to make by-laws for its own local government.—*State v. Francis*, (Mo.) 1.*

Obligation of contracts.

2. Act Tex. Feb. 4, 1856, granting the Memphis, El Paso & Pacific Railroad Company all vacant lands within eight miles of the extension line of its road, upon which the company invested its money, is a contract within the protection of that clause of the United States constitution prohibiting a state from passing any law impairing the obligation of contracts, and was therefore not affected by Const. Tex. 1869, art. 10, § 5, declaring said lands open to purchasers, settlers, locators, and holders of genuine certificates.—*Houston & T. C. Ry. Co. v. Texas & P. Ry. Co.*, (Tex.) 498.

Police power.

3. Pen. Code Tex. art. 186, which provides that "any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employee of any such person, who shall sell or barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement, on Sunday, shall be fined," etc., is constitutional.—*Ex parte Sundstrom*, (Tex.) 207.

Taxation.

4. Const. Mo. 1875, art. 10, § 11, provides, in regard to taxation: "For county purposes, the annual rate on property in counties having six million dollars or less shall not in the aggregate exceed 50 cents on the \$100 valuation. * * * Said restriction shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness." *Held*, that a county falling within such provision, having levied a tax of 50 cents on the \$100 to meet the ordinary current expenses of the county, and 40 cents on the \$100 to pay debts created prior to November 30, 1875, when said constitutional provision took effect, cannot also collect a road tax of 5 cents on the \$100, or a tax of 40 cents on the \$100, to pay judgments founded wholly upon warrants issued to pay current county expenses since November 30, 1875.—*Arnold v. Hawkins*, (Mo.) 718.

5. The legislature of Kentucky, by acts passed April 28, 1884, and May 12, 1884, provided that all persons whose property was attempted to be assessed for the years from 1876 to 1883, inclusive, "in the sense that assessments were extended upon the assessor's books, and who have not paid those assess-

ments, are, as far as such prior levies or assessments were inoperative and void, assessed now, upon the extended value of such property as appearing on said books, at the following rates." *Held*, that the assessments therein sought to be validated, being void and not merely defective, could not be cured, and that the act amounted to an assessment of *ad valorem* taxes by the legislature, which was an unconstitutional attempt to exercise judicial power.—*Slaughter v. City of Louisville*, (Ky.) 917.

6. The legislature of Tennessee had the power, in 1856, to grant to a corporation, by a clause in its charter, an exemption from all other taxes, upon the payment of an annual fixed tax on its capital stock; and, such corporation having accepted and organized under such charter, subsequent legislation cannot take away the exemption, which is in the nature of a contract.—*State v. Butler*, (Tenn.) 586.*

CONTINUANCE.

In criminal cases, see *Criminal Law*, 18-19.

Diligence.

Under Rev. St. Tex. art. 1277, providing that an applicant for continuance for want of testimony shall state "that he has used due diligence to procure the same, stating such diligence," such an application, which does not show when the subpoenas for the absent witnesses were placed in the hands of an officer for service, or when they were served, is properly refused.—*Brown v. Abilene Nat. Bank*, (Tex.) 599.

CONTRACTS.

See, also, *Assignment; Assignment for Benefit of Creditors; Bail; Carriers; Chattel Mortgages; Deed; Factors and Brokers; Frauds, Statute of; Fraudulent Conveyances; Insurance; Interest; Landlord and Tenant; Master and Servant; Mortgages; Negotiable Instruments; Orders; Partnership; Principal and Agent; Principal and Surety; Sale; Specific Performance; Usury; Vendor and Vendee.*

Rescission, see *Equity*, 4, 5.

Interpretation.

1. Under a contract by a subcontractor with a railroad contractor for the construction of a portion of the railroad, which provided, in the event of cancellation, that the subcontractor should be paid for "labor done and materials furnished up to the date of such cancellation," the right of the subcontractor to recover for materials furnished was not restricted to such materials as had been delivered at the time of cancellation of the contract, but he was also entitled to pay for material procured or prepared for the work.—*Dickinson v. Gray*, (Ky.) 876.

2. A contract for the delivery of "good and merchantable cattle" calls for the delivery of cattle not simply good for the purposes of sale, but inherently sound.—*Parks v. O'Connor*, (Tex.) 104.

Rescission.

8. Plaintiff, a subcontractor, contracted with defendant, a railroad contractor, to furnish materials, and construct the piling on a portion of the road, stipulating that, if the railroad company failed to pay the monthly estimates of defendant, the latter should have the right to cancel the contract upon giving notice, and only be liable for labor and materials furnished up to the date of such cancellation. The railroad company subsequently made default, and defendant notified plaintiff to stop work until further orders; that efforts were being made to secure an adjustment with the railroad company, but, pending these, work was to be suspended. *Held*, that plaintiff, having ceased to work upon such notice to suspend, and not resuming it, must be regarded as having accepted it as a notice of cancellation of the contract, and, in an action on the contract, was not entitled to prospective profits which would have resulted from its completion.—*Dickinson v. Gray*, (Ky.) 876.

Contributory Negligence.

See *Carriers*, 15-23; *Master and Servant*, 20, 21; *Railroad Companies*, 17, 29-32.

CORPORATIONS.

See, also, *Banks and Banking*; *Benevolent Societies*; *Charities*; *Horse and Street Railroads*; *Insurance*; *Municipal Corporations*; *Railroad Companies*; *Telegraph Companies*.

Alteration of franchise.

1. A company organized under act Mo. Feb. 20, 1865, entitled "An act to incorporate the Missouri Petroleum and Mining Company," which expressly exempts charters of companies formed thereunder from legislative alterations, is not subject to provisions of Rev. St. Mo. 1855, c. 34, art. 1, § 7, declaring that the charter of every corporation thereafter granted shall be subject to alteration.—*Granby Mining & Smelting Co. v. Richards*, (Mo.) 246.

Corporate existence.

2. Under act Mo. Feb. 20, 1865, providing that, where a special company is created and organized, a certificate in writing shall be filed with the circuit clerk in the county where the business is carried on, and a duplicate filed with the secretary of state, the failure to file such certificate with the circuit clerk is not fatal to the existence of the corporation, but is a mere omission which cannot be taken advantage of collaterally.—*Id.*

Duties of officers.

3. The president of a packet company having failed to make a contract for his company with the government for carrying the mails, and subsequently succeeding in making such a contract in his own behalf, employing the boats of his company to the extent of its capacity so long as the said company operated boats on that route, but employing other boats when necessary, will be required to use all the facilities afforded by the company, and to account to the company for all money received

for the service performed by it, but not for that received for services rendered by the other boats.—*Clubb v. Davidson*, (Mo.) 545.

Contract of partnership.

4. A corporation created under the Tennessee incorporation act of 1875, for the manufacture of cotton-seed oil, has no implied power to enter into a partnership with other similar corporations, by which the business of all the contracting companies is to be managed by a committee; and such contract, whether made by the directors or by all the stockholders, is *ultra vires* and void, as far as unexecuted.—*Mallory v. Hananer Oil Works*, (Tenn.) 396.

5. Where, by the contract of partnership, the committee was to have possession of the properties of all the contracting companies for the space of three years, and an action of unlawful detainer was brought by one of the companies to recover its property at the end of two years, *held*, that the contract was as to the remainder of the term unexecuted, and could be repudiated as *ultra vires*.—*Id.*

6. The contract being void, it could not operate to convert the managers of the combination into tenants from year to year, and entitle them to the statutory notice to quit.—*Id.*

Actions—Pleading.

7. The articles of incorporation of a corporation created for lumbering purposes authorized it to purchase timber or other lands necessary or convenient for the transaction of its business. In a suit by the corporation to quiet its title to a tract of land, and to compel the removal of an obstruction therefrom, the defense of *ultra vires* was attempted to be interposed, but the answer did not allege that no part of the tract was timbered land suitable for the business of said corporation. *Held*, that the paragraphs stating this defense were defective and demurrable.—*Kentucky Lumber Co. v. Green*, (Ky.) 439.

8. Under Acts Tex. 1883, c. 101, p. 103, relating to the impleading of corporations, an allegation in the petition that "defendant is a private corporation" is sufficient without alleging by what authority it was incorporated.—*Houston Water-Works Co. v. Kennedy*, (Tex.) 86.

Stock.

9. Where the powers of a corporation and the procedure by which it could be brought into existence have been prescribed by the legislature, the mere fact that the legislature in the same act gave such corporation power to dispose of special stock which was to form no part of the general stock of the corporation, and permitted the holders of such special stock to become a distinct company, is not such a delegation of legislative power as to render an organization formed under the special stock clause invalid.—*Granby Mining & Smelting Co. v. Richards*, (Mo.) 246.

Subscriptions to stock.

10. Under subscriptions to railroad stock on the following terms: "One-fourth to be paid when the road is completed to a certain county line;" the remainder "to be paid in four equal installments, of four months, as the work

progresses through the county, provided the company establish a depot "at a certain point,—the erection of the depot is not a condition precedent to payment of the subscriptions; and an assignee of the subscription list may maintain an action thereon for a call maturing after the road is completed to the county line, and while work thereon is in progress, though, at the time the action is brought, work on the road has been abandoned, the depot has not been built, the railway company is insolvent, and its property and franchises have been sold.—*Paducah & M. R. Co. v. Parks*, (Tenn.) 842.

11. An action may be maintained on a subscription to railroad stock, without a previous tender of stock certificates, though the contract of subscription provides that "certificates of stock issue to such subscribers, as to other subscribers in said company, upon payment of their subscriptions."—*Id.*

12. But such action cannot be maintained for an installment not maturing until after all work on the road has been abandoned.—*Id.*

COSTS.

Who liable.

1. One of the children of a testator brought a bill against the other children and the widow for partition and sale of the realty under the will. The widow filed a cross-petition against one of her co-defendants, an imbecile step-daughter, for support, etc. A guardian *ad litem* was appointed for such child, and, on trial of the cross-petition, the guardian filed a counter-claim and recovered. Code Pr. Ky. § 33, provides that "the court shall allow to the guardian *ad litem* a reasonable fee for his services, to be paid by the plaintiff, and taxed in the costs." *Held* that, the widow, being plaintiff in the cross-petition, should pay the guardian's fees, but as the guardian became the real plaintiff under the counter-claim, the widow should be allowed credit for such payment in her account with the imbecile daughter.—*Huhlien v. Huhlien*, (Ky.) 260.

2. Under Rev. St. Tex. arts. 1420, 1420a, enacting that each party to a suit shall be responsible to the officers of the court for costs incurred by him, and that the clerks of the courts may demand payment of all costs in each and every case pending in their courts up to the adjournment of each term of said courts, no injunction to restrain a district clerk from collecting appeal costs can be sustained, as appellant is primarily liable for the costs, though successful on his appeal.—*Moore v. Moore*, (Tex.) 28.

On appeal.

3. Under Rev. St. Tex. art. 219, providing for the allowance of costs to a garnishee when the proceedings against him are dismissed on answer, when the garnishee is an assignee whose trust has not been executed, and the proceedings are dismissed on this account, it is proper, on appeal, to allow the garnishee compensation to be included as costs, and to compel the garnishing creditors to pay costs of appeal, as well as the costs below, although the garnishment proceedings are, by order of the supreme court, allowed to stand until the

trust should be fully executed.—*Moody v. Carroll*, (Tex.) 510.

4. Where a plaintiff can have a judgment, entered in an improper form, corrected in the lower court, but, instead of making application for such correction, appeals, the costs in both courts should be paid by him.—*Dodge v. Richardson*, (Tex.) 30.

Remedies.

5. On suit to restrain execution for costs of appeal, where it appeared that complainant, defendant in another action, obtained on appeal a reversal of judgment, and on another appeal by plaintiff it was again reversed and remanded, and that, during the suit, execution was issued for the costs of complainant's successful appeal, complainant made plaintiff in the original action a defendant to the injunction suit. *Held*, that plaintiff was not a necessary party to such proceedings, and complainant, having a judgment already against her for the costs of his appeal, could only proceed against her during the pendency of the original action by motion to the district court to have the costs between the parties adjusted.—*Moore v. Moore*, (Tex.) 28.

In criminal cases.

6. Under Mansf. Dig. Ark. § 2343, providing that in all criminal cases, if defendant shall be acquitted, the costs shall be paid by the county, *held*, that the entry of a *nolle pros.* is not an acquittal, and the county is not liable for costs in a misdemeanor case which has been dismissed by a *nolle pros.*—*Craighead County v. Cross County*, (Ark.) 183.

7. Under Mansf. Dig. Ark. § 2345, providing that, in all cases where the county shall be liable to pay the costs in criminal cases, the circuit court in which the case was tried shall adjust the same, and cause the same to be certified to the county court, the certificate of such adjustment by the circuit court is not conclusive of the county's liability.—*Id.*

COUNTIES.

See, also, *Highways; Municipal Corporations.*

Liability for costs, see *Costs*, 6, 7.

Limit of tax, see *Constitutional Law*, 4.

Municipal aid, see *Railroad Companies.*

Erection of court-house.

1. Act Mo. March 14, 1885, granting authority to the county court in certain cases to cause the erection of court-houses at places other than county-seats, and granting therewith all the powers conferred for the erection of court-houses at the county-seat, confers as a necessary incident the power to purchase land for the erection of such court-houses, if necessary, and to determine whether such necessity exists.—*Shiedley v. Lynch*, (Mo.) 484.

2. Under Rev. St. Mo. § 5328, providing that where the county court is about to cause the construction of a court-house, and land is purchased for such purpose, the circuit court "shall examine its title, and certify its decision thereon to the county court;" and section 5329, providing that, "if the title be approved, the

county court, if they approve the selection, shall make an order," etc.,—a county court, having considered a selection of land, and disapproved it, with the required certificate of the circuit court before them, may subsequently, upon the same certificate of title, reconsider and approve such selection; there having been no change of title since the certificate of the circuit court was given.—*Id.*

County board.

3. A meeting of the county commissioners' court held less than 80 days after the first election in a county previously unorganized, at which meeting two commissioners, who had not then qualified, were not present, and of which they had no notice, is illegal, though a majority of the commissioners were present; and acts done at such meeting, when afterwards revoked at a legal meeting of the court, are not binding on the county.—*Cassin v. Zavalla County, (Tex.) 97.*

4. Under Rev. St. Tex. art. 994, providing that the county treasurer shall receive all moneys belonging to the county, from whatever source derived, and apply the same in such manner as the commissioners' court may direct, the commissioners' court cannot authorize the county judge to receive and disburse funds, though raised by the county for a special purpose.—*Bastrop County v. Hearn, (Tex.) 302.*

Compensation of treasurer.

5. Under Rev. St. Tex. art. 2403, providing that the county treasurer shall be entitled to commissions not exceeding a certain percentage, to be fixed by the commissioners' court, for receiving and disbursing moneys belonging to the county, (excepting school funds,) a failure by the commissioners' court to make an order regulating the allowance in a particular case raises an implied agreement on the part of the county that the treasurer shall have the maximum percentage allowed.—*Id.*

6. Where the commissioners' court is authorized by law to fix the allowance of the county treasurer, within certain prescribed limits, and such court had for a long time allowed the same percentage, a failure to make an order regulating the allowance in a particular case would raise an agreement by implication on the part of the county to continue to pay the same amount until it should notify the treasurer to the contrary.—*Id.*

7. Where funds which the law required to pass through the hands of the county treasurer, and for the receiving and disbursing of which he was entitled to a commission, are received and disbursed by another officer, the treasurer is entitled to recover from the county the commissions to which he would have been entitled had he handled the funds according to law.—*Id.*

Contracts.

8. In an action on a contract made between the commissioners' court of P. county and the firm of V., H. & C., by which the latter were employed to subdivide, map, and classify the school lands of the county, plaintiffs alleged that, when the contract was made, the commissioners knew that V., H. & C. had no personal fitness to perform the work; that they

expected to employ some competent person to do it, and that the contract was made with that understanding; but that, by inadvertence in entering the order on the minutes, the clerk omitted so much of the agreement as authorized the contractors to employ substitutes. *Held*, that the allegations were not sufficient to admit of a correction of the order on the ground of mistake. It was the duty of the contractors, before entering upon the work, to see that the order as entered was in accordance with the terms of this agreement.—*Gano v. Palo Pinto County, (Tex.) 684.*

9. Under Mansf. Dig. Ark. § 1407, allowing county courts to dispose of real or personal property belonging to the county, and appropriate the proceeds to the county's use, such courts are trustees of the county; and where it appears that land donated by congress to a county for public buildings was leased by such court for 99 years, without regard to the statute requiring that sales of county lands should be by a commissioner appointed by the county court, and without advertising that the land was to be leased, to persons paying an inadequate consideration therefor, such lease may be set aside by the county on the ground of fraud.—*State v. Baxter, (Ark.) 188.*

10. All debts due a county, being by statute (Dig. Ark. 1884, § 1146) payable in its warrants, a county cannot prove by parol, in defense to a petition for the sheriff to receive such warrants in payment of a judgment recovered by it, that it was agreed that the note on which such judgment was based should be paid in money, when neither note nor judgment specify in what medium it is to be paid, since to do so would be to modify the terms of a written instrument by parol.—*Richie v. Fraser, (Ark.) 148.*

Liabilities and indebtedness.

11. The fact that there is not quite enough money in a county treasury to pay the price of land legally purchased for a court-house, is not ground for restraining such payment, where the deeds for the land had been accepted and filed for record; it appearing that, when the warrants were drawn, the county treasurer had stated to the county court that there was enough money to pay the appropriation, and the county court having the right to anticipate the revenue of the county to the extent of the revenue provided for that year.—*Shiedley v. Lynch, (Mo.) 484.*

12. If, in the proper discharge of their duties, county officers cause an obstruction in the course of a stream, whereby premises are flooded, the county is not liable.—*Downing v. Mason County, (Ky.) 264.**

13. Though act Ark. Feb. 27, 1879, provides that no suit shall be brought against a county, yet, where a claim against it has been presented to and allowed by the county court, it becomes a judgment against the county.—*Nevada County v. Hicks, (Ark.) 180.*

14. Const. Ark. art. 16, § 1, forbidding counties to issue any interest-bearing evidences of indebtedness, does not prevent a decree against a county for a sum of money from drawing interest.—*Id.*

15. Mansf. Dig. Ark. §§ 4740, 4741, providing that all judgments shall draw interest at 6 per

cent., make no exceptions in favor of counties; and a decree against a county for a sum of money draws interest from the time it is rendered, though it makes no mention of interest.—*Id.*

COURTS.

See, also, *Justices of the Peace; Removal of Causes.*

Jurisdiction.

1. In a suit brought in New York, where defendant resided, for specific performance of a contract to convey land in Texas, a judgment was rendered requiring defendant to execute a deed according to the contract, and, in default thereof, to pay plaintiff a certain sum of money, or the value of the land. Afterwards defendant was adjudged insane, and his committee was decreed by the court to convey the land in question to plaintiff. *Held*, that a deed executed in pursuance of such decree is ineffectual to pass title to the land, the court of one state not having power to compel a sale of land in another state to be made by one in a fiduciary capacity.—*Morris v. Hand*, (Tex.) 210.

2. A bill was filed in Tennessee by a landlord against tenants holding land in Arkansas, to establish a trust in his favor in said land purchased by defendants at a judicial sale, on the ground that it was fraudulent for a tenant to purchase his landlord's property at such sale, but no actual fraud was proved. *Held*, that such purchase, if fraudulent at all, was only a constructive or legal, and not an actual, fraud, and that said court had no jurisdiction thereof.—*Pickett v. Ferguson*, (Tenn.) 886.

Power of county court.

3. A county judge has authority, under act Ky. Feb. 24, 1868, authorizing subscriptions in aid of a certain railroad company, to cause a levy and collection of a tax for the payment of interest coupons, without associating with him the justices of the peace of the county, who, together with him, constitute a court of claims, under Gen. St. Ky. art. 17, § 1, to make the county levy, appropriate money, and transact other financial business of the county, because the appropriation for the payment of interest on such bonds is already made by the act of 1868, and the duty imposed by it on the county court, to cause the levy and collection of a tax therefor, is merely ministerial, and does not pertain to the court of claims.—*Feland v. Morton*, (Ky.) 862.

CREDITORS' BILL.

See, also, *Fraudulent Conveyances.*

Pleading.

1. A creditors' bill to subject a certain fund to debts, claiming that one partner, on the death of the other, administered on the partnership estate, and paid with his individual means a debt due from the firm to L., and on final distribution, having obtained an order of court therefor, paid L. 43 per cent. of his debt from the firm assets, showed what the firm v.8s.w.—61

debts were aside from that due to L., and alleged that the surviving partner had taken credit for a fictitious payment, so as to absorb the funds in his hands; and that the fund in equity belonged to him. *Held*, that the interest of such surviving partner in the amount paid to L. under order of court is sufficiently averred, as against a general demurrer.—*Lyons v. Murray*, (Mo.) 170.

Personal judgment.

2. One who purchases personal property without notice of a pending creditors' bill to set aside his vendor's title, which title is subsequently set aside therein, cannot be charged with a personal judgment in a supplemental bill to subject the property to the satisfaction of the former judgment.—*Carr v. Lewis Coal Co.*, (Mo.) 907.

CRIMINAL LAW.

See, also, *Bail; Extradition; Grand Jury; Habeas Corpus; Indictment and Information; Jury; Witness.*

Costs in criminal cases, see *Costs*, 6, 7.

Obstructing highways, see *Highways*, 4-6.

Offenses against election laws, see *Elections and Voters*, 4-6.

Particular crimes, see *Assault and Battery; Bribery; Burglary; Carrying Weapons; Cruelty to Animals; Disorderly Conduct; Disturbing Public Worship; Embezzlement; False Pretenses; Forgery; Fornication; Gaming; Homicide; Intoxicating Liquors; Larceny; Libel and Slander; Malignant Mischief; Malignant Prosecution; Mayhem; Perjury; Rape; Receiving Stolen Goods; Robbery.*

Sureties on appeal-bond, see *Principal and Surety*, 4.

Complaint.

1. When the jurat attached to a complaint charging a criminal offense does not show the official character of the officer before whom it was verified, the complaint is fatally defective, and will not support an information and conviction.—*Robertson v. State*, (Tex.) 659.

Motion to quash.

2. It is too late, after a mistrial upon an indictment for obtaining goods by false pretenses, for defendant to ask leave to withdraw his plea, and file a motion to quash, especially if the indictment is sufficient in law.—*State v. Lichliter*, (Mo.) 720.

Arraignment.

3. Under Code Crim. Proc. Tex. arts. 504, 506, providing that, where the accused is in custody, as soon as the indictment is presented a certified copy shall be made out and served upon him; and under article 582, providing that, in cases where defendant is entitled to be served with a copy of the indictment, he shall be allowed two days' time after service to plead,—where a defendant, when his case is called for trial, answers that he is not ready, because he has been in custody, and has never been served with a copy of the indictment, and thereupon demands such copy and a postponement for two days, it is error

to refuse such demand.—*Woodall v. State*, (Tex.) 802.

Arraignment—Plea in abatement.

4. Under Code Crim. Proc. Tex. § 528, which provides only two grounds for setting aside an indictment, viz., that the record shows that the indictment was not found by at least nine grand jurors, and that some person not authorized was present during the deliberation and voting of the jurors on the charge, a plea in abatement on the ground of disqualification of some of the grand jurors will not be considered.—*Owens v. State*, (Tex.) 658.

Former jeopardy.

5. Although a plea of former jeopardy and former conviction omits to set out the indictment and judgment referred to, and would therefore be fatally defective if both trials had been in different courts, such defect will not bar the defense when both trials were in the same court, since the court takes judicial cognizance of previous proceedings in the case.—*Foster v. State*, (Tex.) 664.*

6. Where a defendant has been tried and found guilty of a misdemeanor, and the record does not show whether judgment was entered on such verdict or the verdict set aside, a second conviction in the same case will be reversed on appeal.—*Id.*

7. An acquittal upon an indictment for robbery is a bar to a prosecution for the same act under an indictment for false imprisonment, when an assault constitutes an ingredient of the transaction.—*Fox v. State*, (Ark.) 836.

Venue.

8. Where, on appeal from a conviction for murder, the bill of exceptions recited that defendant's petition for change of venue "was regularly, in due form, and complied with all the requirements of law," and that the court refused to permit counsel to file the same, and refused to entertain the same, on the ground that it had no jurisdiction to pass on the petition, it must be presumed that such petition was sufficient and regular in all respects, although it was not preserved by the bill of exceptions, and that such change of venue should have been granted.—*State v. Shea*, (Mo.) 409.

9. The action of the trial court on an application for change of venue in a prosecution for murder will be held to be conclusive, in the absence of palpable abuse of judicial discretion prejudicial to defendant.—*State v. Rider*, (Mo.) 723.

10. Judgment of conviction for felonious assault will be reversed if no venue of the offense is proven.—*State v. Stewart*, (Mo.) 216.

11. Proof of the venue of an offense is essential to the sufficiency of a conviction.—*Leggett v. State*, (Tex.) 660.

12. In a prosecution for a misdemeanor, the record failing to show that the offense was committed in the county laid in the indictment, a judgment of conviction will be reversed on appeal.—*Owens v. State*, (Tex.) 658.

Continuance.

13. Where five months elapse between indictment and trial, and defendant makes no effort to have witnesses summoned until the

second day of the term at which he is tried, and a few days before the trial, and his affidavit for a continuance on the ground of absence of witnesses does not show that the witnesses are not absent by his consent, connivance, or procurement, as required, in case it is demanded by the opposite party, by act Ark. Feb. 21, 1887, the refusal of the continuance is a proper exercise of the discretion of the court.—*Blackmore v. State*, (Ark.) 940.

14. Upon trial for forging letters of recommendation, the only controversy was whether defendant had shown witness the letters produced at the trial, and admitted to be genuine, or other spurious letters, as claimed by the witness, which were not produced. There being no pretense that the parties had written such letters as witness claimed were shown him, it was not prejudicial to the defendant to refuse a continuance to procure the attendance of witnesses in another state, to prove the genuineness of the letters produced.—*Richie v. Commonwealth*, (Ky.) 913.

15. In a criminal case defendant is not entitled to a continuance because of the absence of a material witness, where the affidavit shows that process was issued, but does not show that it was placed in the hands of an officer for service.—*Unsel v. Commonwealth*, (Ky.) 144.

16. A continuance of a criminal trial on the ground of absent witnesses is properly refused where no due diligence is shown, and the testimony sought to be procured is vague, uncertain, and merely negative, and not likely to influence the jury's finding.—*Moseley v. State*, (Tex.) 652.

17. It is not an abuse of discretion in the trial court to refuse to grant a continuance, in a criminal case, because of the absence of two witnesses, where it is not shown that any subpoena was issued for these witnesses before the first day of the term at which the prisoner was tried, and nearly a year after he was indicted, and no facts showing due diligence appear in the affidavit for continuance.—*Wells v. State*, (Ark.) 826.

18. Where a person charged with murder is tried at the same term at which the indictment is preferred, the courts should grant a continuance to enable accused to procure an absent witness by whom he proposes to prove that deceased had threatened and was disposed to bully him, thereby corroborating defendant's testimony that deceased commenced the affray.—*Smith v. Commonwealth*, (Ky.) 192.

19. An application for a continuance for the absence of a material witness set out what the witness was expected to prove. The prosecuting attorney consented that the facts set out in the application as to what defendant expected to prove by the absent witness should be taken as the latter's testimony, and defendant was compelled to go to trial. *Held*, that the continuance was improperly refused. Following *State v. Neider*, 6 S. W. Rep. 703.—*State v. Warden*, (Mo.) 233.

Conduct of trial—Summoning talesmen.

20. An order made by the court several days before a criminal cause was set for trial, di-

recting the sheriff to summon talesmen, in anticipation that the regular panel would be exhausted without obtaining a jury, is not premature.—*Mabry v. State*, (Ark.) 838.

21. The practice of summoning a special jury in each case having been abolished, it is no objection to an order directing the sheriff to summon talesmen that it was made in the absence of the accused, he having had the full benefit of his right to peremptory challenges.—*Id.*

— Reception of evidence.

22. Under *Crim. Code Ky.* § 280, providing that "if, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this state, the court shall stop the trial, discharge the jury, and take the proceedings in the case directed in sections 166, 167," where there is evidence that defendant is guilty of a crime, it is error to refuse to allow the commonwealth's attorney to recall a witness to show that the crime was committed within the jurisdiction, though he had announced himself through with his evidence.—*Commonwealth v. Patterson*, (Ky.) 694.

— Remarks of counsel.

23. Upon trial for felony, defendant having testified on one point only, the prosecuting attorney, in argument, over the objection of defendant, was permitted to allude to the failure of defendant to testify upon another question. *Held* reversible error, under *Rev. St. Mo.* §§ 1918, 1919, which provide that an accused may testify in his own behalf, and may be cross-examined as to any matter testified to; and that his failure to testify shall not be construed against him, or referred to by any attorney in the cause, nor considered by the judge or jury. *BRACE and SHERWOOD, JJ.*, dissenting.—*State v. Graves*, (Mo.) 739.

24. Remarks of counsel for prosecution in argument, which are not strictly proper, if they are condemned by the court within the hearing of the jury, so that no prejudice arises to defendant, are not ground for reversal.—*McGill v. State*, (Tex.) 661.*

Evidence—Hearsay.

25. It is error to admit evidence of a statement, made in the absence of accused by his brother to the sheriff, that accused would plead guilty, though the county attorney stated that he expected to prove facts which would render the testimony admissible.—*Rushing v. State*, (Tex.) 807.

— Confessions and admissions.

26. Under *Code Crim. Proc. Tex.* art. 750, providing that a confession shall not be used if made while defendant was under arrest, "unless such confession be made in the voluntary statement of the accused taken before an examining court in accordance with law, or be made voluntarily after having been first cautioned that it may be used against him," a caution by the magistrate at the examination that defendant's written statement before the magistrate, if he should make one, would be used against him, is not such caution as to make admissible statements made by defend-

ant to another person a few hours afterwards.—*Baker v. State*, (Tex.) 23.

27. A defendant's testimony to show that certain criminal admissions should not be admitted in evidence against him, by reason of the circumstances under which they were made, must be offered to the court while that issue is pending. If given while testifying in his own behalf before the jury, it affords no ground for excluding the admissions.—*State v. Rush*, (Mo.) 231.*

28. Defendant, arrested for robbery, made criminal admissions upon being told by the officer having him in custody that his co-defendant had implicated him, but it did not appear that such admissions were induced by promises, threats, or intimidation. *Held*, that they were voluntary, and admissible in evidence.—*Id.**

29. Testimony detailing a conversation which the witness had with defendant under arrest is inadmissible, unless for the purpose of showing a confession.—*Baker v. State*, (Tex.) 23.

— Of accomplices.

30. *Crim. Code Ky.* § 241, provides that "a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence, tending to connect defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed, and the circumstances thereof." Defendant was connected with the theft for which he was indicted, independently of the testimony of an accomplice, only by testimony that one of the things stolen had been found in a place where it was probable that he had hidden it. *Held*, that defendant was entitled to an instruction embodying the entire substance of the above section.—*Taylor v. Commonwealth*, (Ky.) 461.*

31. In the prosecution of a jail-guard for permitting the escape of a prisoner, evidence of acts and declarations performed and made both before and after the escape, and in the absence of defendant, by a fellow-guard, who was under a separate indictment for the same escape, is not admissible; there being no sufficient proof of a conspiracy between the two to permit the escape.—*Martin v. State*, (Tex.) 682.

— Character.

32. Evidence is not admissible to prove that the general reputation of a prosecuting witness for veracity is good, where his veracity has not been directly assailed, but there is simply a conflict between his testimony and that of witnesses for the defense.—*Rushing v. State*, (Tex.) 807.

33. Where defendant in a criminal action becomes a witness in his own behalf, under act *Ky.* May 1, 1886, providing that such a defendant may testify in his own behalf, his credibility may be impeached by testimony assailing his general moral character.—*Lockard v. Commonwealth*, (Ky.) 266.*

Instructions.

34. Evidence that defendant was present in a crowd at the scene of and immediately after the robbery for which he was indicted, and there heard it discussed, and was not again

seen in the city until brought back after his arrest, which occurred a year subsequently; a writ having been issued, a reward offered, and diligent search made for him in the mean time; and that, both when arrested and when testifying as a witness, he gave no account of his absence,—is sufficient to warrant an instruction to the jury on the presumption arising from flight.—*State v. Rush*, (Mo.) 221.

35. On a trial for a crime, the use of the word "real" in an instruction stating that a doubt, to authorize an acquittal, must be a real, substantial doubt, does not constitute reversible error.—*State v. Davidson*, (Mo.) 413.

36. Special charges requested to be given, are properly refused when substantially embodied in the charge as given to the jury.—*Martin v. State*, (Tex.) 683.

Custody and conduct of jury.

37. A felony case being submitted to a jury, who were placed in charge of a sheriff, and so remained until the return of their verdict, their adjournment from their consultation room to their meals and sleeping apartment, and return to the consultation room, were not a resubmission of the case at each return, and did not constitute a submission in the absence of the prisoner.—*Richie v. Commonwealth*, (Ky.) 913.

38. Where the only communication shown to have been had between the jury and the sheriff, or any one else, is that the sheriff furnished the jury with cigars at their request, and another person, at the sheriff's direction, threw soap and towels into the hall-way, which was open to the jury-room, and the only separation allowed was brief and proper, there is no misconduct by the sheriff.—*State v. Rush*, (Mo.) 221.

39. Under *Crim. Code Ky. 1883*, § 248, providing that, "upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause," it is not reversible error to give the jury the indictment upon which is indorsed a previous jury's verdict of conviction.—*Harrold v. Commonwealth*, (Ky.) 194.

Verdict.

40. Under *Gen. St. Ky. (New Ed.) 464*, giving, in certain cases, authority to the jury to say whether defendant shall be put at hard labor in lieu of imprisonment for non-payment of fine, it is insufficient for the verdict to say merely "the working statute applied," but, under instruction, they should fix in their verdict the extent of the punishment they intend to inflict.—*Eldridge v. Commonwealth*, (Ky.) 892.

Sentence.

41. Under *Rev. St. Mo. §§ 1877, 1878, 1881*, providing that no judge of a circuit or criminal court shall be competent to try any indictment when he shall have been counsel in the cause; and that, in case of such disqualification, a special judge may be elected; but that if a competent special judge cannot be elected, or will not serve, such disqualified judge may notify and request the judge of some other circuit to try the cause; and it shall be the duty of the judge so requested to

appear for the trial of said cause; and he shall during said trial, and in relation to said cause, possess all the powers and perform all the duties of a circuit judge,—a sentence on a trial and conviction for murder, passed by a circuit judge who had not tried the cause, at the request of the regular judge of the court in which the cause was pending, the latter having been prosecuting attorney on the trial, is unauthorized and *coram non judge*, the regular judge not being disqualified from passing sentence by having acted as prosecuting attorney, and the only purpose for which a judge of another court may be called in being for the trial of a cause when the regular judge is disqualified, and a special judge cannot be elected or will not serve.—*State v. Shea*, (Mo.) 409.

42. Where petitioner was convicted at the same term on three indictments for felony; and, on a subsequent day of that term, was sentenced to imprisonment for a term commencing from date, on the third conviction; and, on the following day, was sentenced to imprisonment on the first and second convictions, respectively,—each term to commence at the expiration of the one preceding it,—there was no such irregularity in the proceedings as would avoid the imprisonment, under *Rev. St. Mo. § 1859*, providing: "When any person is convicted of two or more offenses before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction."—*Ex parte Jackson*, (Mo.) 800.

43. Where a prisoner was sentenced, at the same term of court, to three successive terms of imprisonment, the reversal of the judgment upon which he was sentenced to the second term of imprisonment does not entitle him to a discharge upon expiration of his first term, but the third term will begin immediately after the first has expired.—*Id.*

44. *Rev. St. Mo. 1870, §§ 1922, 1923*, providing that one accused of crime must be brought to trial within a specified time, otherwise he is entitled to be discharged, does not invalidate a sentence pronounced after such time on a verdict rendered within the time.—*State v. Watson*, (Mo.) 883.

45. The power to sentence one convicted of a crime is not confined to the term of court at which he was convicted.—*Id.*

New trial.

46. A new trial will not be granted, in a criminal case, on the ground of newly-discovered evidence, where a part of the evidence relates solely to the impeachment of a witness, affidavits of none of the new witnesses are produced, no diligence is shown to have been exercised, and all the evidence, except that for the impeachment of the witness, is merely cumulative.—*Wells v. State*, (Ark.) 826.*

47. Where the affidavits accompanying a motion for a new trial fail to disclose any diligence on the part of defendant to discover the evidence he proposed to offer upon a second trial,

and did not allege that the evidence first came to his knowledge after the trial, or that, before the trial, he had no knowledge of it, the motion is properly denied.—*State v. Lohliker*, (Mo.) 720.*

43. In Texas, on trial for perjury, where a continuance because of absence of two witnesses, who would corroborate defendant, has been properly refused for want of diligence, a new trial should still be granted if the evidence adduced on the trial shows that the absent testimony would be material, and is probably true.—*Cordway v. State*, (Tex.) 870.

49. It is not sufficient to except to the giving and refusing of instructions for the first time in a motion for a new trial.—*State v. Rambo*, (Mo.) 865.

Appeal.—Right of state.

50. The state has no right of appeal in a criminal case, where defendant, as provided by Rev. St. Mo. § 1923, was discharged on motion because not brought to trial before the end of the third term of the court in which her cause was pending.—*State v. Ashcraft*, (Mo.) 816.

Record.

51. A bill of exceptions, signed by the judge, reciting that "the foregoing bill of exceptions having been tendered and examined by the court, and corrected, is now approved and signed and ordered to be made part of the record herein," which shows that there was evidence that the larceny was committed in S., the county seat, shows that the crime was committed in the county, the court and jury having the right to take judicial cognizance of public cities within their jurisdiction; and under Civil Code Ky. § 387, subsec. 3, providing that "if the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as a part of the record, but not spread at large upon the order book. If not approved he shall correct it, or suggest the correction to be made, and sign it,"—cannot be contradicted by a written statement of the judge following the bill that there was no evidence that the larceny was committed within the jurisdiction, such statement being unauthorized and unofficial.—*Commonwealth v. Patterson*, (Ky.) 694.

52. Where the record shows that a bill of exceptions was approved and filed in term-time, more than 10 days after the trial, in the absence of contrary proof the presumption arises that the bill was regularly presented to the judge within the 10 days for his approval, as required by law.—*Tomlin v. State*, (Tex.) 981.

58. Where, on appeal, the record fails to show that, at the trial, any plea was made by or entered for the defendant, the judgment will be reversed.—*McCarty v. State*, (Tex.) 666.

Exceptions.

54. Where the regular panel of jurors was discharged, and a special venire ordered to try defendant, and he was tried by the special jury, against his objection, and convicted, such conviction will not be set aside where the bill of exceptions does not show that a motion for a new trial was made, as a failure

to file a motion for a new trial is a waiver of exceptions taken on the trial.—*Chambers v. State*, (Ark.) 822.

55. Exceptions to the charge of the court, which were not taken until the jury had retired from the box, and the grounds of which were not specified until after a verdict had been returned, will not be considered by the appellate court; no fundamental error being found in the charge as given.—*Martin v. State*, (Tex.) 683.

56. A general exception to a charge, not specifically pointing out an error therein, will not be considered on appeal.—*Cordway v. State*, (Tex.) 670.

57. Where the ground of objection to the admissibility of evidence is not preserved, the objection will be presumed invalid.—*State v. Gilmore*, (Mo.) 859.

Error in transcript.

58. Where a conviction of willful and malicious shooting was reversed on appeal because it appeared by the transcript that the indictment charged simply willful shooting and on the second trial defendant was again convicted on the same indictment, which on the second appeal appears to have been good at first, the mistake having been in the transcript, reversal will not be ordered because the indictment was held defective before.—*Harrold v. Commonwealth*, (Ky.) 194.

Insufficiency of bond.

59. On conviction and fine in the recorder's court, defendant appealed to the county court, and filed his appeal-bond in a penalty sufficient to cover the fine and all costs then accrued. Held, that a dismissal of the appeal, because of the insufficiency of the bond to cover subsequent costs for the transcript and for receiving and paying over the fine and costs is error.—*Drum v. State*, (Tex.) 819.

Harmless error.

60. Where the jury find defendant guilty of felony, and fix his punishment, but recommend that he have credit for the time already served under a previous conviction, and the court renders judgment reducing the time by six months served, the irregularity is not prejudicial error entitling defendant to a reversal.—*Harrold v. Commonwealth*, (Ky.) 194.

CRUELTY TO ANIMALS.

See *Municipal Corporations*, 1, 2.

Indictment.

An indictment for shooting a heifer, which charges the time and place of the offense, and that defendant feloniously, willfully, and maliciously wounded a certain heifer, by then and there shooting said heifer with a shotgun loaded with gunpowder and leaden shot which said shot, so discharged from said gun, * * * entered into the flesh of said heifer, * * * thereby causing and inflicting a wound, "etc.", is sufficient.—*State v. Woodward*, (Mo.) 220.

COURTESY.

Sale by tenant.

Where lands belong jointly to seven heirs, and one person buys four and another two of

the shares, and the estate of a tenant by curtesy in another share, and these purchasers divide the land between themselves, regardless of the rights of the reversioner of the one-seventh in which the estate by curtesy had been purchased, such reversioner may affirm the partition, and recover one-third of the three-sevenths of the land set off to the purchaser of the estate by curtesy and the two other sevenths.—*Smith v. Patterson*, (Mo.) 567.

CUSTOM AND USAGE.

Pleading.

Plaintiffs alleged "that it had long been the custom in the state of Texas, where similar contracts were made by counties, * * * for the party contracted with to employ competent parties to do the work, even when no express authority to do the work was given in the contract with the county." But it was not alleged that the commissioners' court, with whom the contract sued on was made, had knowledge of such custom. *Held*, that the allegations were not sufficient to make the custom a part of the contract.—*Gano v. Palo Pinto County*, (Tex.) 634.

DAMAGES.

For death by wrongful act, see *Death by Wrongful Act*, 5, 6.

fires set by railroad companies, see *Railroad Companies*, 85.

In condemnation proceedings, see *Eminent Domain*, 8-7.

injunction proceedings, see *Injunction*, 5.
Punitive damages, see *Railroad Companies*, 18.

Exemplary.

1. A petition alleging that defendant, knowing he had no cause of action against plaintiff, maliciously sued out two writs of attachment on the latter's property, and that, by reason of such attachment, plaintiff has suffered injury, states a cause of action against defendant; and, if the facts are proven as alleged, plaintiff may recover exemplary damages.—*Rice v. Miller*, (Tex.) 817.*

Measure of damages for tort.

2. In an action for personal injuries caused by negligence, where plaintiff, in the hearing of the jury, has disclaimed any recovery for medical expenses or loss of time, an instruction that, if the jury find for plaintiff, they shall assess his damages at such amount as he has sustained, is not erroneous, so far as defendant is concerned, because it fails to point out the *criteria* by which they are to be governed in fixing the compensatory damages; nor does it authorize the jury to find punitive damages.—*Kentucky Cent. R. Co. v. Ackley*, (Ky.) 691.

3. Where a passenger is pulled off a railroad car by a brakeman, acting within the scope of his employment, the company is liable for all injuries occasioned thereby, though, owing to plaintiff's health, such injuries were more difficult to cure, and by reason of latent disease were more serious than they would have been

to a person of robust health.—*Owens v. Kansas City, St. J. & C. B. R. Co.*, (Mo.) 350.*

4. Though for injuries inflicted on a minor by the negligence of a railroad company, resulting in diminished capacity to earn a livelihood, he is not entitled to recover during minority, as the proceeds would belong to his parent, a charge not so qualified is not reversible error where the verdict was not excessive, nor a proper charge asked by defendant.—*Houston & T. C. Ry. Co. v. Booser*, (Tex.) 119.

5. In an action for damages to plaintiff's crops and land, caused by the overflow of an embankment on defendant's railway, the measure of damages is the market value of the crops at the time they were destroyed, and the amount of injury to the land, as shown by the testimony.—*Gulf, C. & S. F. Ry. Co. v. Pool*, (Tex.) 535.

Excessive.

6. In an action for an injury sustained from the sudden starting of a street car, whereby plaintiff, a passenger, was thrown down, and his hand thrust through the car window, and severely cut, it appeared that he was sick from his injuries for several months, and was finally compelled to have his arm amputated just below the elbow, and that his expenses therefor were nearly \$2,000; that his salary as a telegraph manager was \$144 per month, and, being an expert operator, he occasionally made \$50 per month extra; and that his value and usefulness as an operator had been impaired to the extent of one-half. *Held*, that a verdict for \$12,000 was not excessive, though the nature of the case only allowed compensatory damages.—*Dougherty v. Missouri R. Co.* (Mo.) 900.

7. The verdict of a jury awarding to a brake man \$10,000 damages for the loss of a foot, not being so glaringly excessive as to appear to have resulted from passion or prejudice, will not be disturbed.—*Louisville & N. R. Co. v. Mitchell*, (Ky.) 706.*

Practice—Pleading.

8. In an action for damages caused by cutting away an arch to make room for a water-pipe, the allegation that defendant "cut away a portion of the arch aforesaid to make way through same for defendant's water-pipe, and in so doing removed the support theretofore afforded to said east corner of said building, causing thereby said building to settle in the ground, away from the other portions of said building, and the walls of said building to crack and burst open in several different places, thus occasioning to plaintiff's property serious injury and damage," followed by an averment of the amount of damages, is sufficient.—*Houston Water-Works Co. v. Kennedy*, (Tex.) 36.

9. In an action for personal injuries, an allegation in the petition that plaintiff was "injured in his spine, chest, head, and limbs" is sufficient to embrace a heart disease, or an aneurism of the blood vessels situated in the chest.—*Gulf, C. & S. F. Ry. Co. v. Mannewitz*, (Tex.) 66.

Evidence.

10. In an action against a railroad company for personal injuries causing paralysis, it is

not error to refuse to order plaintiff to submit to a personal examination by a medical commission, where she is cross-examined, before the motion is made, in the presence of physicians as to her physical condition, and there is evidence on that point covering almost her entire life.—*Owens v. Kansas City, St. J. & C. B. R. Co., (Mo.) 350.*

11. In an action against a railroad company to recover for injuries sustained while getting off defendant's train, plaintiff may, in describing her injuries, testify that the nerves of her head, side, and left limb are paralyzed.—*Id.*

—Submitting improper issue.

12. The submission to the jury of the issue, unauthorized by the proof, of punitive damages for wrongful attachment, is not ground for reversal, if so much of the verdict is remitted, unless it appears that such submission improperly influenced the jury in finding the actual damages.—*Freiberg v. Elliot, (Tex.) 322.*

DEATH BY WRONGFUL ACT.

Parties.

1. The fact that the deceased had begun a suit for damages for the injury, which suit was pending at his death, is no bar to the action by his widow and children.—*International & G. N. Ry. Co. v. Kuehn, (Tex.) 484.*

2. The fact that, pending the suit, the widow remarried, does not preclude her right of action.—*Id.*

3. The fact that the husband of the mother acted as next friend for the minor children was not error.—*Id.*

Pleading.

4. Under Gen. St. Ky. 1833, c. 57, § 3, giving a right of action to the personal representatives of one killed by the "willful neglect" of another, to recover punitive damages of the person guilty of such neglect, a complaint does not state a cause of action, alleging that the intestate was of feeble mind, and without will power to control his appetite for liquor, that defendant knew this, and carelessly and with willful neglect furnished and gave it to him, and tempted, induced, and caused him to drink to such excess as to die therefrom, but not alleging that the liquor was furnished in violation of law.—*Rogers' Adm'r v. Hughes, (Ky.) 16.*

Measure of damages.

5. In an action for the wrongful death of plaintiff's daughter, six years old, caused by the negligent sale of morphine, instead of quinine, a charge that the value of the child's services during the period of her minority should be ascertained by the jury as best they could from their own judgment, common sense, and sound discretion, and the evidence, is unobjectionable, and the proper mode of ascertaining damages where, from the undeveloped state of the child, an estimate of its services would be matter of opinion, and no expert testimony would be better than the judgment and common sense of the jury.—*Brunswick v. White, (Tex.) 85.**

6. In an action for the wrongful death of plaintiff's child, a charge that the damages to

be awarded should not exceed the sum expended in the efforts to restore its health and the value of its services during minority, nor the amount sued for, is not erroneous, because not cautioning the jury to exclude expenses for nurture, education, etc., and though improper in referring to the claim of damages, does not require a reversal where the verdict is largely below that amount.—*Id.*

DEED.

See, also, *Fraudulent Conveyances; Mortgages; Vendor and Vendee.*

Conveyance by wife, see *Husband and Wife, 1-9.*

Reformation, see *Equity, 1-3.*

Tax deeds, see *Taxation, 15-20.*

Description.

1. The description in a deed was: "The following described tract or parcel of land, the north-east quarter and the west half of the south-east quarter and the east half of the east half of the south-west quarter of section" 36, township 43, range 26,—without any punctuation. The deed contained no statement of quantity, but reserved possession until a fixed time, with certain crops grown on the land that season. By one construction, the deed would convey 160 acres, being the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 36, and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ section 36, and the E. $\frac{1}{2}$ of the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ section 36, the lands of which grantors were in possession, and which they surrendered to grantee, including the land in controversy. By another construction, it would convey the N. E. $\frac{1}{4}$ section 36, of which grantors were not in possession, and did not own, and the E. $\frac{1}{2}$ of the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ section 36; in all 280 acres. *Held*, that the former construction should prevail.—*Wolfe v. Dyer, (Mo.) 551.*

2. While a deed in fee-simple, in which the description of the land intended to be conveyed is left blank, parol authority being given to select the lands desired, and insert their description in the deed, cannot be used as evidence of title, the description not having been inserted in the grantor's life-time, it may be used as evidence of the character of the grantee's holding where the selection was made and he went into possession under it.—*Tarrant County v. McLemore, (Tex.) 94.*

3. Where one intending to donate to a county land for jail purposes executed a deed in which the numbers of the lots and block of the land proposed to be granted were left blank, and gave parol authority to another to select the lots desired, and insert their description in the deed, but the blanks were never filled, neither the agent nor the court, after the donor's death, can perfect the deed.—*Id.*

4. A description as follows: "200 acres of the Chas. L. Harrison one-third league survey, on the Wichita river, in Wichita county, Tex., to be run off by the surveyor of said county, fronting 475 varas on the river, and back for complement of 200 acres to be taken out of my half of said survey, and begin at the upper or lower corner, and run with the up-

per or lower line of my survey for completion. Field-notes to be attached to this deed by said surveyor, and become a part of this instrument," sufficiently identifies the interest conveyed.—*Nye v. Moody*, (Tex.) 606.

5. In a deed to which field-notes were to be attached fixing the locality of the portion conveyed of a certain survey, the fact that the field-notes were added after the recording does not lessen its effect as a recorded instrument, and the right to select the locality of the portion conveyed will be protected.—*Id.*

Acknowledgment.

6. The certificate of proof of a transfer was as follows: "I, W., clerk of the county aforesaid, do hereby certify that T., one of the above subscribing witnesses, who, being duly sworn, in due and solemn form, that he, himself, with P., signed as witnesses when R. signed and acknowledged the foregoing instrument of writing for the purposes therein set forth." The statute in force (Pasch. Dig. Tex. art. 4973) required that one of the witnesses shall swear to the signature of the signer, which shall be certified, etc. *Held*, that it was apparent that the word "says" or "said" was inadvertently omitted, and that, even as it stood, it satisfied the requirements of the statute.—*Talbert v. Dull*, (Tex.) 580.

7. Rev. St. Tex. art. 4906, provides that "the acknowledgment or proof of an instrument of writing for record may be made without this state, but within the United States, before either (1) a clerk of a court of record having a seal; (2) a commissioner of deeds duly appointed under the laws of this state; (3) a notary public." *Held*, that this does not authorize an acknowledgment by a judge of a court of record without this state.—*Id.*

8. It is sufficient if a certificate of acknowledgment of a deed complies with the statute in substance, although it does not follow the exact language.—*Id.*

Delivery.

9. When it appears, in an action to annul a deed, that the deed was not recorded until after the death of the grantor, and that both grantor and grantee had made declarations inconsistent with its delivery, the presumption of delivery arising from possession of the deed will not be supported by the mere fact that the grantee received by mail an envelope, addressed in his own handwriting, in which the deed was contained when filed for record.—*Scott v. Scott*, (Mo.) 161.*

Recording.

10. Where the description in a deed is ambiguous, the deed being recorded, a subsequent purchaser has notice, as the deed itself would lead him to investigate the facts bearing upon its construction.—*Wolfe v. Dyer*, (Mo.) 551.

11. When a deed has been filed for record, and the recording fees paid, it will be presumed that the clerk did his duty, and recorded the deed.—*Harrison v. McMurray*, (Tex.) 612.

Construction and effect.

12. Under a deed from a husband to his wife of a certain lot, to the party of the second part, and her heirs, in fee-simple, forever; to have and to hold said lot for the sole use and

benefit of said second party, free from the control of her husband, with power to sell, and by deed jointly with her husband convey, the said lot, and vest the proceeds in other property, to be held for the same sole use; and providing that, "should said second party die in the life-time of said first party, then said lot of land is to revert to him in fee-simple," on the death of the wife without having disposed of the lot, the husband is entitled thereto as against the wife's heirs, though a subsequent clause in the deed repeats, "to have and to hold the above-described land * * * unto the party of the second part, and her heirs, forever."—*Fogarty v. Stack*, (Tenn.) 846.

13. A condition subsequent in a deed will not defeat the grant until entry by the grantor or his heirs for condition broken; and it is not sufficient for the grantor to obtain a surreptitious attornment from the tenant of the grantee, and to induce such tenant to accept a lease from him.—*Missouri Historical Soc. v. Academy of Science*, (Mo.) 846.

14. Where the granting clause of a deed conveys a fee-simple, with nothing to indicate that the grantor intended such clause to be limited by the *habendum*, which conveys only a life-estate, the grantee will take an absolute title to the property, unrestricted by the terms of the *habendum*. Affirming *Ratliffe v. Marra*, 7 S. W. Rep. 395.—*Ratliffe v. Marra*, (Ky.) 376.

15. Where a life-tenant conveys in fee, covenanting for good title, and thereafter inherits the fee, such after-acquired title inures to the grantee, and does not pass to the heirs of such life-tenant.—*McIlvain v. Porter*, (Ky.) 705.

Deposition.

In former suit, see *Evidence*, 17.

To impeach witness, see *Witness*, 13, 14.

DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators; Wills*.

Inheritance from bastard.

1. The legitimate children of a deceased bastard inherit from their parent's bastard brother by the same mother, when such bastard brother died before the death of the parent, under Gen. St. Ky., providing that bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock.—*Sutton v. Sutton*, (Ky.) 837.

Remedies and liabilities of heirs.

2. Under Code Tenn. §§ 2267-2269, providing that, the personalty of a decedent having been exhausted in payment of *bona fide* debts, leaving debts unpaid, the real estate may be sold to satisfy such debts, if a personal representative, without notice of debts, and after the expiration of the time fixed by section 2311 for payment to legatees, pay them the amounts in his hands, taking and causing to be recorded the refunding bonds, with security, condi

tioned for the payment *pro rata* by such legatees of any debts thereafter established, the real estate of such decedent will be exonerated from the payment of debts to the amounts so paid to such legatees, and as to such amounts the creditor can only look to the distributees and the refunding bonds, regardless of the insolvency of the parties, or the sureties on the bonds; nor is it material that the legatee is the heir or devisee into whose hands the real estate has passed.—*Marxwell v. Smith*, (Tenn.) 340.

8. Where lands of a decedent, whose personality was insufficient to pay his debts, have been partitioned among his heirs, some of whom have aliened their shares to *bona fide* purchasers, which are therefore not liable to such debts, the shares unaliened are liable to creditors for the full amount of the debts, though, as between each other, the heirs should bear the burden ratably; and those whose land is so subjected may compel contribution from the others.—*Id.*

4. Under Rev. St. Tex. art. 1248, which provides that, when a defendant dies before judgment, his administrator or executor, and, in a proper case, his heir, may be substituted as defendant, a petition for *actre factas* to revive a money judgment against a deceased defendant, which alleges that deceased left assets which came into the possession of his heirs, but does not show that there was no administration on his estate, or no necessity for such administration, does not show a proper case for citing the heirs as defendants.—*Schmidtke v. Miller*, (Tex.) 638.

5. On *actre factas* to revive a judgment against the heirs of a deceased defendant, it is error to render judgment against the heirs without proof that they inherited assets from their ancestor.—*Id.*

DISORDERLY CONDUCT.

Evidence.

1. Persons living in residences which abut on a public street are inhabitants of such street, within the meaning of Pen. Code Tex. art. 314, which establishes a penalty for using loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof;" and, in a prosecution under the statute, evidence that there are houses abutting on such street, and that the houses are inhabited, is admissible.—*Keller v. State*, (Tex.) 275.

2. A prosecution for swearing in a public street, under Pen. Code Tex. § 314, which establishes a penalty for using loud, indecent, or profane language "upon a public street, or near a private house, in a manner calculated to disturb the inhabitants thereof," is not barred by the fact that defendant may have equally violated the statute by disturbing the inhabitants of private residences.—*Id.*

DISTURBANCE OF PUBLIC WORSHIP.

Evidence.

On an information for disturbing a Sunday-school "by loud and vociferous exclamations

and swearing," where it appeared that defendant and two other boys were sitting on a bench in a back part of the building, and witnesses heard laughing and talking, but none of them heard loud and vociferous exclamations or swearing, the allegation is not sustained by the proof.—*Lyons v. State*, (Tex.) 643.

DIVORCE.

Domicile.

Under Civil Code Ky. § 423, which provides that, in an action for divorce, the plaintiff "must allege and prove, in addition to a legal cause of divorce, a residence in the state for one year next before the commencement of the action," a mere legal residence or domicile in the state, with an actual residence out of the state, is not sufficient to entitle the plaintiff to maintain his action.—*Tipton v. Tipton*, (Ky.) 440.

DOWER.

Action for assignment.

1. In an action for assignment of dower, plaintiff's children, the heirs of her deceased husband, were made defendants, but did not appear. The other defendants appeared and answered. *Held*, that a decree investing title in the heirs of plaintiff's deceased husband, as against their co-defendants, was erroneous, they not having claimed such relief.—*O'Bryan v. Allen*, (Mo.) 225.

2. An action for assignment of dower is an action to recover real estate, within Rev. St. Mo. 1879, § 3219, providing that no action for the recovery of possession of land shall be maintained by any person, unless he, or the person under whom he claims, was seized or possessed of the premises within 10 years before the action, the widow being deemed in possession on the death of her husband, and the limitation will begin to run at the time the cause of action accrues.—*Robinson v. Ware*, (Mo.) 153; *Beard v. Hale*, (Mo.) 156.

DRUGGISTS.

Sale of poison.

1. In an action for damages for negligently causing the death of plaintiff's child, a complaint alleging that plaintiff's agent, as customer of defendants, druggists, demanded quinine, but was by defendants' clerk given morphine instead, and relying on the representation of said clerk that the drug was quinine, plaintiff administered the same to their daughter, from the effects of which she died, states a good cause of action.—*Brunswick v. White*, (Tex.) 85.

2. In an action for causing the death of plaintiff's child by the sale of morphine for quinine, under evidence that a person, as agent for plaintiff, called at defendants' drug-store, demanded quinine, but was given morphine, and told by the clerk that it was the best French quinine, and under evidence by such clerk that he had delivered what was called for, and that ounces bottles of both drugs were kept in separate places some distance apart, but that both were wrapped in blue paper, an

instruction that plaintiffs could not recover if their agent was negligent in not examining the label of the bottle, was properly refused, as not called for by the evidence, and where the jury had been told that plaintiffs could not recover if their agent got what he had called for.—*Id.*

8. In an action for the wrongful death of an infant, it is proper to refuse to grant a new trial on the ground that the verdict was contrary to the evidence, where the evidence showed, and the jury found, that defendants negligently sold morphine for quinine, though not on prescription, but on private application therefor, as that would not excuse a druggist from exercising due care in dealing with persons who of necessity must rely on him for the article they wish to use.—*Id.*

EJECTMENT.

See, also, *Trespass to Try Title*.

Adverse possession, see *Boundaries*, 4; *Limitation of Actions*, 1-8.

Parties.

1. Ejectment cannot be maintained against a landlord not in possession, without joining as defendant the tenant who is in possession.—*Shaw v. Tracy*, (Mo.) 434.

Pleading and proof.

2. In ejectment against husband and wife, where the wife's answer avers, and the replication does not controvert, that the wife was, at the time plaintiff acquired the title under which he claims, the owner in fee of the real estate in question, the sole issue being the validity of a certain deed made by her, plaintiff cannot, without amendment, prove another title in himself, derived from the husband, and not put in issue by the pleadings.—*Mays v. Pryce*, (Mo.) 731.

Writ of possession.

3. One who enters premises, pending an action of ejectment, under a conveyance from defendant, is in privity with and presumed to hold under defendant, and after recovery, and in a proceeding for a writ of possession against the person so entering, an answer by her alleging that she then holds under an independent title is insufficient; the burden of proof to show the validity of such independent title, in a separate proceeding, resting upon her.—*Ritchie v. Johnson*, (Ark.) 942.

ELECTIONS AND VOTERS.

Elections under local option law, see *Intoxicating Liquors*, 1-3.

Keeping saloon open, see *Intoxicating Liquors*, 4.

Registration lists.

1. *Mundamus* will lie to compel the recorder of voters of the city of St. Louis to permit the copying of the registration lists in his custody, the same being public records, under reasonable regulations for their safety, for use by a "voluntary political organization" in holding a primary election, under the act of March 27, 1875, (Acts Mo. 1875, p. 54,) as the

lists furnish the best evidence of the qualifications of voters prescribed by that act; but the writ will not be granted until the statutory notice required for such election has been given.—*State v. Williams*, (Mo.) 771.

Majority of legal voters.

2. Where a law requires a vote to be taken, and a majority of the legal voters is mentioned therein as being necessary to carry the proposed measure, a majority of all the legal voters entitled to vote is contemplated by the law; and not a mere majority of those voting.—*State v. Francis*, (Mo.) 1.

Contests.

3. Where, in an election, votes were given for Matthew Ryan, Mattias Ryan, and M. Ryan, and the recorder counted them as for one person, Matthew Ryan, *mandamus* to compel him to count the votes as given for separate persons will not lie, there being no averment that Matthew Ryan, Mattias Ryan, and M. Ryan are not the same person.—*State v. Williams*, (Mo.) 415.

Offenses against election laws.

4. Under Gen. St. Ky. (New Ed.) 464, giving the jury authority, in fixing the penalty for a misdemeanor prescribed in chapter 29, Gen. St., if the same be a fine, to say in their verdict whether defendant shall be put at hard labor in lieu of imprisonment, for nonpayment of the fine, the offenses so punishable being manifestly misdemeanors only, a judgment upon a verdict directing punishment by hard labor for receiving a bribe for voting, being a crime for which, under Const. art. 8, § 4, a person may be excluded from office and suffrage, is erroneous.—*Eldridge v. Commonwealth*, (Ky.) 892.

5. Pen. Code Tex. art. 163, prohibiting any person, under penalty, from carrying a dangerous weapon on election day, during polling hours, within a half mile of the polls; and article 330, with a different penalty, prohibiting any one from going where any portion of the people of this state are collected to vote at any election, with a dangerous weapon about his person,—do not define the same offense, so that defendant, convicted upon indictment of the offense defined in article 163, may object that the two provisions fix different punishments for the same offense, and are therefore not enforceable.—*Cooper v. State*, (Tex.) 654.

6. Defendant, on trial for carrying dangerous weapons on election day, cannot object that it was no offense because the election was void; the election being actually held under color of law.—*Id.*

EMBEZZLEMENT.

Indictment.

1. Defendant was indicted for embezzling the money of a corporation of which he was secretary and treasurer. It appeared that by virtue of his office he was custodian of the company's books, and took charge of and received all of its money. *Held* that, an indictment alleging that defendant embezzled \$500 lawful money of the United States, a more particular description of which could not be

given, need not allege the kind of money, that it was current, or from whom it was received.—*Malcolmson v. State*, (Tex.) 468.

Evidence.

2. The secretary and treasurer of a corporation was indicted for embezzling its money. On trial, evidence was admitted showing that he, with an ex-president of the company, had conveyed some of its land for worthless stock. *Held*, that such evidence was inadmissible, and as it prejudiced defendant, and it did not appear to a reasonable certainty that he was guilty as charged, the case would be reversed. *Willson, J.*, dissenting.—*Id.*

3. On a trial for embezzling the money of a corporation, it is not error to admit evidence showing that defendant, who was secretary and treasurer of the company, and handled all its money, purchased, with funds of the corporation, a span of horses and a set of harness, and afterwards sold them and appropriated the proceeds.—*Id.*

4. Defendant purchased a mule which he agreed not to remove from the county until paid for, or the payment secured. It was understood that he was to give a note, with a certain person as signer. Defendant removed the mule to the county where he lived, without giving the note or paying for the mule. There was no evidence that he intended to deprive the seller of the mule, or its value, and the seller did nothing for several months to assert his rights, though he knew that the mule had been removed and where it was. He then had defendant arrested. *Held*, that the evidence did not support a conviction for embezzlement.—*Williams v. State*, (Tex.) 935.

Instructions.

5. It was not error to refuse to charge that the jury could not convict for converting the horses, as the evidence only showed that defendant received certain money from this source, which he did not account for.—*Malcolmson v. State*, (Tex.) 468.

EMINENT DOMAIN.

Taking possession of land.

1. Act Ky. April 11, 1882, § 7, providing that, on an appeal by a railroad company from a judgment of a county court fixing the damages in condemnation proceedings, the company shall not be entitled to take possession of the premises sought to be condemned, unless it execute to the owner a bond, with surety in double the amount of damage assessed, conditioned to perform the judgment of the court, or any other court to which the case may be appealed, violates Const. Ky. art. 13, § 14, providing that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."—*Covington S. R. T. Ry. Co. v. Piel*, (Ky.) 449.

Jurisdiction.

2. In a proceeding to establish a street under an ordinance passed pursuant to city charter St. Louis, art. 6, § 2, providing that whenever the assembly shall provide by ordinance for establishing any street, either on

the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting thereon, and it becomes necessary to appropriate private property, the city counselor shall apply to the circuit court, by petition, if it does not appear from such petition, or from the ordinance therein recited, that such ordinance was passed "either on the unanimous recommendation of the board of public improvements, or on the petition of the owners of a major portion of the ground fronting on the proposed street," the court has no jurisdiction to condemn the land in question.—*City of St. Louis v. Gleason*, (Mo.) 848.

Compensation.

3. Under Const. Ky. art. 13, § 14, providing that "no man's property shall be taken or applied to public use without just compensation being previously made to him," a railroad company cannot obtain a writ of possession while an appeal from the awarded damages for land sought to be condemned, is still pending, by giving its bond, but such damages must first be paid in money before the owner can be deprived of his land.—*Asher v. Louisville & N. R. Co.*, (Ky.) 854.

4. Act Ky. April 11, 1882, providing that, in the condemnation of land by a railroad company, the value of the land and material taken must be awarded separately from any damages that may result to the adjacent lands of the owner, does not require that the value of land taken from a small tract upon which the dwelling, barns, orchard, etc., of the owner stand, be awarded separately from the damages to the adjacent land in the same tract, resulting from the injury to the dwelling, barns, etc.—*Id.*

5. In 1877 the commissioners' court caused a public road of the third class to be laid out across lands which plaintiff subsequently purchased. In 1885 the commissioners' court classed the road as second class, and ordered the removal of the gates which had been erected at the entrances to plaintiff's lands. *Held*, that this was a taking for public use, and imposing additional burdens upon plaintiff, for which, under the seventeenth section of the Texas bill of rights, he was entitled to compensation.—*Woodridge v. Eastland County*, (Tex.) 503.

6. In proceedings to condemn a person's home and place of business for a right of way for a railroad company, the jury may, in estimating the damages, take into consideration the inconvenience and loss resulting to the owner from being deprived of his home and established place of business.—*Covington S. R. T. Ry. Co. v. Piel*, (Ky.) 449.

7. In proceedings to condemn land for a right of way for a railroad company, where there have been three verdicts fixing the damages at \$7,750, \$8,000, and \$8,250, respectively, the final verdict will not be disturbed, in the absence of any evidence to show that either finding was excessive.—*Id.*

EQUITY.

See, also, *Creditors' Bill*; *Fraudulent Conveyances*; *Injunction*; *Mortgages*; *Partnership*; *Specific Performance*; *Trusts*.

Surcharging executor's account, see *Executors and Administrators*, 12.

Reformation of deed.

1. Where, in settlement of a claim of a married woman against an estate, a sale, directed by the court, is made to her of land belonging to the estate, but by mistake, and without her consent, the commissioner's deed is made to and in the name of her husband, who has paid no part of the consideration, she being inexperienced in business, and until his death unaware of the mistake, the deed will be corrected.—*Clemons v. Holtheide*, (Ky.) 697.*

2. Where a title-bond describes the land to be conveyed as being 92 feet front, and the purchaser accepts the bond with the understanding, which is a material inducement to the purchase, that the 92-foot front included a dwelling on the east end and 8 feet passway still east of the house, when in fact it did not, the purchaser is entitled to a correction of the bond, and parol evidence is admissible to prove the mistake.—*Goff v. Jones*, (Tex.) 535.*

3. The proof of mistake, to warrant the reformation of a deed, must be clear, positive, and satisfactory, and equivalent to an admission.—*Turner v. Shaw*, (Mo.) 897.*

Rescission of contracts.

4. Where, in an action to set aside a trustee sale of lands on the grounds of fraud in preventing bidding at the sale, and that the land, being in two separate parcels, should not have been sold *en masse*, the allegation of fraud being supported by the testimony of but a single witness, that he refrained from bidding at the sale because of an agreement by the purchaser to pay him a consideration therefor, the witness being impeached by a number of others, and the purchaser denying the alleged agreement; and it appearing that the method of sale was not prejudicial to the owners, and that the amount realized was not materially disproportionate to the value of the land; the evidence of fraud is not so clear as to warrant a cancellation of the trust deed.—*Keiser v. Gammon*, (Mo.) 377.

Laches.

5. Where one, in 1858, executed a deed in which the description of the land intended to be conveyed was left blank, and gave parol authority to another to select the land desired, and insert the description in the deed, and the grantor died in 1866, an action to perfect the deed, brought in 1885, is barred.—*Tarrant County v. McLemore*, (Tex.) 94.

Decree.

6. A subsequent mortgagee, for his own protection, paid a prior mortgage, and was by a decree, to which defendant, who was the mortgagor's grantee, was a party, subrogated to the rights of the prior mortgagee; whereupon defendant paid the amount decreed. Plaintiff, receiving a deed to a portion of the land from the mortgagor, and believing the same not included in defendant's deed, brought ejectment. *Held*, that said decree, being for no other purpose than that of subrogation to the lien aforesaid, did not establish title in defendant.—*Wolfe v. Dyer*, (Mo.) 551.

7. A decree is not erroneous for being for a greater sum than claimed by the bill, when the bill seeks the recovery of a certain sum, with interest from a given time, and the decree is for a sum less than the amount named in the bill, with interest from the time specified until decree.—*Maxwell v. Smith*, (Tenn.) 840.

8. A decree setting aside a deed *in toto* for defect, in the acknowledgment of the wife and vesting said married woman with all the rights of the grantee, is erroneous, the proper decree being simply to set aside the deed as to her.—*Mays v. Pryce*, (Mo.) 731.

ESTOPPEL.

Liability of surety, see *Principal and Surety*, 1, 2.

To deny landlord's title, see *Landlord and Tenant*, 1.

In pais.

1. K. and B. were tenants in common, and in 1859 made a parol partition, each taking possession of his own portion. February 19, 1861, creditors of B. attached his interest in the whole tract. February 26, 1861, K. executed a mortgage at B.'s request of a one-half interest in B.'s portion of the land. The mortgage was foreclosed, and plaintiff became purchaser. The defendant claims, by sale under the attachment, the whole of B.'s portion, relying upon the parol partition. *Held* that, it being recited in a deed of record by B., dated February 15, 1861, that K. is the owner of an undivided one-half of B.'s portion, and plaintiff having been treated by the attaching creditors as owner of one-half thereof by being called on to pay one-half of the taxes, and the attaching creditors having claimed for 14 years in disregard of the parol partition, they cannot now affirm the same, and defeat plaintiff's mortgage.—*Nave v. Smith*, (Mo.) 796; *Same v. Hamilton*, (Mo.) 799.

2. In an action for the partition of real estate, where a party under whom defendants claim title has made certain declarations, and acted in a manner inconsistent with defendants' title, defendants are not estopped from relying on such title by his conduct, where it is not shown that they, or those under whom they claim, influenced or brought about in any way such conduct.—*Goode v. Lowery*, (Tex.) 78.

3. An attaching creditor seeking priority over an assignment for benefit of creditors is not estopped by representations made to other creditors, two or three months before the assignment, that, in his opinion, the assignors were solvent, and worth four or five thousand dollars above their liabilities and exemptions; it appearing that representations to that effect were made by the assignors to such creditor.—*Hasell v. Bank of Tipton*, (Mo.) 173.

4. Where, in an action to recover land, there is no evidence that plaintiff assented to the location of the boundary line claimed and used by the defendant, he is not estopped, unless by the statute of limitations, from asserting his claim.—*Horst v. Herring*, (Tex.) 304.*

EVIDENCE.

See, also, *Witness*.

Best and secondary, see *Trespass to Try Title*, 10.

Competency and relevancy, see *Carriers*, 10; *False Pretenses*, 6; *Fraudulent Conveyances*, 18-18; *Gaming*, 2-7; *Larceny*, 10-25; *Malicious Prosecution*, 1, 2; *Negligence*, 5, 6.

Confessions, see *Fornication*, 1, 2; *Robbery*, 3, 4.

Documents, see *Trespass to Try Title*, 7, 8.

Expert evidence, see *Municipal Corporations*, 18.

In criminal cases, see *Criminal Law*, 25-33.

Parol to vary writing, see *Counties*, 10.

Weight and sufficiency, see *Mayhem*, 2.

Best and secondary.

1. Under Rev. St. Tex. art. 2257, providing that whenever a party to a suit shall file an affidavit that an original deed, duly recorded, cannot be procured, a certified copy shall be admitted in evidence, a petition averring that defendant had the original deed, notifying him to produce it, or that secondary evidence of its contents would be introduced, together with a certified copy thereof, filed with such petition six months or more prior to the trial, is sufficient to render the certified copy admissible.—*Pennington v. Schwartz*, (Tex.) 32.

2. Under act Tex. Aug. 1870, which requires all official oaths of executors and administrators and all inventories to be spread upon the county records, and gives the same effect to certified copies of those records as to copies of the originals, the fact that an executor qualified and rendered an inventory cannot be shown by parol.—*Roberts v. Connelle*, (Tex.) 626.

3. Under Rev. St. Tex. art. 2257, providing that certified copies of recorded instruments may be admitted in evidence upon the filing of an affidavit by the party wishing to introduce such copy, to the effect that the original has been lost or that he cannot procure it, an affidavit by defendants, stating that they "cannot procure the original," is sufficient, and need not show a search for the original.—*Nye v. Gribble*, (Tex.) 603.

4. Where a seller of machinery indorsed the purchaser's notes, and delivered the contract of purchase to the indorsee, evidence that he afterwards wrote to the indorsee for such contract, without obtaining it, does not show sufficient effort to obtain the original to admit secondary evidence of its contents.—*Low v. Tandy*, (Tex.) 620.*

Hearsay.

5. Plaintiff employed a private surveyor to survey a tract of land, to ascertain its boundaries. This surveyor had not made the original survey, nor was he present when it was made. During the course of his work he made numerous declarations, to persons who were present and assisting him, of his opinion as to identity of lines and corners. Held, that these declarations were merely hearsay, and not admissible in evidence, although the surveyor had died before the trial.—*Russell v. Hunnicutt*, (Tex.) 500.

Declarations and admissions.

6. In an action against a railroad company for the death of a jack while being shipped over its road, the evidence showed that a tramp, with a stick in his hand, was found in the car with the jacks; that, soon after being removed from the car by the conductor, he said in the latter's presence: "If it had not been for lopping them mules over the head, I would have froze." Afterwards the jack was found lying dead in the car, with blood running out of its mouth and nose. Held, that the declaration of the tramp, not being part of the *res gestæ*, was inadmissible.—*St. Louis, I. M. & S. Ry. Co. v. Weakly*, (Ark.) 134.

7. On the trial of the validity of an assignment for benefit of creditors, an attaching creditor may show a conversation had with the assignor before the assignment, in which he gave as a reason for making the assignment that he could then get a better settlement with creditors.—*Hazell v. Bank of Tipton*, (Mo.) 173.

8. Conversations had with an assignor, in the presence of the assignee, shortly after an assignment for benefit of creditors, are admissible on the trial of the validity of such assignment in the suit by an attaching creditor.—*Id.*

9. Where defendants, in an action of ejectment, claim title to the land involved through a verbal contract with their father, since deceased, evidence of statements made by the father to others in relation to the contract may be received in connection with other testimony.—*Carney v. Carney*, (Mo.) 729.

Documentary.

10. A book purporting to be a reprint of the Penal Code of the state of Coahuila, Mexico, when duly proven to be such by a competent witness, is admissible in evidence to prove the laws of such state, under Rev. St. Tex. art. 2250, which provides that the printed statute books of any foreign government, purporting to have been printed under the authority thereof, shall be received as evidence of the acts and resolutions therein contained.—*Fernandez v. State*, (Tex.) 667.

11. The usual form of certificate attached by the commissioner of the general land-office to certified copies of patents was changed in the certificate to a copy of patent offered in evidence by the interlineation of the words, "as said patent was originally recorded." Held that, although unusual in form, the certificate did not render the copy incompetent.—*Stephens v. Geiser*, (Tex.) 610.

12. A transfer conveying a number of land certificates purchased from different persons named, among them, "Juan Diaz, one league and labor, dated 11th May, 1838, No. 519," is admissible as a link in the chain of title, in an action by one claiming land under the patentees by virtue of such certificate.—*Talbert v. Dull*, (Tex.) 530.

13. Under Rev. St. Tex. art. 2253, authorizing all heads of departments to give certificates to "any fact or facts contained in papers, documents, or records of their offices," which "shall be received in evidence in all cases in which the originals would be evidence," the number of the certificate by which the land in controversy was patented, where that fact

does not appear in the patent, is properly proved by the certificate of the commissioner of the general land-office.—*Id.*

14. A certificate and copy of his record, given by a probate judge of another state concerning an administration within his jurisdiction, are inadmissible as evidence in Texas, unless offered as an examined copy produced by a witness, or accredited, as described in Rev. St. U. S. §§ 905, 906, by attestation of the clerk under seal of the court duly certified by the judge, or in the case of records, by attestation, under seal of their keeper, duly certified by one of the officers designated by the statute.—*Grimes v. Smith*, (Tex.) 33.

15. Where an action is tried upon amended pleadings, a party may read in evidence the original pleadings of his adversary.—*Schad v. Sharp*, (Mo.) 549.

Parol.

16. Appellee, in a deed to appellants of certain property, retained a lien to secure him against expenses that might be incurred in defending the title of other property conveyed to him by appellants. *Held*, that parol testimony as to the anticipation by the parties of a suit in reference to that title, and the expenses incurred in defending it, was admissible in suit to foreclose the lien.—*Bumpas v. Morrison*, (Tex.) 596.

In former suit.

17. Depositions taken in a prior suit, and relied in a subsequent suit between the same parties, involving the same subject of inquiry and dispute, may properly be read in evidence.—*Lohman v. Stocke*, (Mo.) 9.

Competency.

18. Evidence of the inscription on the tombstone at one's grave may be introduced to prove the date at which she died.—*Smith v. Patterson*, (Mo.) 567.

19. The testimony of the draughtsman of a will is not admissible to prove the intention of the testator.—*McCauley v. Buckner*, (Ky.) 196.

Weight.

20. The declaration of a deceased bank teller that he had lent plaintiff's money, made at the time of exhibiting to plaintiff a note therefor payable to himself or order, when corroborated by the statement of the makers of the note that the teller said the money belonged to an outside party, is sufficient to prove plaintiff's ownership of the note in an action against the bank for the amount paid to it on said note.—*City Nat. Bank v. Martin*, (Tex.) 507.

EXCEPTIONS, BILL OF.

When taken.

1. In Texas, a bill of exceptions, not filed within the term, but after the court has adjourned, will not be considered on appeal.—*George v. State*, (Tex.) 25.*

2. Where all the oral testimony heard by the court is in the record by the recitals in a decree, a bill of exceptions is not necessary.—*Benjamin v. Birmingham*, (Ark.) 183.

Failure to file.

3. A bill of exceptions founded on a statement of facts cannot be considered where the statement was not filed until after adjournment of the court at the end of the term.—*Morris v. Rhine*, (Tex.) 315.*

Refusal to sign.

4. On appeal from a conviction for murder the trial judge refused to sign the bill of exceptions on the ground that it was not true. Defendant's counsel had the rejected bill signed by three by-standers, and filed with the clerk four affidavits as to its correctness, as provided by Rev. St. Mo. §§ 3633-3641. One of the affiants stated that he did not hear all the evidence, but that his own testimony was correctly reported. The other three affiants were on the panel of jurors. One of them stated that the proceedings were in the main correctly stated in the bill, and the other two stated that the bill was true according to their best recollection at the time. The state, as authorized by section 3640, also filed the affidavits of four lawyers, residents of the county, to the effect that they were present during the trial, heard all the evidence, objections, and rulings of the court, had carefully examined the bill prepared by defendant's counsel, and that it was not true. *Held* that, under such preponderance of evidence against the correctness of the bill, it could not be considered.—*State v. Hronek*, (Mo.) 237.

5. A paper which the trial judge states to be incorrect, and which he refuses to allow, will not be considered as a bill of exceptions.—*Rushing v. State*, (Tex.) 807.

EXECUTION.

See, also, *Attachment*.

Exemptions, see *Exemptions; Homestead*.

Sale.

1. Rev. St. Mo. § 2381, which requires notice to be given to defendant when his real estate, situated in a different county from that in which defendant resides, is sought to be sold under an execution, does not apply where the judgment was rendered, and the execution issued, in the county where the land is situated.—*Lohman v. Stocke*, (Mo.) 9.

Sheriff's deed.

2. A sheriff's deed, under an execution issued more than seven years after entry of judgment, and the docket showing the issuance of such execution, are admissible in evidence to show title in the purchaser at the sheriff's sale, although no execution had been issued on the judgment within one year after its rendition, since an execution issued on a dormant judgment is only voidable.—*Maverick v. Flores*, (Tex.) 636.

EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution*.

Appeal from allowance of claim, see *Appeal*, 3-5.

Evidence of appointment.

1. A receipt and account current dated in New York purporting to pass between an executor having administration in Connecticut and the executor having administration in Texas, is not legal evidence as to the then pendency of the administration in Connecticut.—*Grimes v. Smith*, (Tex.) 33.

Bond.

2. Where a will directs that the executor sell all the estate of the testator, pay first his debts and certain legacies, and loan out the balance for the payment of certain other legacies, payable on the arrival at age of the legatees, the executor, having completely administered the estate, and paid the special legacies within two years, becomes trustee for the sums loaned out, especially where he is made residuary legatee, and the liability of the sureties on his bond as executor ceases.—*Allen v. Kennedy*, (Ky.) 882.

3. Under Gen. St. Ky. c. 39, art. 2, § 13, providing that "if a personal representative shall give a new bond when ruled to do so, on motion of a surety, his former surety shall not be bound for any act of his done after the execution" of such second bond, the giving of such a new bond does not release the former surety from liability for acts done by his principal before the execution of the second bond, although such bond contain a covenant to indemnify him for loss on account of his suretyship.—*Pepper v. Donnelly*, (Ky.) 441.

Contracts of executor.

4. In trespass to try title by one claiming as devisee of a league of land, a contract entered into by S., claiming to be executor, and a third party, for the location, by such third party, at his own expense, of a certificate covering the land in question, and a subsequent location and grant by such executor to the third party of the land in question, is not admissible in evidence; it not having been shown that S. had ever qualified as executor, and the will itself showing that, if he had qualified, he had no authority to sell the land.—*Grimes v. Smith*, (Tex.) 33.

Allowance of demands.

5. Under Rev. St. Tex. arts. 1942, 1943, providing that a person may so make his will that the probate, registration, and return of inventory, appraisement, and list of claims, shall be all the action to be had by the county court in reference to his estate, and an executor of such will may be sued for a debt against the estate, and execution shall run against the estate in the hands of the executor, the qualification and return of inventory by one of two executors of such a will is sufficient to withdraw the estate from administration by the court, and subject property in the hands of such executor to levy and sale on execution.—*Roberts v. Connelle*, (Tex.) 626.

6. When a claim against an estate is considered on its merits and disallowed, the claimant cannot complain because the court denied his motion to strike out, for want of verification, an answer setting up that he had assigned his claim before its presentation to the administrator, since such ruling, if incorrect,

was, under the circumstances, harmless error.—*Glenn v. Kimbrough's Estate*, (Tex.) 81.

7. Where a testator had boarded a person free of charge, which was intended as a gratuity, the executors cannot revoke the gift, and recover the amount of such board for the estate.—*Stevens' Ex'rs v. Lee*, (Tex.) 40.

8. Claims presented for approval of the probate court against an estate may be contested without affidavit supporting the objections thereto.—*Glenn v. Kimbrough's Estate*, (Tex.) 81.

Settlement and accounting.

9. In an action by the heirs against the administrator of the administrator of their intestate to recover on a promissory note alleged to have been given by the administrator to the deceased, and never accounted for, proof that the estate was withdrawn from administration and turned over to the heirs; that two years afterwards the probate court ordered the administrator to file an account to include the note, which was not done, is not sufficient to establish the indebtedness, the court having no authority to order an inventory after the estate had been withdrawn from administration, though no formal order of discharge had been entered.—*Davis v. Harwood*, (Tex.) 58.

10. Rev. St. Tex. art. 1820, providing that, when letters testamentary or of administration have been granted, "the persons interested in the administration may proceed after any lapse of time to compel a settlement of an estate which does not appear from the record to have been closed," abrogates the rule that the administration is presumed to have been closed, where a considerable length of time has elapsed since the last order was made; and, in the absence of an order of record showing the settlement of an estate, such settlement may be compelled at any time.—*Branch v. Hanrick*, (Tex.) 539.

11. A purchaser of the interest of an heir has the same right to apply for a settlement of the estate and for partition as the heir would have had.—*Id.*

12. On a bill to surcharge and falsify an administrator's accounts, as settled in the probate court, the chancery court has no jurisdiction to go further than to inquire into specific charges of fraud, accident, or mistake, and is limited to such items as are affected thereby; and its jurisdiction does not embrace matters passed upon by the probate court, which may be reviewed on appeal; and such jurisdiction cannot be enlarged by the administrator's answer admitting mutual mistakes, and asking that the report as a whole be set aside.—*McLeod v. Griffie*, (Ark.) 337.

Sales by order of court.

13. Where, on exception to the commissioner's report of judicial sale of decedent's land for distribution among the heirs, the heir excepting offers \$2,000, without guaranty or security for the land, which sold for \$1,715, the amount brought at the sale is not so inadequate as to raise the least presumption of fraud, and the sale, having been duly advertised and publicly and fairly made, will not be disturbed.—*Calvert v. Alexander*, (Ky.) 696.

14. On judicial sale by the commissioner of decedent's land for distribution among the heirs, it is not indispensable that the report shall contain a precise and full description by metes and bounds of the land sold.—*Id.*

15. The probate court having directed that a deed be made to M., in accordance with a bond for title given by the deceased, an administrator's deed, reciting full payment of the purchase money, passed the equitable title, although not executed by both the administrator and administratrix, as it should have been.—*Harrison v. McMurray*, (Tex.) 613.

16. When real estate of a decedent is sold, under decree of court, to pay debts of the estate, such sale is absolute, and free from the equity of redemption.—*Maxwell v. Smith*, (Tenn.) 840.

Action against.

17. A demand, accompanied by an affidavit of the justice of the claim, need not be made by a ward before suit against an administrator for injury to his estate resulting from decedent, as county judge, having allowed his guardian to qualify without surety, in violation of Rev. St. Ky. c. 48, art. 1, §§ 3, 4, imposing a liability on the judge for such violation.—*Commonwealth v. Netherland's Adm'r*, (Ky.) 372.

Probate practice.

18. Under Rev. St. Mo. §§ 205, 206, enacting that "when the demand or set-off is not due at the time of trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or judgment of the court;" and, "in case the parties do not agree to rebate the demand or set-off, no execution shall issue upon any judgment until the demand or set-off upon which the judgment was rendered shall become due and payable," the court should, on allowing a claim against an estate founded on a note not yet due, if the parties do not agree to a rebate, classify the demand, and order that no execution shall issue until after the maturity of the note.—*Cassatt v. Vogel*, (Mo.) 169.

19. *Scire facias* by a creditor on a refunding bond given by a legatee is, under Code Tenn. § 2818, the remedy to be pursued in the county court where such bond is of record as by said section provided; and it is error in a chancery suit on a bill not filed for the purpose, and to which many of the sureties are not parties, to allow writs of *scire facias* to issue, requiring the legatees and their sureties on refunding bonds to show cause why judgment should not be rendered on such bonds. The proper course in such case, after a decree against the personal representative and a finding of fully administered, is to file an original or supplemental bill, setting up such decree and finding, as provided in said section.—*Maxwell v. Smith*, (Tenn.) 840.

EXEMPTIONS.

See, also, *Attachment*, 4; *Homestead*.

What exempt.

1. Under Const. Tex. 1876, art. 16, § 49, which makes it the duty of the legislature "to pro-

tect by law from forced sale a certain portion of the personal property of all heads of families," the provision of Rev. St. Tex. art. 2333, which exempts from forced sale "all provisions and forage on hand for home consumption," does not contemplate that gathered crops, merely because they have grown upon the homestead, should be exempt from seizure.—*Coates v. Caldwell*, (Tex.) 922.

2. A matured crop grown upon a homestead, and not severed from the land, is exempt from execution.—*Id.*

Unlawful seizure.

3. In an action for levying upon exempt property, the value of the property taken, with interest, is the limit of damages.—*Low v. Tandy*, (Tex.) 620.

Express Companies.

Liability for loss, see *Carriers*, 7.

EXTRADITION.

Interstate.

1. A warrant issued by the state executive for the apprehension and extradition of fugitives from justice, is sufficient when it recites, without setting out in full, the affidavit on which it is based.—*Ex parte Stanley*, (Tex.) 645.

2. The recital in an extradition warrant that the demand for the arrest of the fugitive was accompanied by a copy of the affidavit on which it was based, "duly certified as authentic," is equivalent to a recital that the copy was "certified as authentic by the governor" of the state who made the demand, as it could not have been duly certified by any other authority.—*Id.*

3. An extradition warrant stating that the persons whose arrest and surrender is thereby ordered, stand charged with a certain crime in the demanding state, and that they "have taken refuge in the state of Texas," sufficiently shows that they were fugitives from justice.—*Id.*

4. It is not essential to the validity of an extradition warrant that it should show that the crime with which the fugitives are charged in the indictment, recited in the demand, is a crime by the law of the demanding state.—*Id.*

FACTORS AND BROKERS.

Real estate agents.

1. Plaintiff, a real-estate broker, agreed to procure a purchaser for certain land of defendant at a price named, for which he was to receive an agreed sum as commission. He found such purchaser, and a written agreement was entered into by both defendant and the proposed purchaser, by which the latter was to take the land at the price named, and was to have time to examine the title. Within the time fixed, the purchaser made a groundless objection to the title, which was in fact good, and refused to take the land; but defendant did not sue for specific performance. *Held*, that plaintiff was entitled to the full amount

of his commission. *FOLKES and SNODGRASS, JJ.*, dissenting.—*Parker v. Walker*, (Tenn.) 891.*

2. Where defendant was willing and able to complete a sale, and the purchaser, on a flimsy objection to the title, refused to accept a good title, and plaintiffs, real-estate brokers, had not reduced the contract for such sale to writing, so that specific performance would lie on part of defendant against such purchaser, plaintiffs are not entitled to their commissions for such sale from defendant.—*Gilchrist v. Clarke*, (Tenn.) 572.*

FALSE IMPRISONMENT.

Former jeopardy, see *Criminal Law*, 7.

Evidence.

Where informant, on the way to his cotton-patch, was intercepted by several persons, and abused for having made certain statements, and finally forced to sign a "lie bill," on paper admitting such statements to be false, and defendant, separated from the others by a fence, did nothing further than to observe what was going on, the fact that he did nothing to prevent the commission of the offense is not sufficient to sustain his conviction for false imprisonment.—*Walker v. State*, (Tex.) 647.

FALSE PRETENSES.

What constitutes.

1. A false representation by defendant that a mortgage which he gave was a first mortgage, being urged thus to represent by the actual first mortgagee, is not such false pretense as to render defendant guilty of larceny under *Manuf. Dig. Ark. § 1645*, providing that one who obtains anything of value from another by means of false pretenses, with intent to defraud, shall be guilty of larceny, etc., since the first mortgagee, by urging such false representation, waived his prior lien, and thus rendered the mortgage, fraudulently obtained, a first mortgage, and therefore the pretense was not actually false.—*State v. Asher*, (Ark.) 177.

Indictment.

2. In a prosecution under *Rev. St. Mo. 1879, § 1561*, which provides that in the indictment it shall be sufficient to charge the unlawful and felonious obtaining of the money "by means and by use of a cheat or fraud or trick or deception, or false and fraudulent representation or statement, or false pretense, as the case may be," an indictment charging that defendant "did then and there unlawfully, willfully, and feloniously obtain from D. * * * his money, by means and by use of a cheat and fraud and trick and deception, and fraudulent representation and statement, and false pretense, contrary," etc., is sufficient.—*State v. Sarony*, (Mo.) 407.

3. Under *Rev. St. Mo. § 1561*, defining certain offenses as felonies, and providing that an indictment for such offenses shall be sufficient if charging that "the accused did unlawfully and feloniously obtain from —

his or her money or property by means and by use of a cheat," etc., an indictment charging that defendant "did obtain of and from E. and P. her, his and their property, to-wit, certain real estate and personal property, the exact description of which is unknown to these grand jurors, of the value of \$8,075, by means," etc., is fatally defective, as not stating what particular property defendant was charged with having feloniously obtained.—*State v. Crooker*, (Mo.) 422.

4. Under *Rev. St. Mo. § 1561*, providing that a person who, with intent to defraud, shall obtain the property of another by means of deception, shall be guilty of a felony, an indictment, charging that a deed belonging to certain parties was fraudulently obtained from them by the accused, yet alleging that such parties had executed and delivered the deed to a third person, is bad, as the deed is the property of the third person and he alone can be defrauded.—*State v. Dowd*, (Mo.) 7.

5. An indictment for swindling by means of a chattel mortgage, accompanied by verbal representations, which fails to set out the mortgage *in his verbis*, or, if that cannot be done, to state the reason for the omission, and to set out the mortgage in substance, is fatally defective.—*Ferguson v. State*, (Tex.) 479.

Evidence.

6. Upon trial for obtaining goods by false pretenses by means of a letter giving a false statement of the financial standing of defendant's firm, it appeared that the letter was written and mailed, with an order for goods, in Jasper county, to a firm in St. Louis; and that they, relying upon the statement, filled the order, and delivered the goods to a railroad company in St. Louis, consigned to defendant's firm, in Jasper county. *Held*, that the crime was committed in St. Louis county.—*State v. Lichter*, (Mo.) 720.

7. Evidence of defendant's conduct in the disposition of the goods is admissible as bearing upon the question of his intent in obtaining them.—*Id.*

8. In a prosecution under *Rev. St. Mo. 1879, § 1561*, relating to cheats and frauds, for selling plaintiff tickets to a lecture which was not delivered, evidence that defendant sold such tickets to others at about the same time, and printed, posted, and circulated hand-bills advertising the delivery of such lecture, is to be considered by the jury as bearing on the question of fraudulent intent.—*State v. Sarony*, (Mo.) 407.

Instructions.

9. In a trial for obtaining goods by false pretenses by means of a false statement of the financial standing of defendant's firm, it appeared that the statement was written by a third person from figures furnished by the firm, but that defendant was not present when the statement was written. Defendant requested an instruction that unless the jury believed beyond a reasonable doubt that the defendant "did make," and was "present, counseling, aiding, and abetting the making of such statement," the verdict must be not guilty, which the court gave, with the modification that it was not necessary that defendant should have been present when the writ-

ing was done; but if the statement was written as the result of a common understanding and fraudulent conspiracy on the part of defendant, and the one writing the statement, though not written in the presence of the defendant, it was the statement of defendant. *Held*, that the modification was properly given, as explaining what was meant by the terms "present, counseling, aiding, and abetting."—*State v. Lichliter*, (Mo.) 720.

FENCES.

Pulling down.

A tenant who, against the consent of the landlord, removes a panel from a fence separating the leased premises from the farm of a third person, for the purpose of obtaining a more convenient passage-way, such passage-way not exposing the growing crops of another to depredation, cannot be convicted under Pen. Code Tex. art. 684, providing that any person who shall break, pull down, or injure the fence of another without his consent, shall be fined.—*Hooks v. State*, (Tex.) 808.

Fire Insurance.

See *Insurance*.

Fires.

Set by locomotives, see *Railroad Companies*, 84, 85.

FORCIBLE ENTRY AND DETAINER.

Notice.

Where the action of unlawful detainer will lie under the Tennessee statutes, no other notice than the suing out of the writ is necessary.—*Mallory v. Hananer Oil-Works*, (Tenn.) 896.

FORGERY.

See *Extradition*.

What constitutes.

1. Pledging a forged negotiable bill of exchange as security for the payment of goods taken on credit, with knowledge that it is forged, is as much the uttering of a forged instrument, denounced by Pen. Code Tex. art. 448, as giving it in payment.—*Thurmond v. State*, (Tex.) 473.

Indictment.

2. An indictment for uttering a forged writing, which charges the accused with having the writing, knowing it to be false, presenting it to the party defrauded, representing it as genuine, and thereby obtaining property of value, is sufficient; the falsity of the writing being sufficiently stated in the charge, that the accused knew it to be false, it being immaterial when, where, how, or by whom it was forged.—*Lockard v. Commonwealth*, (Ky.) 206.

FORNICATION.

Evidence.

1. In a prosecution for fornication, where the defendant in her confession, which was relied upon to establish the fact of the misdemeanor, showed that she was a prostitute, the admission of such confession, though irrelevant, is harmless error.—*Perigo v. State*, (Tex.) 660.

2. On a prosecution for fornication, the confessions of the two defendants in a joint trial, though not made in the presence of each other, are admissible, and it is for the defendants to request the court to instruct the jury that such confessions could only affect the party making them.—*Id.*

Fraud.

See, also, *Assignment for Benefit of Creditors*, 11-14; *Fraudulent Conveyances*. As ground for rescission, see *Equity*, 4.

FRAUDS, STATUTE OF.

Acceptance of draft.

1. A verbal acceptance of a bill of exchange is not within the statute of frauds.—*Neumann v. Schroeder*, (Tex.) 632.

Agreement relating to land.

2. Defendants, under a verbal contract with their father to pay the interest and debt due on certain land for the purchase price, and to take care of their father and mother for life, and in consideration thereof to have the land, had for 15 years labored on the land, paying debts and liabilities, and taking care of their parents according to the contract. *Held*, that the contract was so far executed by them as to take it out of the statute of frauds.—*Carney v. Carney*, (Mo.) 729.*

FRAUDULENT CONVEYANCES.

See, also, *Creditors' Bill*.

Consideration. ●

1. Where the owner of land, being old and infirm, conveyed it to his nephew in consideration of support during life, under an agreement to convey back to him in case he became dissatisfied, and the land was reconveyed to him according to agreement, and then conveyed by him to the nephew's wife, such reconveyance by the nephew is valid as against his creditors, although the agreement was by parol, since the giving of the deed was a waiver of the defense of the statute of frauds.—*C. Aultman & Co. v. Booth*, (Mo.) 742.

Knowledge of grantee.

2. Knowledge by a preferred creditor that a transfer of property to him by an insolvent firm was made with the intent on their part to delay, hinder, or defraud other creditors does not amount to a participation in the intended fraud, when the transfer was accepted in good faith by the creditor solely for the

purpose of saving a *bona fide* debt.—Sexton v. Anderson, (Mo.) 564.

3. On a creditors' bill to subject a certain fund to debts, it appeared that M., one of the firm of V., M. & Co., on the death of V., administered on the partnership estate; that at that time the firm was indebted largely to L.; that M. applied all his individual means in payment of L.'s debt, and on the final distribution of the partnership estate, having obtained an order therefor, paid 43 per cent. of L.'s debt out of the firm assets; and that M. was largely indebted at the time. *Held*, that such payment to L. out of the firm assets, being for no consideration, was in fraud of M.'s creditors, and void, though L. was innocent of any fraudulent intent.—Lyons v. Murray, (Mo.) 170.

Rights of creditors.

4. Creditors having general judgments against a debtor cannot issue executions thereon after the debtor's death; and, where the debtor's estate proves to be insolvent, they need not proceed further at law to entitle them to equitable relief as against the debtor's fraudulent grantee.—*Id.*

Rights of purchaser.

5. Where property sold is afterwards seized under an execution against the vendor, testimony as to his reputation for solvency is pertinent in an action by the purchaser for the recovery of the value of the property to affect the purchaser with knowledge, or want of knowledge, of the vendor's failing circumstances.—Goldberg v. McCracken, (Tex.) 676.

Action to set aside.

6. An action by a judgment creditor to set aside a conveyance as fraudulent as to creditors is within Rev. St. Mo. § 3494, allowing service of notice by publication "in all actions, at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, etc., to or against real estate."—Adams v. Cowles, (Mo.) 711.

7. A notice by publication in an action by a judgment creditor to set aside a conveyance as fraudulent as to creditors, which, after describing the land, notifies defendant that the object of the suit is to obtain a decree of title to it, is not bad for failure to state "briefly the object and general nature of the petition," as required by Rev. St. Mo. § 3494.—*Id.*

8. Where an insolvent purchased several tracts of land with his own money, but had the deeds made to his wife, and the land was subsequently sold under execution against the husband, a bill by the purchaser, reciting the facts as to each deed, and asking relief separately, praying that the deeds be set aside as in fraud of creditors, is based upon one general right, and is not multifarious, and the court properly refused to compel plaintiff to elect on which cause of action he will proceed.—Rinehart v. Long, (Mo.) 559.

9. An allegation, in a bill to set aside certain conveyances as fraudulent, that at the dates of the deeds defendant was wholly insolvent, owing some \$14,000, and that his property was wholly inadequate to satisfy his indebtedness, sufficiently shows that defendant

had no other property out of which the debts could be made.—*Id.*

10. A purchaser at an execution sale, in seeking to set aside or defeat a fraudulent conveyance, made by the judgment debtor, occupies the same position and has all the advantages of the judgment creditor.—*Id.*

11. In an action to set aside a judgment by confession, on the ground of intent to defraud creditors, a charge to the effect that, if the jury find that the maker of the judgment note was insolvent at the time the note was given, and gave it to defraud other creditors, and that if the payee knew of such insolvency, and intent to defraud, then the judgment would be void as to other creditors, is not in conflict with a charge to the effect that, if the payee had knowledge of such facts regarding the finances of the debtor as would have put a prudent business man on inquiry, and if such inquiry, when made, would have led to knowledge of such insolvency, then the payee would be chargeable with notice of such insolvency.—Mack v. Block, (Tex.) 495.

12. Where a debtor gives his judgment note, with an agreement allowing 10 per cent. interest and attorney's fee if the note has to be sued on, for aggregate indebtedness, in which is included a debt due to a third party, the assumption of this debt by the payee is a sufficient consideration for the agreement to pay 10 per cent. interest and attorney's fee, and the mere giving of the note, being for a just debt, is not fraudulent or a badge of fraud as to other creditors.—*Id.*

Evidence.

13. In an action to set aside a deed of trust as in fraud of creditors, and for want of consideration, evidence that at the date of the deed the grantor was insolvent; that the date of the acknowledgment and record was a year after the date of the deed, and only a few days prior to the judgment under which plaintiff claimed; that the notary had been requested to date the acknowledgment back to the date of the deed; that the person attempted to be secured was worth less than one-fifteenth the amount secured to him; and that defendant's testimony was evasive and contradictory, is sufficient to support a judgment setting aside such deed.—Lohman v. Stocke, (Mo.) 9.

14. Where a bill of sale of goods and fixtures made by an insolvent firm to a creditor, absolute in form, is accompanied by an agreement, signed by such creditor at the same time as the bill of sale, by which the creditor engages to pay certain specified indebtedness of the firm, they are different parts of one and the same transaction, and must be construed together, and parol evidence is admissible to show that the consideration for the goods was the discharge of existing debts of the firm by such creditor.—Sexton v. Anderson, (Mo.) 564.

15. Inadequacy of consideration is no defense in a suit by the purchaser of land at an execution sale to set aside a prior conveyance as fraudulent, where the land is incumbered, and the judgment debtor disclaimed ownership of the land, and gave notice that whoever bought the land would buy a lawsuit.—Rinehart v. Long, (Mo.) 559.

16. Where lands are paid for by an insolvent debtor, but the deeds are made to his wife, who pays no part of the consideration, the husband owning other real estate, heavily incumbered, which had been sold under legal process, and from which he had been ousted in an ejectment suit, the conveyances to the wife are fraudulent as to creditors of the husband.—*Id.*

17. Where a sale of goods is attacked as being in fraud of creditors, it is error to permit the vendor to be asked: "Is it not true that the notes given you in part payment of the goods were taken and made in good faith?"—*Schmick v. Noel*, (Tex.) 83.

18. And it is error to charge that "fraud cannot be presumed, but must be proved to the satisfaction of the jury by evidence adduced at the trial. And in this case the burden is on the defendants to prove the fraud as alleged by them; but, as any other fact, it may be proved by positive or circumstantial evidence."—*Id.*

GAMING.

Indictment.

1. An indictment under Pen. Code Tex. art. 185, prohibiting gaming, for money or other consideration, within the limits of a city or town, on Sunday, which charges that defendant played a game of cards for a horse, without alleging the name of the person with whom he played, or with whom the wager was made, is defective.—*Shook v. State*, (Tex.) 329.

Evidence.

2. A conviction under indictment for keeping a gaming table, will not be sustained where the evidence merely establishes the fact that defendant was frequently seen in the house where the offense was committed, but failed to show that he took any part therein, or that he owned or controlled the premises, or had any interest in the table, or was concerned in its operations.—*Erwin v. State*, (Tex.) 276.

3. Where the only evidence in a prosecution for playing cards at a house for retailing spirituous liquors is the testimony of one witness, who looked through a key-hole 70 feet from the place where certain parties were confessedly playing, at 11 o'clock at night, and who states that he does not think he could be mistaken as to defendant's identity, and where two persons who participated in the game testify that defendant was not present, but that one whose face and hat resembled those of defendant was present, a conviction cannot be sustained.—*Tucker v. State*, (Tex.) 813.

4. A conviction for playing cards at a house for retailing spirituous liquors cannot be sustained where the venue is not proved.—*Id.*

5. On an indictment for permitting a game of monte to be played in a house under defendant's control, the evidence is insufficient to warrant a conviction where it appears that the game was played during the occupancy of the house by a tenant who was then in possession and carried the keys.—*Kimbrough v. State*, (Tex.) 476.

6. On indictment for permitting a game at cards to be played on premises appurtenant to

a house for retailing liquors, a deed of conveyance to defendant is admissible to show ownership in him.—*Biles v. State*, (Tex.) 650.

7. On prosecution for permitting a game at cards to be played in a house appurtenant to a liquor saloon, where a deed of conveyance was introduced to show defendant's ownership, it is error to exclude evidence by one of the grantors that defendant was not present when the deed was signed, that it was not delivered to him, that he did not pay the grantors anything, nor that he had any knowledge of the deed other than that derived from the indictment.—*Id.*

Garnishment.

Costs of garnishee, see *Costs*, 3.

Jurisdiction of justice, see *Justices of the Peace*, 3.

Gifts.

Between husband and wife, see *Husband and Wife*, 5.

GRAND JURY.

Disqualification, see *Criminal Law*, 4.

Qualifications.

1. The fact that one grand juror was a justice of the peace and two were deputy-sheriffs does not disqualify them from serving, although, under Rev. St. Tex. art. 3014, such officers are exempt from jury service when they claim such exemption.—*Owens v. State*, (Tex.) 668.

Appointment of foreman.

2. By permitting the grand jury to select its foreman, and report its action to the court, and directing the members selected to be sworn as foreman, the court, in effect, appoints the foreman; and an indictment found by such grand jury is not objectionable on the ground that the foreman was selected by the jury, and not by the court.—*Blackmore v. State*, (Ark.) 940.

GUARDIAN AND WARD.

Right to costs, see *Costs*, 1.

Appointment of guardian.

1. Under Rev. St. Ky. c. 43, art. 1, §§ 8, 4, providing that no guardian, except a testamentary one, can act until he has been appointed by the proper court and given security, approved by the court, and that if the court fails to take such covenant, or accepts persons for surety who do not satisfy it of their sufficiency, the judges in default shall be liable to the ward for any damage he may sustain, a judge who allows a guardian to qualify on his signing another's name as surety, representing that he had authority to sign, it appearing that he had no authority, and that the act was never ratified, is liable for injury resulting to the ward's estate.—*Commonwealth v. Netherland's Adm'r*, (Ky.) 272.

2. Where, in chancery, the final judgment recites that a guardian *ad litem* of minors appeared in pursuance of a due and proper appointment by the court, such recital is a sufficient record entry to establish the guardian's authority.—*Benjamin v. Birmingham*, (Ark.) 188.

Non-resident guardian.

3. Under Rev. St. Mo. §§ 2597, 2598, 2609, providing that where a guardian and ward are non-residents, and the ward has property here, the probate court may order the property to be delivered to the non-resident guardian. Such an order will not be made, where the funds are in the hands of a curator in this state, and the non-resident guardian was appointed at the instance of the ward's father, who, as former guardian, had misappropriated the funds, and was seeking to get control of them again.—*In re Wilson*, (Mo.) 869.

Action by ward.

4. A ward who brings suit, within a year after attaining majority, against an administrator for injury to his estate resulting from decedent, as county judge, having allowed his guardian to qualify without surety, in violation of Rev. St. Ky. c. 43, art. 1, §§ 3, 4, imposing on the judge a liability for such violation, is within the saving of the statute, and may maintain his action.—*Commonwealth v. Netherland's Adm'r*, (Ky.) 272.

5. That an action has been brought by an administrator for settlement of his decedent's estate, and injunction issued enjoining all persons from bringing suit against the estate except in said suit, does not prevent a ward bringing a separate action for an injury to his estate resulting from decedent, as county judge, having allowed his guardian to qualify without surety, in violation of Rev. St. Ky. c. 43, art. 1, §§ 3, 4, imposing a liability on the judge for such violation.—*Id.*

HABEAS CORPUS.

Return.

Where, on requisition of the governor of a sister state, a person is arrested as a fugitive from justice, it is error on *habeas corpus* to admit in evidence, as part of the sheriff's return, the affidavit on which the warrant of arrest was based, but to which it was not attached, yet is no ground for the reversal of an order remanding the prisoner.—*Ex parte Stanley*, (Tex.) 645.

HEALTH.

Selling diseased meat.

Under Pen. Code Tex. art. 892, making it unlawful knowingly to slaughter for food any diseased animal, or to sell the flesh of any animal slaughtered when diseased, it is essential that the defendant should know, at the time of the sale, that the meat was diseased, before he can be convicted of such offense.—*Teague v. State*, (Tex.) 667.

HIGHWAYS.

Streets, see *Municipal Corporations*, 7-10.

Establishment by statute.

1. A writ of *ad quod damnum*, which directs the sheriff to summon a jury to meet on the land of the proprietors over which it is proposed the road shall run, and to assess the damages in the mode specified by statute, and set forth in the writ, sufficiently describes the land, under Gen. St. Ky. 1883, c. 94, § 8, providing that a writ of *ad quod damnum* shall be awarded commanding the proper officer to summon a jury to meet on the land of the proprietors over which it is proposed the road shall run, and assess the damages for the land proposed to be taken.—*Smoot v. Schooler*, (Ky.) 202.

2. Rev. St. Mo. § 6985, provides that applications for the establishment of new roads shall be made by petition, signed by at least 12 householders of the township through which the proposed road is to run, 8 of whom shall be of the immediate neighborhood. Section 6986 requires public notice of such application. *Held*, on *certiorari* to remove proceedings to open a public road from the county court to the circuit court, when it did not appear on the face of the proceedings that these sections had been complied with, that the proceedings should be quashed, the jurisdictional requisites not being affirmatively shown, although the petition stated the residence of the petitioners as complying with section 6986, and the order reciting the filing of the petition stated that due legal notice of the application had been given.—*Chicago, R. I. & P. Ry. Co. v. Young*, (Mo.) 776.

3. Rev. St. Mo. § 6987, relating to opening public roads, recites: "The commissioner shall take the relinquishment of the right of way of all persons who may give such, and make report thereon. The commissioner shall also state in his report the names of all persons who have relinquished * * * or failed to relinquish the right of way, giving the names of both, and the reasons therefor." *Held*, that this contemplates a conference between the land-owners and the commissioner, which must affirmatively appear on the face of the proceedings before the county court can take jurisdiction to appoint jurors to assess damages.—*Id.*

Obstruction.

4. A count in an information for obstructing a public road, charging that defendant "did unlawfully * * * prevent the free use of said public road, said prevention not being expressly authorized by law," charges no crime; being formulated under Code Crim. Proc. Tex. art. 124, providing that, whenever any road is made a public highway, no person shall obstruct, or prevent the free use thereof, except when expressly authorized by law, which article is inoperative because it provides no penalty.—*Rankin v. State*, (Tex.) 982.

5. Where G. extended the fences of land leased from defendant so as to include a public road, evidence of defendant's statements that he had nothing to do with the road; that he had leased the land to G., and had directed

G. to fence the land, but not the road, and had paid him for it; and evidence that witness had seen a check with which defendant paid G. for fencing the land, and that defendant lived 15 miles from the road,—is insufficient to sustain a conviction for obstructing the road.—*Watson v. State*, (Tex.) 817.

6. Proof that defendant permitted a fence to remain after a public road had been established over the land, but not opened, is insufficient to support a conviction for obstructing a public road.—*Rankin v. State*, (Tex.) 932.

HOMESTEAD.

Contract to convey, see *Specific Performance*, 1.

Nature and extent of right.

1. Where the title to land occupied as a homestead becomes vested in the wife, and, after her death, the husband continues so to occupy it, being the head of a family of children, his estate by curtesy is not subject to the lien of a judgment obtained against him after the wife's death, homestead rights attaching to a life-estate as well as to a fee.—*Kendall v. Powers*, (Mo.) 798.

2. Under the Texas homestead law, one residing on property which he does not own may claim as a homestead a lot upon which are erected a gin and mill buildings, for the exercise of his business and calling.—*Low v. Tandy*, (Tex.) 620.

3. Where a mortgage was given upon the machinery of a gin-mill, which was attached as a fixture to the realty, and the mortgagee, instead of foreclosing the mortgage, sues on the note secured thereby, and levies on such machinery, the mortgagor may claim it as his homestead.—*Id.*

Acquisition.

4. Defendant claimed that a store-house and lot which had been attached was his place of business as a commission merchant, and therefore part of his homestead, and not subject to attachment. Plaintiff insisted that opening the house ostensibly was a pretense to avoid payment of debts; that he had done but little, if any, business as a commission merchant. *Held*, that transacting business was not necessary to exempt the property from attachment, if defendant opened it in good faith for that purpose.—*Gassaway v. White*, (Tex.) 117.

5. Defendant claimed a store-house and lot exempt from attachment as his place of business as a commission merchant. *Held*, that evidence that he had a license to do business all over the state, but remained at home, and usually kept the house open, was not sufficient to show that the house was not necessary to such business, so as to warrant setting aside a verdict for defendant, on the ground that it was contrary to the evidence.—*Id.*

6. A tract of less than 200 acres becomes a homestead by the owner living upon the land with his family, and it is unnecessary that he should have "designated" it as a homestead under Rev. St. Tex. art. 2844, which provides that "the head of the family shall, by filing with the clerk of the county court a description, by metes and bounds, designate

that portion of the larger tract which is to be the homestead," since such statute applies to those exemptions of tracts of land which exceed the limit of 200 acres allowed by the constitution and laws.—*Coates v. Caldwell*, (Tex.) 922.

7. When real estate is claimed as a homestead, it is immaterial whether or not the claimant has, at all times since his acquisition thereof, used or claimed the same as homestead. His rights depend on the facts existing at the time the levy is made thereon; and, if so used at that time, such real estate is not subject to forced sale.—*Ingle v. Lea*, (Tex.) 825.*

Sale under mortgage.

8. Though, on foreclosure of a mortgage executed by the husband without joining his wife, the homestead is sold subject to her homestead and dower rights, the sale passes the interest of neither, under Gen. St. Ky. c. 88, art. 18, § 13, which provides that no mortgage or other release of the homestead exemption shall be valid, unless subscribed by both husband and wife, and acknowledged and recorded in the same manner as conveyances of real estate.—*Atkinson v. Gowdy's Adm'r*, (Ky.) 698.

Abandonment.

9. A man who had a homestead in Texas went to Arizona, bought property and located there, with intent to remain. His wife and children continued on the homestead, intending to follow him as soon as they could get the means by sale of the homestead. This they had not succeeded in doing, and were still living on the homestead, when it was levied on for the husband's debts. *Held*, that there was no abandonment of the homestead, and that the levy and sale were invalid.—*McDaniel v. Ragdale*, (Tex.) 625.*

10. H. owned a house and lot, in which he carried on the saloon business as a means of support for himself and family. Attachments were issued, and the personal property and fixtures used in the saloon were levied on. While the saloon was closed under these attachments, other creditors attached the house and lot. *Held*, that the closing of the business by the levy of the former attachments did not work an abandonment of the homestead character of the property.—*King v. Harter*, (Tex.) 808.

11. Where a business which is exempt from execution has been levied on, an arrangement regarding it cannot be fraudulent as to creditors; nor can an estoppel to assert a homestead be based on such an arrangement.—*Id.*

12. Proof that defendant had not paid the county and city tax, nor obtained a license as required by law, as commission merchant, would not subject his homestead to forced sale for carrying on an illegal business, as the business was legitimate, and only the failure to pay the tax penal.—*Gassaway v. White*, (Tex.) 117.

13. Defendant sold part of a tract of land owned by him, including his homestead, and then removed to a neighboring town, where he engaged in business. He also endeavored to sell the residue of the tract. *Held*, that he

had abandoned the homestead.—*Nethercutt v. Herron*, (Ky.) 13.*

Enforcement.

14. H. having died before the house and lot were sold on execution, his widow applied to have it set off to her as homestead. On trial of the issue, she was asked, on cross-examination, "if she made any objection to the business being carried on in the name of W." *Held*, that as, during the life-time of the husband, he had the right to control the property, it was immaterial, as to the question of her rights, whether she made any objection or not.—*King v. Harter*, (Tex.) 308.

HOMICIDE.

Right to bail, see *Bail*, 1, 2.

Murder.

1. In a trial for homicide, the dying declaration of the deceased showed that he came with a snake in his hands to where defendant was, and said he would throw it on him; that defendant said he would kill him if he did, and got up and went to a tent; that deceased followed him part way, when he came out with a pistol in his hand, when deceased said, "Well, let us throw the snake into the pond," and as he started to throw it defendant shot him; that, when deceased fell, defendant ran to him, exclaiming, "Mr. Browning, have I hurt you?" When defendant fired he did not raise his hand above his hip. After deceased fell, he tried to get defendant to go for his wife, who lived a mile away, and for a neighbor, who lived about 400 yards away; but defendant did not go, but went away somewhere, and did not return until others had reached deceased, when he said to him: "Mr. Browning, has there ever been any hard feelings between us? It was an accident. You know I did not intend to hurt you." Deceased replied: "Frank, I don't know what your intention was." Deceased stated that there had never been any previous hard feeling or difficulty between them. *Held*, that the evidence did not support a conviction of murder in the second degree.—*Jones v. State*, (Tex.) 936.

2. Where the evidence shows that, on the evening of the murder, deceased said to defendant, who had stolen money from him, "Dave, give me back my money," that shortly afterwards deceased rode away, defendant followed, returned in half an hour, and, again going away, returned about midnight, and left at sunrise,—two witnesses denying that defendant left the house that evening; and where deceased's body was found concealed by rubbish not far from the house, and defendant was seen, shortly after sunrise, some miles distant, with his clothes wet to his waist, with a knife which was bloody, and with deceased's pocket-book, and money corresponding in amount with that in deceased's possession; and two witnesses testify that defendant confessed the deed,—a conviction will be sustained.—*Roberts v. Commonwealth*, (Ky.) 270.

3. On a trial for murder, evidence that deceased was last seen in defendant's company, and that defendant was seen shortly after the

homicide, walking away from where the body of deceased was found, near a pool of water, in which his coat was found sunken; that tracks leading from the body to the water corresponded to those made by defendant's shoes, and indicated that the person making them had knelt down by the water; that a handkerchief was found on defendant's person, appearing to have been used to wipe hands partially cleansed of blood; and that deceased came to his death by violence,—although circumstantial, amply sustains conviction, when the only defense consists of an *alibi*, based only on evidence that, four or five days before the killing, defendant was in another county, which had communication by rail with the county where the offense was committed.—*McGill v. State*, (Tex.) 661.

4. Evidence that deceased was murdered by some one; that defendant was impecunious, and knew deceased to have a large sum of money on his person; that deceased was last seen alive in his company; that defendant admitted to have been with deceased at the place of the murder; that defendant, one hour after the murder, was seen one and three-fourths miles distant from the place of the murder; that, instead of availing himself of an opportunity to procure work, in search of which he and deceased were traveling together, defendant left the county and state; that he made false statements about his conduct at the time, and, when arrested on the charge of murder, endeavored to procure tools to break jail,—sufficiently supports a verdict of guilty of murder in the first degree, though a great deal of mystery is connected with the crime, and defendant's clothes, after the murder, were not noticed to be blood-covered, and footprints at the scene of the crime did not conform to the length of defendant's foot.—*State v. Jackson*, (Mo.) 749.

5. On trial of defendant for the murder of his wife, whom the inquest showed to have died from strychnine, evidence that he gave her as medicine a powder, saying that it was quinine; that he substituted for the paper which had contained the powder another paper like it, which had contained quinine; that defendant was seen shortly before the death, in consultation with witness C., who testified that he bought strychnine at request of defendant, who told him to explain that it was wanted to kill wolves with, and that if he was asked as to what became of it to say that he had left it in his overcoat pocket, from which it was stolen, defendant stating that his purpose was to kill some dogs, so that he could visit a woman in the neighborhood at night; that, after the death, he wished witness to go into the country; and that the wife's life was insured for \$2,000,—sustains a verdict for conviction.—*Roe v. State*, (Tex.) 463.

6. On a trial for murder by killing one of the constable's posse while resisting arrest, an instruction that, if defendants believed the arrest a pretext by deceased and the others to disarm them, and inflict bodily harm, they might resist by any means in their power, was defective, in not saying that if the jury found deceased was present in good faith, under a lawful summons to assist in the arrest, but defendants had reason to believe the constable

and some others of the *posse* were making the arrest with such intent, and that deceased, with such others present as were lawfully disposed, would fail to protect them, then defendants might resist, and, if necessary, kill the constable or other unlawful assailants, and that if, in using such right with reasonable precaution, they accidentally killed deceased, they should be acquitted.—*Minniard v. Commonwealth*, (Ky.) 269.

7. An instruction that if, at the time of the killing, deceased was summoned by a constable having a warrant for the defendants' arrest, and was in good faith aiding in the arrest, it was defendants' duty to submit; and that, if defendants, in resisting, willfully killed deceased, knowing that he was summoned by the constable having a warrant for defendants' arrest, they were guilty of murder; and that, if they killed deceased without such knowledge, they were guilty of manslaughter,—is error.—Id.

8. Upon trial for murder, an instruction that if the jury believe that defendant took the life of deceased "by shooting him in a vital part, with a pistol loaded with gunpowder and leaden ball, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason, cause, or extenuation, then such killing is murder in the first degree," properly defines the offense charged, and affords no ground of exception. *Norton, C. J., and Brace, J., dissenting.*—*State v. Tabor*, (Mo.) 744.

9. On an indictment for murder committed in the perpetration of rape, where the charge on murder committed with express malice aforethought is full and correct, and not objected to, nor additional instructions offered, defendant cannot, on motion for a new trial, complain of the court's omission to charge on murder in the perpetration of rape, as the latter crime is but evidence of the essential element of murder in the first degree, and the omission was favorable, rather than injurious, to defendant.—*Washington v. State*, (Tex.) 642.

10. On a trial for murder an instruction that if the jury find that defendant committed the crime they must find him guilty of murder in the first degree, notwithstanding that they may also believe and find that unskilled medical treatment aggravated the wound of deceased, and that deceased might have recovered if greater care and skill had been employed in treating her, is proper.—*State v. Langford*, (Mo.) 237.

11. On a murder trial the court instructed the jury that, in order to convict defendant of murder in the first degree, they must not only believe that he intended the shooting of deceased, but that he shot intending to kill her; and that if her death ensued from his act of shooting her in a vital part with a deadly weapon they must find that he intended to kill her, unless the evidence shows to the contrary. *Held*, that the instruction was correct.—Id.

12. On a trial for murder, where there was no evidence of either a lawful or just provocation, the court instructed the jury that if they found that defendant deliberately com-

mitted the crime they must find him guilty. and, after defining "deliberately" to mean "done in a cool state of the blood, and not done in a heat of passion engendered by a lawful or just provocation," added, "and the court instructs you that in this case there is no lawful provocation." *Held*, that the omission of the word "just," if erroneous, could work no prejudice to defendant.—Id.

13. On a trial for murder the court instructed the jury that if they found from the evidence that defendant premeditatedly committed the crime they must find him guilty, and that "premeditatedly" meant "thought of beforehand, any time, however short." *Held*, that the definition is correct, and does not materially vary from the usual one, "thought of beforehand, any length of time, however short."—Id.

Manslaughter.

14. On a trial for murder it appeared that defendant was attacked by deceased, who accused him of having lied about him; and that defendant, being knocked over against a window and repeatedly struck, drew a dirk-knife, and stabbed deceased twice, one of the wounds proving fatal. *Held*, not to be manslaughter in the third degree, under Rev. St. Mo. § 1244, providing that in such case the killing must be "without a design to effect death," as defendant evidently had such design.—*State v. Watson*, (Mo.) 333.

15. Where deceased struck defendant with an iron scoop, and defendant retreated a few steps, picked up a stick, and approached deceased, who struck at him again, and they continued striking at each other until deceased was knocked down, a charge on the trial for murder, omitting the instruction that if there was no cessation from the first act of violence until the fatal blow was struck, and if deceased struck the first blow, and defendant struck in self-defense, he would not be guilty, is ground for reversal.—*Bean v. State*, (Tex.) 278.

16. Where defendant and deceased had been in a saloon drinking, and, at the time of the killing, deceased had taken defendant by the arm, and they were going, in a good humor, towards a hotel, defendant being an assenting party, the crime is not reduced to manslaughter by the fact that before they left the saloon deceased had announced his intention to arrest defendant, and take him to the calaboose, in the absence of evidence that defendant believed, or had good reason to believe, that such arrest was really intended to be made by force. *Norton, C. J., and Brace, J., dissenting.*—*State v. Tabor*, (Mo.) 744.

Justifiable homicide.

17. On a trial for murder, evidence that defendant, in a quarrel with deceased, put his hand against or in front of him, bidding deceased go away; whereupon the latter struck defendant, threw him in a ditch, and fell upon him; whereupon defendant fired the fatal shot,—is a sufficient showing of defendant's having provoked the contest to warrant an instruction that, if defendant brought on or voluntarily entered into the fight, he cannot avail himself of the law of self-defense, however great the danger to which he may have

thought himself exposed.—*State v. Davidson*, (Mo.) 418.

18. Where the evidence shows defendant guilty of manslaughter, having himself provoked the contest in which deceased was killed, he is deprived of the benefits of the law of self-defense, although he may not have provoked the conflict with the design of killing deceased or doing him great bodily harm.—*Id.*

19. In such case a charge omitting to instruct that if defendant was assaulted on his own premises with an instrument calculated to inflict a serious injury, and he retreated, picked up a like instrument, and returned with no intention of renewing the conflict, and deceased again assaulted him, then, in self-defense, he had the right to repel such assault, and, if he killed deceased, he should still be acquitted, is ground for reversal.—*Bean v. State*, (Tex.) 278.

20. Where it appears that a friend of deceased was present at the time of the killing, also armed, and assisting him, it is error in the charge to restrict defendant's right to self-defense against deceased alone.—*Id.*

21. Where two men, of nearly the same size, were walking along the street together, conversing in a low tone, when one of them suddenly made a loud exclamation, and the other began firing with a pistol upon the one making the exclamation, who was unarmed and had not shown, drawn, nor, as far as could be seen, attempted to draw, a weapon, and the former continued to fire upon him after all attempts to avoid the aim had ceased, the killing was not in self-defense.—*State v. Tabor*, (Mo.) 744.

22. In a trial for murder, an instruction that if defendant, arming himself, went in search of deceased, with the intention of killing him, and, finding him, did willfully, deliberately, premeditatedly, and of his malice aforethought, so kill him, and at the time deceased was not threatening or attempting to assault defendant, then there is no self-defense, and the jury should convict, is not erroneous.—*State v. Rider*, (Mo.) 728.

23. In a trial for murder, an instruction that previous threats alone, unaccompanied by any hostile demonstration at the time of the homicide, would not justify the killing, and which contains nothing that could be fairly construed to intimate that such threats might not be considered for any other legitimate purpose, is not erroneous.—*Id.**

24. One who voluntarily provokes or enters into a difficulty brought on by any willful act of his, resulting in the death of another, cannot justify on the ground of self-defense.—*State v. Hardy*, (Mo.) 418.*

Assault with intent to kill.

25. On trial of an indictment for shooting at one G. with intent to kill, a half-brother of G. was asked, "Where is your brother now?" and answered, "My brother is dead," but stated that it was over a year after he was shot before he died. *Held*, that such testimony is competent to account for G.'s absence from the trial.—*State v. Brannum*, (Mo.) 218.

26. A person assaulted cannot stop to estimate just how much force is necessary to repel the assailant. Hence it is error to charge,

in a trial for assault with intent to kill, that if the defendant believed, and had good cause to believe, that his assailant was about to do him some great bodily harm, that would not justify him in using greater force than was necessary to repel the assault.—*State v. Hickam*, (Mo.) 252.*

27. Where persons are indicted as accessories to an assault with intent to kill, they cannot be convicted unless there was a common purpose in the minds of the principal and the defendants to kill, and the assault was done in the attempt to accomplish such common purpose, or unless the assault was made by the principal with an intent to kill, of which defendants had knowledge, and they did some act in furtherance of the attempt.—*Id.*

28. In a trial for assault with intent to kill, it is error to charge that if the jury find that defendant made the assault with a pistol, in the manner charged in the indictment, it devolves on him to show some grounds for making the assault, and, if he has not done so, they must find him guilty, as such charge throws on defendant the burden of proving his innocence, and submits to the jury a question of law as to what facts would justify the assault.—*Id.*

29. Where a person, finding his mother and sister engaged in an altercation with other persons, goes to their assistance, and, during the affray, shoots one of such others, his guilt depends on the motive prompting the act, and the circumstances under which it was done, and not on the fact that he voluntarily engaged in the difficulty.—*Id.*

Indictment.

30. A conviction of aggravated assault and battery under Pen. Code Tex. art. 438, making it aggravated assault, "when serious bodily injury is inflicted," may be had under an indictment for murder in the second degree, which charges defendant with killing the deceased "by striking, beating, bruising, and wounding him with a stick," independently of article 714, providing that murder shall include all assaults.—*Bean v. State*, (Tex.) 278.

31. Under Rev. St. Mo. § 1262, providing that "every person who shall * * * assault another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, * * * such person * * * shall be punished," etc., an indictment charging that "defendant feloniously assaulted * * * one R. with a large * * * stone, a deadly weapon likely to produce death, * * * and him, the said R., did then and there strike * * * with great force, likely to produce death, against," etc., is sufficient.—*State v. Havens*, (Mo.) 219.

32. An indictment charging that four persons named, with malice aforethought, shot at nine other persons named, with intent to kill, is not invalid, on the ground that it charges nine different offenses in one count.—*State v. Rambo*, (Mo.) 365.

Evidence—Presumptions.

33. On a trial for murder, in the absence of direct proof of the venue of the crime, where the evidence shows that defendant and de-

ceased were traveling westward on a straight railroad track, and had crossed the Brazos river, and were seen together, near where the body was found, at least a mile and a half from the river, the court will take judicial notice of the fact that the Brazos river is the eastern boundary of Milam county, and not disturb a conviction of the crime in that county, as the *locus in quo* could not have been elsewhere.—*McGill v. State*, (Tex.) 661.

84. On trial for murder, testimony, by one sent to receive defendant from the authorities of another state, that the prisoner was not delivered up without proof of his identity, is irrelevant, since the fact that defendant did not facilitate his transportation affords no presumption of guilt.—*State v. Jackson*, (Mo.) 749.

Evidence — Competency and relevancy.

85. Where defendant, testifying in his own behalf, gave a detailed account of his feelings on the day of the homicide, designed to show absence of malice, it is proper, on cross-examination, to ask, "Did you state to F., on the day of the homicide, that you had the same right to kill a man who was trying to steal your land as you would have if he was trying to steal your horse?"—as a foundation for proof of a state of mind different from that testified to by him.—*State v. West*, (Mo.) 854.

86. On trial for murder, evidence that defendant had stolen money from deceased is admissible as showing motive; the deceased having accused defendant of the stealing.—*Roberts v. Commonwealth*, (Ky.) 270.

87. Upon trial for murder, it is error to admit evidence that defendant was an escaped convict, for the purpose of supporting a theory of the prosecution that defendant killed deceased on the belief that he was a detective seeking defendant's arrest, there being no evidence that defendant had such a belief. *Norton, C. J.*, and *Brace, J.*, dissenting.—*State v. Tabor*, (Mo.) 744.

88. Upon an indictment for murder in the first degree, the homicide having been proven, and no countervailing circumstances being evolved by the testimony of the prosecution, the burden of proof to show that the offense was one of less degree, or that the killing was done in self-defense, is cast upon defendant.—*Id.*

89. Upon trial for murder, evidence that defendant, within half an hour of the time of the homicide, and within a short distance from the place thereof, aimed his gun at a third person, and compelled him to give defendant his pistol, is admissible as tending to show deliberation and premeditation on the part of defendant in arming himself for the encounter with deceased, and as a connecting part of the entire transaction.—*State v. Rider*, (Mo.) 723.

90. Where defendant, on trial for murder, contended that deceased assaulted him, evidence that deceased told a witness that he had had sexual intercourse with defendant's wife did not tend to prove that such assault was made, and was properly refused.—*Id.*

91. On trial for murder, it is competent to show that defendant requested a fellow-prisoner to assist him in escaping from the jail in

which he was confined, and the jury may take that fact into consideration in determining defendant's guilt or innocence. *Norton, C. J.*, and *Ray, J.*, dissenting.—*State v. Jackson*, (Mo.) 749.

92. Upon trial for murder, the deceased having been shot in the night by some one outside the house where he was, the commonwealth proved that persons jointly indicted with defendant, but not on trial, on the day following the murder, were hunting cartridge shells at the place of the killing, and also proved conversations of such parties relative to the murder, all which took place in the absence of defendant. Although the evidence was incompetent, as it does not appear that it could have prejudiced defendant, its admission was harmless error.—*Pearce v. Commonwealth*, (Ky.) 893.

93. On a trial for murder of deceased, whose body was found not far from a pool of water where his coat was found sunken, the testimony of a witness that he went to the place pointed out to him as the place where the body was found, and there found, among many shoe-tracks, one leading to the water, made by a run-down and patched shoe, such as that worn by defendant, is relevant, however remote.—*McGill v. State*, (Tex.) 661.

— Declarations and admissions.

94. On the trial of an indictment for murder, evidence that defendant, a short time before the killing, became angered at a brother of deceased, and said that deceased and such brother were trying to run him off, but that he intended to arm himself, and would not be run off, is competent as tending to show the state of defendant's feelings towards deceased; and evidence that defendant accused his wife of showing a preference for deceased is competent for the same reason.—*Brewer v. Commonwealth*, (Ky.) 839.

95. The declarations of defendant on trial for murder, made to a witness a few minutes after the homicide, and after defendant had gone two or three hundred yards from the scene thereof, are not part of the *res gestæ*, and are not admissible in evidence.—*State v. Rider*, (Mo.) 723.*

96. A homicide having originated from a feud between two factions, though the commonwealth proved the whereabouts of the leader of one of them at the time of the commission of the crime, statements by such leader relative to the murder are inadmissible in evidence for the defendant.—*Pearce v. Commonwealth*, (Ky.) 893.

97. Evidence that defendant went to and was seen in the kitchen of the house where his wife served as a cook, and that soon after he left she was found senseless, and severely beaten on the head with a blunt instrument, from which beating she died two days later, fully sustains a verdict of murder in the first degree, in connection with evidence of defendant's confessions on the night of the murder, that he had beaten his wife and killed her with a steelyard.—*Williams v. State*, (Tex.) 653.

98. Admissions to a fellow-prisoner that defendant had attempted to break jail in another state on learning that he was to be brought to

this state on the charge of murder, are admissible against him on his trial for that crime.—*State v. Jackson*, (Mo.) 749.

49. A statement to a fellow-prisoner by one accused of murder that he knew that the deceased had a large sum of money in a belt upon his person is admissible in evidence as tending to show a motive for committing the crime.—Id.

50. On trial for murder, evidence not amounting to an acknowledgment of guilt, but simply that defendant had stated to witness that, when he learned from a newspaper in another state that he was accused of the murder, he felt so distressed that he went stealing horses to pacify his mind, is inadmissible, not being a confession of the crime charged.—Id.

—Threats.

51. On trial for murder, the threats of deceased to take the life of defendant having been proven, it was not error to permit the state to show that, at the very time of the homicide, deceased was preparing to remove from the neighborhood where they both lived, as proof of his abandonment of any such design.—*Trumbull v. State*, (Tex.) 814.

52. At the trial of a husband for the murder of his wife, the previous threats of the husband, and difficulties between the parties, may be given in evidence to show the state of the accused's mind, and his malice.—*Howard v. State*, (Tex.) 929.

Instructions.

53. Where a husband, on trial for the murder of his wife, was shown to have been in a quarrel with a neighbor in the former's dooryard, and was waving a pistol, and threatening, without any apparent intention, to shoot, and his wife was shot upon coming to the door, and urging him to come in, and her dying declarations were that the shooting was accidental while trying to take the pistol from her husband's hand, it was error to refuse to instruct the jury on the law of negligent homicide, under Pen. Code Tex. arts. 584, 585, providing that, "to bring the offense within the definition of homicide by negligence, there must be no apparent intention to kill. The homicide must be the consequence of the act done or intended to be done."—Id.

54. An instruction, on trial for murder, that flight raises the presumption of guilt, and that, if defendant fled the country, they might consider it in determining his guilt or innocence, but that they should not consider such leaving as a flight if defendant left on his own proper and legitimate business, and not for the purpose of avoiding arrest or trial, is unobjectionable, where defendant, after the commission of the crime, left for another state.—*State v. Jackson*, (Mo.) 749.

55. Upon an indictment for murder, where defendant and deceased had been playing pool and drinking together, and were seen walking along pleasantly together, arm in arm, conversing in a low tone, when deceased suddenly exclaimed, "You will play hell;" and, after a brief struggle, defendant shot deceased, there is no evidence showing who brought on the difficulty, and an instruction

as to the responsibility of a party who brings on a difficulty is improper. *Norton, C. J.*, and *Brack, J.*, dissenting.—*State v. Tabor*, (Mo.) 744.

56. Under Code Crim. Proc. Tex. art. 777, sub. 2, providing that a charge, if clearly erroneous, is ground for reversal, though not objected to until appeal, if it relates to a material matter, and is calculated to prejudice defendant, a charge on a trial for murder, not excepted to, to disregard the arguments of counsel, and try the case by the law given in the charge and the testimony admitted, "and allow nothing else to influence you in finding your verdict," is not a deprivation of the right to be heard by counsel so as to be cause for reversal.—*Roe v. State*, (Tex.) 463.

57. Under the above statute, language in a charge not excepted to, follows: "In so far, in this case, as circumstantial evidence is relied on to convict,"—is not an intimation that, in the opinion of the judge, there was direct evidence in the case, so as to be cause for reversal.—Id.

58. Improper documentary evidence having been admitted at the instance of the commonwealth, the error is rendered harmless by its withdrawal before the close of the prosecution's testimony, and direction to the jury to disregard it.—Id.

59. Under above statute, a charge that the defense alleges that two witnesses are accomplices when the defense does not so allege, but claims that the two witnesses were sole perpetrators, objected to as directing the mind of the jury to defendant as principal, since upon the evidence a charge on accomplices was required whatever was alleged by defendant, is not cause for reversal.—Id.

60. In the absence of evidence as to when the murder was committed, and where defendant was at the time, it is not error to refuse to instruct the jury on the subject of *alibi*; that not having been made an affirmative defense.—*State v. Jackson*, (Mo.) 749.

61. An instruction to the effect that "if A. shoots at B., and missing him, kills C., this is murder, because the law transfers the felonious intent from B. to the innocent party, who is slain," is correct.—*State v. Gilmore*, (Mo.) 359.

62. In a trial for murder, an instruction which charges that, "in law, it is the same offense to kill a bad man as it is to kill a good man, and although the jury may believe from the evidence that deceased, when intoxicated, was a bad or quarrelsome man, this fact alone will not justify or excuse the defendant for the killing of deceased," is proper.—*State v. Hardy*, (Mo.) 416.

63. An instruction that "if defendant and M. had an altercation which resulted in the death of S., and if defendant commenced the difficulty or brought it on by any willful act of his committed at the time, or if he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self-defense in the case," is not reversible error, no evidence of self-defense having been given.—*State v. Gilmore*, (Mo.) 359.

64. Where the assault was alleged to have been done in self-defense, a charge, purporting to cover the whole case, which does not

instruct the jury that they must be satisfied beyond a reasonable doubt that it was not done in self-defense before they can convict, is defective.—*State v. Hickam*, (Mo.) 252.

Instructions—Degrees of crime.

65. On a trial for murder, where defendant, knowing that deceased was on his premises, having a gun and pistol, with the declared purpose of giving defendant trouble, seized the gun from deceased, and ordered him off, but made no effort to use it until deceased advanced with drawn pistol, when he shot him, it is error to instruct the jury that defendant was guilty of murder or manslaughter if he provoked the trouble, without instructing them that, in such case, if deceased renewed the assault after defendant had abandoned it, defendant had a right to defend himself.—*Barnard v. Commonwealth*, (Ky.) 444.*

66. On a trial for murder, it appeared that defendant, after provoking the difficulty with deceased, prepared himself with a pair of scissors, and in the encounter which ensued backed the deceased, who was unarmed, against a building, and stabbed him three times. The court instructed the jury as to murder in the first and second degrees. *Held*, that the evidence justified the instructions, and there was no error in omitting to instruct as to any lower grade of homicide.—*State v. Hardy*, (Mo.) 416.

67. Upon trial for murder, it appeared that deceased had suddenly died soon after the operation of probing the wound inflicted by defendant, although he was in fair strength when it began. The physician who did the probing was jointly indicted with defendant for waylaying and shooting deceased, and the proof tended to show his guilt, and that he committed the act to aid in getting the property of deceased. *Held*, that there was sufficient evidence that the death was not caused by the wound to entitle defendant to an instruction for a less offense than murder.—*Smith v. State*, (Ark.) 941.

68. Where the evidence tends to establish only the offense of murder in the first degree, the court may properly refuse to charge as to the inferior grades of homicide or self-defense.—*Trumbull v. State*, (Tex.) 814.

69. Upon an indictment for murder, while it is the duty of the court to instruct the jury upon the whole law of the case, yet it is not error to give the law of murder, omitting the law of manslaughter, when all the evidence tends to prove murder, and no circumstances are shown tending to reduce the offense to the lower grade.—*Cook v. Commonwealth*, (Ky.) 872.

70. Where the evidence shows that defendant either deliberately shot deceased for revenge, or shot him in self-defense, there is no error in not giving the jury instructions defining any lower grade of homicide than murder in the first degree.—*State v. Rider*, (Mo.) 723.

71. Requested instructions, fully covered by other instructions given in unobjectionable phraseology, will be refused.—*Id.*

72. Where the evidence establishes that defendant killed deceased, either to rob him or to conceal a larceny, a refusal to charge on

the law of self-defense is not error.—*Robert v. Commonwealth*, (Ky.) 270.

Trial—Impaneling jury.

73. The court may fill the panel by calling two jurors from the regular venire to take the place of two unavoidably absent who were on neither challenge list, defendant having declined to challenge the two thus called, and having waived his statutory right to additional time to make further challenges.—*State v. Gilmore*, (Mo.) 339.

Conduct of prosecuting attorney.

74. On trial for murder, it is reversible error for the prosecuting attorney, over defendant's objection, to state, in opening the case, that defendant, when about to be brought from another state, denied his identity there,—there being no evidence of the fact except that before extradition proof of prisoner's identity was required,—and that defendant had admitted that, on learning of the charge of murder against him, he went stealing horses to pacify his mind, even though the court, on exception to the first statement, admonished the jury not to permit it to influence their minds. *NORRIS, C. J.*, and *RAY, J.*, dissenting.—*State v. Jackson*, (Mo.) 749.

75. A judgment on a verdict of guilty of murder in the first degree will be reversed on the ground that the prosecuting attorney, in his closing address, remarked, in urging the jury to convict, that "escape of criminals at the hands of juries brings on lynch law." *NORRIS, C. J.*, and *RAY, J.*, dissenting.—*Id.*

— Submitting case in defendant's absence.

76. On a trial for murder, it is error to submit the case to the jury to consider their verdict in the absence of the accused; and, unless it affirmatively appears from the record that such error is not prejudicial, a new trial will be granted.—*Brewer v. Commonwealth*, (Ky.) 339.*

Verdict.

77. On a trial for murder, the jury found defendant "guilty of manslaughter," without fixing the punishment. The evidence warranted a conviction for murder in the first degree, but not for involuntary manslaughter; and the jury had not been charged as to the latter offense, but only as to murder and voluntary manslaughter. *Held*, that judgment and sentence for voluntary manslaughter were properly entered on the verdict.—*Fagg v. State*, (Ark.) 829.

78. Under an indictment charging four persons with making an assault on nine other persons, one of the defendant's may be convicted though the others are acquitted, and though the proof shows that the assault was made on only one of the nine.—*State v. Rambo*, (Mo.) 335.

Appeal—Review.

79. On appeal from a conviction of manslaughter, error in a charge cannot be considered when there is no statement of facts.—*George v. State*, (Tex.) 25.

80. Objection to evidence admitted at the trial will not be considered in the absence of a bill of exceptions, or a showing in the record

that objection below was made.—*Roe v. State*, (Tex.) 463.

HORSE AND STREET RAILROADS.

Right to use another's track.

1. Act Ky. March, 1863, grants to the city of Louisville power to contract for the construction of street railways. In the contract with plaintiff, the council reserved power to permit other companies, on compensation, to use plaintiff's track. Defendant, under its charter authorizing it and the city council to contract "as the council may prescribe," contracted with the council for the privilege of running over plaintiff's track when plaintiff's consent should be obtained. Contract was then entered into between the two companies regarding the use of the track; the terms to be readjusted when necessary, "upon an equitable consideration." Readjustment was determined on the basis that defendant's right to use plaintiff's track was derived by its charter from the legislature, and that it was therefore liable only to pay for the use and wear of the track. *Held* error, and that plaintiff's compensation should be determined by a consideration of the contract between them, and of the growth of the business.—*Louisville City Ry. Co. v. Central Pass. R. Co.*, (Ky.) 829.

2. Act Ky. March, 1863, grants to the city of Louisville power to contract for the construction of street railways. Plaintiff was by its charter authorized to construct * * * a railway * * * in such manner, and with such rights, as the city council should prescribe. In the contract between them, the council reserved power to grant to other companies the right to use plaintiff's track on payment of compensation. *Held*, that plaintiff's charter did not take from the legislature the right to permit other companies to go on the same streets, or on plaintiff's track.—*Id.*

Injuries to persons on track.

3. Plaintiff, a boy 11 years old, carelessly ran against a mule attached to defendant's car; the mule sprang to one side, causing plaintiff to fall on the track about 11 feet in advance of the car; the driver saw plaintiff, after he had fallen, in time to stop the car. The court charged that, though the driver's negligence might have contributed to the injury, still, if plaintiff was guilty of negligence which directly contributed to the injury, he could not recover unless the jury found that the driver's negligence was malicious, or wantonly reckless, showing an utter disregard of plaintiff, and the plaintiff's negligence was but slight. *Held*, that such instruction was erroneous, as precluding plaintiff from recovery unless he exercised extraordinary prudence and foresight to avoid the injury.—*Hays v. Gainesville St. Ry. Co.*, (Tex.) 491.

4. Where the driver discovered the peril of plaintiff in time, and by the reasonable exercise of means at hand could have prevented the injury, the law considers the failure to use such means as the immediate cause, and will permit recovery notwithstanding the in-

jured party was guilty of contributory negligence.—*Id.**

5. Evidence that other boys than plaintiff had been in the habit of jumping on the cars, and "rocking and scaring the mules," was immaterial, and should have been excluded.—*Id.*

6. It is proper for plaintiff to exhibit in evidence the boot worn by him at the time he was injured, for the purpose of showing the indentations made thereon, as tending to prove that the brake was not applied, but that the wheel rolled over the plaintiff's foot; there being other evidence that, when the brakes are applied, the car-wheel will not revolve, but will slide along the rail.—*Id.*

7. A charge that if, by failure of the company to employ skilled and prudent drivers, any one is injured, the company is liable, and also that, though the driver might have been careless or imprudent at other times, that would not render the defendant liable, unless, on the occasion of the injury sued for, such driver was careless, reckless, and imprudent, is argumentative and improper.—*Id.*

HUSBAND AND WIFE.

See, also, *Curtesy; Divorce; Dower; Homestead.*

Death of husband, see *Abatement and Revival.*

Decree in suit between, see *Judgment, 7.*
Defective acknowledgment, see *Equity, 8.*

Conveyances.

1. A wife who, with her husband, executed a deed, was not informed by the notary taking the acknowledgment, neither did she know, that the deed conveyed the land included therein, her separate property, and did not acknowledge nor did he ask her whether she executed the deed freely, without compulsion or undue influence of her husband. *Rev. St. Mo. § 680*, enacts that no acknowledgment of a writing conveying real estate, by a married woman, shall be taken unless she is first made acquainted with the contents of the instrument, and shall acknowledge, on an examination apart from her husband, that she executed the same freely, and without compulsion or undue influence of her husband. *Held*, that said deed was, as to the married woman, invalid, though the certificate of acknowledgment showed on its face full compliance with the statutory requirements.—*Mays v. Pryce*, (Mo.) 731.

2. In such case, the testimony of the notary who took the acknowledgment is admissible to contradict the statements of his certificate.—*Id.*

3. A husband, in 1861, conveyed to his wife real estate in Missouri, with a *habendum* clause, "To have and to hold unto the said S. A. T., and to her sole use and benefit." *Held* that, though in law such conveyance may have been void, in equity it vested the wife with a separate estate in said land.—*Turner v. Shaw*, (Mo.) 897.

4. Being so vested with such equitable separate estate, in 1874 the wife executed a deed for said land directly to her husband. Although this conveyance, as to a statutory sep-

arate estate, may have been invalid, it was operative and effectual to pass such equitable estate.—Id.

Gifts between.

5. Where a husband causes a bill of sale from a third person to be made to his wife, and afterwards the goods are taken on execution against the vendor, in an action to recover their value from the sheriff and attaching creditor, it is competent for the husband to testify, in answer to the question whether he intended to make a gift to his wife, that he bought with property belonging to his wife, since, although community gains were included in such property, no one but his creditors could question the waiver of his right thereto.—*Goldberg v. McCracken*, (Tex.) 676.

Action by wife.

6. Where a wife released her right of dower and homestead by uniting in a deed of trust executed by her husband upon his lands and crops, to secure his creditors, and the husband sold some of the crops at private sale, and, with the assent of the secured creditors, applied the proceeds to the payment of unsecured debts, she cannot maintain a bill to charge the creditors with the proceeds of such sales, on the ground that she became a surety for her husband, as regards her dower and homestead, as she does not occupy the position of a surety, having conveyed no property, but merely waived a contingent right.—*Creath v. Creath*, (Tenn.) 847.

Community property.

7. W. held land under a contract, on which, at his wife's death, in August, 1881, there was due \$125. His father, J., also held a tract under bond for title, and owed about \$400 on the purchase price. In May, 1881, W. and J. entered into a parol agreement for an exchange of these lands, each agreeing to pay the balance due on the tract taken by him in exchange, and took possession. J. made valuable improvements on the tract which he received, and paid the balance due on it. After his wife's death, W. obtained deeds to both tracts, and subsequently, at J.'s request, conveyed the tract received by J. in the exchange, to third parties. After W.'s death his children sued to recover one-half of this tract, claiming that their father's deed conveyed only his own interest, and that their mother's interest descended to them. *Held*, that the deed made by W., though made after the death of his wife, vested complete title in the grantees.—*Garrett v. Jobe*, (Tex.) 505.

8. Under Rev. St. Tex. art. 2853, providing that all the effects the husband and wife possess at the dissolution of the marriage shall be regarded as common effects, unless the contrary be satisfactorily proved, evidence that the property claimed as a deceased wife's separate property was purchased during marriage, and possessed by the husband at her death; that the wife, at marriage, had property invested in another state, which was subsequently reinvested in Texas, mostly in a homestead, recognized as common property; and that part of the property claimed was made by the husband with her money in such a way as to make it common property,—is in-

sufficient to show that the property was the wife's separate estate, though she attempted to dispose of it as such by will.—*Peet v. Commerce & E. S. Ry. Co.*, (Tex.) 303.

9. Damages accruing from a personal injury to the wife are community property; and for the mental suffering of the wife, as an element of such damages, a recovery may be had at the suit of the husband.—*Loper v. Western Union Tel. Co.*, (Tex.) 600.

INDICTMENT AND INFORMATION.

Illegal sales, see *Intoxicating Liquors*, 6. Obstructing highways, see *Highways*, 4. Particular crimes, see *Arson*, 3; *Assault and Battery*, 1, 2; *Bribery*, 2; *Cruelty to Animals*; *Embezzlement*, 1; *False Pretenses*, 2-5; *Forgery*, 2; *Gaming*, 1; *Homicide*, 30-32; *Larceny*, 6-9; *Malignous Mischief*, 2; *Robbery*, 1, 2.

Finding and filing.

1. Crim. Code Ky. § 191, providing that "the indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk," is substantially complied with by the following record entries: "The grand jury appeared in open court, and by and through their foreman made the following report," followed by the entry of the style of the indictment. And: "On the back of said indictment is the following indorsement, viz: 'A true bill. W., Foreman.' And: 'Received from the foreman of the grand jury, in the presence of the grand jury, and filed in open court.'"—*Pearce v. Commonwealth*, (Ky.) 593.

Form.

2. An information or indictment wherein the word "inhabitants" is spelled "inhabitanance" is sufficient.—*Keller v. State*, (Tex.) 275.

3. The words, "Empire print. Encourage home industry, and your money will circulate among the people," printed at the top of an otherwise valid indictment, does not render such indictment invalid.—*Owens v. State*, (Tex.) 658.

Description of person.

4. Under Code Crim. Proc. Tex. art. 430, subd. 4, providing that an information shall contain the name of the person accused, or state that his name is unknown, and give a reasonably accurate description of him, and article 435, requiring that, in alleging the name of defendant or other person in an indictment, it shall be sufficient to state one or more of the initials of the Christian name and surname, a complaint and information describing the accused as "one Pancho" are fatally defective.—*Pancho v. State*, (Tex.) 476.

5. Under Code Crim. Proc. Tex. art. 430, subd. 4, and article 425, a complaint and information describing the accused as "one Persqual" are fatally defective.—*Persqual v. State*, (Tex.) 477.

6. "Hix Nowels" and "Hicks Nowells" being *idem sonans*, the court rightly withholds from the jury, in a trial for theft, the question of whether the name proved is the name in the indictment.—*Spoonmore v. State*, (Tex.) 390.

Description of place.

7. Under Code Crim. Proc. Tex. art. 430, subd. 5, providing that "it must appear" from an information "that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed," an information omitting the allegation of venue is fatally defective, and that the complaint alleges the venue does not cure the defect.—*Orr v. State*, (Tex.) 644; *Smith v. State*, (Tex.) 645.

Amendment.

8. Where an information fails to allege the venue as required by Code Crim. Proc. Tex. art. 430, subd. 5, but such venue is alleged in the complaint, the prosecution will not be dismissed, but the cause will be remanded, that a new information may be presented.—*Id.*; *Id.*

Infancy.

See *Guardian and Ward*.

Action to vacate judgment, see *Judgment*, 15, 16.

INJUNCTION.

Effect of appeal, see *Appeal*, 50.

To restrain collection of costs, see *Costs*, 2.

When granted.

1. Proceedings on a judgment against the sureties on an administrator's bond should not be restrained for an alleged want of due service, without a meritorious defense having first been shown, as equity will relieve from real and not from mere technical wrongs.—*State v. Hill*, (Ark.) 401.

2. One property holder may maintain a suit, on behalf of himself and others similarly situated, to restrain the execution of an ordinance, illegally passed, for the improvement of a street at the expense of said property holders.—*Dennison v. City of Kansas*, (Mo.) 429.

Pleading.

3. A complaint for an injunction alleged that defendants constructed a warehouse and ditch in the middle of a street, and within 10 feet of plaintiff's land, thereby obstructing the street and preventing the free use and occupation of plaintiff's lot, and damaged his property, but did not allege any special damage, or show that the warehouse and ditch were in that part of the street abutting on plaintiff's land. The answer admitted the construction of the warehouse and ditch, but denied that they in any way damaged plaintiff's property. *Held*, that a demurrer to the answer as not stating facts sufficient to constitute a defense should have been overruled, the answer being as specific as the complaint.—*Arkansas River Packet Co. v. Sorrells*, (Ark.) 683.

Procedure.

4. Where, upon petition to enjoin an encroachment on a right of way over a strip of land, the evidence of both the ownership and possession of such strip is confused and contradictory, the disputed facts should be submitted to a jury in a legal action.—*Newport & L. T. P. R. Co. v. Fitzsimmons*, (Ky.) 201.

Damages for wrongful issuance.

5. Defendant is not entitled to damages for the suing out of an injunction where plaintiff has a lien on the property which defendant was enjoined from selling.—*Parks v. O'Connor*, (Tex.) 104.

6. Damages for wrongfully enjoining the levy of an execution on property, part of which is exempt, are measured by the value of that portion which is not exempt.—*Coates v. Caldwell*, (Tex.) 922.

7. The defendant, in an injunction suit, may recover judgment against the sureties on the injunction bond for his damages caused by the wrongful issue of the writ, upon proper pleadings and proof, without serving citations on the sureties.—*Id.*

Insolvency.

See *Assignment for Benefit of Creditors*; *Creditors' Bill*; *Fraudulent Conveyances*.

INSPECTION.**Duty of inspector.**

1. Under Rev. St. Mo. §§ 5839, 5840, 5842, 5849, making it the duty of the inspector of petroleum oils to inspect, gauge, and brand oils, and, when contained in large tanks or reservoirs, to see that the oil inspected is placed in the packages in which it is intended to be sold, and to gauge and brand them, and fixing the fee, the inspector is bound, after having inspected oil in bulk, and seen it transferred to smaller receptacles, to brand them, whether they are barrels, casks, or wagon tanks, as the statute does not require such receptacles to be exclusively barrels, nor fix a limit of the number of gallons such packages may contain.—*State v. Baggot*, (Mo.) 737.

2. But when such inspector has tested the oil in a large reservoir, but has not seen, and has had no opportunity to see, that it was transferred to small tanks on premises other than those where the large reservoir was located, he is not required to gauge and brand such tanks without a new test.—*Id.*

Instructions.

See *Criminal Law*, 84-86; *Trial*, 4-14.

INSURANCE.**Waiver of condition.**

1. An insurance company which has notice of an additional insurance, by the assured, and remains silent till after loss, waives a condition of forfeiture in the policy for want of its written consent thereon to such additional insurance.—*Phoenix Ins. Co. v. Spiers*, (Ky.) 453.

Proof of loss.

2. An inspection and partial adjustment of loss, with an offer to pay a certain sum in satisfaction of damages, and the acceptance of an inventory of lost and damaged goods without objection, will not constitute a waiver of a stipulation in a policy of insurance requiring

proof of loss to be produced, and appraisal of damage to be made; the assured being notified that such proof and appraisal would be required according to the policy.—*Scottish Union & Nat. Ins. Co. v. Clancy*, (Tex.) 690.

3. An insurance company which refuses to pay a loss, because of an alleged avoidance of the policy, by additional insurance, without its consent, waives necessity for preliminary proofs according to the requirements of the policy.—*Phoenix Ins. Co. v. Spiers*, (Ky.) 453.

Who are agents.

4. A local agent of an insurance company of a distant state, who solicits insurance, takes the application, receives the premium, and delivers the policy, is to be regarded as the agent of the company for the purpose of receiving notice of an additional insurance, no particular notice being required in the policy.—*Id.*

5. Where an agent of an insurance company had no express authority to appoint a sub-agent, but agreed with another person to divide with him commissions on insurance procured, the company having no knowledge of such agreement, such third person is not the agent of the company, and conversations between him and the assured are not admissible, in an action by the latter on the policy.—*Id.*

Actions on policy.

6. Where a policy of fire insurance provides that the extent of any loss shall, upon demand of either party, be appraised by arbitrators, that the report of such appraisal shall be made part of the proofs of loss, and that nothing shall be payable on the policy until such proofs are furnished, such appraisal when demanded, is a condition precedent to right of action by the assured.—*Scottish Union & Nat. Ins. Co. v. Clancy*, (Tex.) 690.

7. In a suit to recover annual premiums paid on an insurance policy on the ground of false representations by the company as to its solvency, proof of insolvency long after the payment of the premiums sought to be recovered does not entitle plaintiff to recovery.—*Life Ass'n of America v. Goode*, (Tex.) 639.

Accident insurance.

8. A policy against death by "external, violent, and accidental means," contained a proviso that no claim should be made under the ticket when the death may have been caused by intentional injuries inflicted by assured or any other person. *Held* that, assured having been waylaid and killed for purposes of robbery, there can be no recovery under such policy.—*Hutchcraft's Ex'r v. Travelers' Ins. Co. of Hartford*, (Ky.) 570.

Mutual benefit companies.

9. Where the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a benefit certificate, resulting from the insured's membership therein, who is not a member of the society, cannot complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the certificate, and receive a new one, with the consent of the beneficiary, was

amended so as to omit the consent of the beneficiary; the beneficiary having no vested rights in such certificate, not being a party to the contract; nor can he recover on the original certificate, it having been surrendered, and a new one issued.—*Byrne v. Casey*, (Tex.) 38.

10. Where a member of a benefit association, relying on the promise of the manager to draw on him for assessments, and, being misled by the fact that such drafts have been twice made on him, is suspended because of non-payment of an assessment for which no draft was made, and is unable to be reinstated for the reason that his health has become impaired, the association is estopped from insisting upon a forfeiture.—*McCorkle v. Texas Benevolent Ass'n*, (Tex.) 516.

11. Under by-laws of a benefit association providing that notice shall be given of assessment due before there shall be a forfeiture of the association benefits, notice to a member put in the mail, directed to him, but not shown to have reached him, is insufficient to support a claim of forfeiture.—*Id.*

License to do business.

12. Under Rev. St. Mo. 1879, § 4644, delegating to cities power "to license, tax, and regulate * * * insurance companies," an ordinance requiring such companies to procure a license at a cost of \$50 per year to carry on their business is authorized and valid, though a tax on their net income is also imposed.—*City of St. Joseph v. Ernst*, (Mo.) 558.

INTEREST.

See, also, *Usury*.

On decree against a county, see *Counties*, 14, 15.

Rate.

1. Under Rev. St. Tex. art. 2990, providing that all judgments shall bear 8 per cent. interest, except when the contract on which they are founded bears a specified rate greater than 8 per cent., but less than the highest legal rate, in which case the judgment shall bear the rate specified in the contract, it is not error, when the contract provides for 5 per cent., to render judgment on such contract for 5 per cent. until date of judgment, and 8 per cent. thereafter.—*Sheldon v. Martin*, (Tex.) 61.

Intervention.

See *Attachment*, 7, 8.

INTOXICATING LIQUORS.

Local option.

1. The act of July 4, 1897, (Sayles, Civil St. art. 3227 *et seq.*), providing that a second election under the local option law shall not be held in less than two years after the first election, and amending Rev. St. Tex. tit. 63, art. 3236, permitting it in one year thereafter, applies only to those localities thereafter adopting the law, and does not nullify a county election repealing the law, held one year after its

adoption, which occurred before the passage of this act.—*Dawson v. State*, (Tex.) 820.

2. The repeal of the local option law, pending an appeal from a conviction for its violation while in force, nullifies the conviction.—*Id.*

3. A complaint under the Texas local option law, alleging an election thereunder to prohibit, not only the sale, but also the exchange, of intoxicating liquors, does not allege such an election as calls such law into operation, and is fatally defective.—*Ninenger v. State*, (Tex.) 480.

Opening saloon on election day.

4. On a trial for opening and keeping open a bar-room on election day, an instruction that, if defendant went into his saloon for any other purpose than that of business connected with the saloon, the jury would find him not guilty, is properly refused where there is no evidence tending to show that defendant opened his saloon for any other purpose than that connected with the saloon business.—*Croell v. State*, (Tex.) 816.

Sales to minors.

5. For the purpose of proving that the purchaser of liquor was a minor, the testimony of witnesses, that it was reasonably apparent to the observation of a prudent man that such purchaser was not of age, is inadmissible.—*Walker v. State*, (Tex.) 644.

Indictment.

6. An indictment for selling intoxicating liquor, in violation of the local option law, which charges that the sale was made "after the qualified voters of the said county had determined, at an election held in accordance with the laws of said state, that the sale or exchange of intoxicating liquor should be prohibited," is fatally defective.—*Croom v. State*, (Tex.) 661.

JAIL AND JAILER.

See *Rescue*, 1, 2.

What constitutes jail.

Where the evidence on an indictment for carrying instruments and arms into a jail, with the intent to facilitate the escape of a prisoner, shows that the instruments and arms were carried inside a wall which was constructed about the house in which the prisoners were confined, it was a question for the jury to decide whether the inclosure between the house and wall constituted a part of the jail; a "jail" being defined by Pen. Code Tex. art. 228, to be a place of confinement used for detaining prisoners.—*Welch v. State*, (Tex.) 657.

Judge.

Liability of county judge, see *Guardian and Ward*, 4, 5.

Special judge, see *Criminal Law*, 41.

JUDGMENT.

By confession, see *Fraudulent Conveyances*, 11, 12.

v.8s.w.—63

By default.

1. Where A. brought an action against B., a non-resident, attached his property, and caused citation to be published, all of which was by statute requisite to a valid judgment against a non-resident, and B. made no appearance, and, after publication, A. filed an amended petition, setting up a new cause of action, on which judgment by default was rendered without any further citation being published or service had on B., the court acquires no jurisdiction, and the judgment is void.—*Stuart v. Anderson*, (Tex.) 295.

2. A judgment taken by default should be set aside upon motion, where it appears that the real party in interest was not made a party to the action.—*Ebell v. Bursinger*, (Tex.) 77.

Rendition.

3. Mansf. Dig. Ark. § 5190, providing that, before judgment can be regularly rendered against a defendant who has been constructively summoned, and has not appeared, an attorney must be appointed at least 60 days in advance, to notify him of the action, and put in a defense for him, is mandatory, and to neglect to comply with its requirements is error.—*Benjamin v. Birmingham*, (Ark.) 183.

Res adjudicata.

4. In an action for damages, the petition alleged that defendant sold plaintiff a tract of land, represented that the title was perfect, and agreed to give a deed with general warranty; that they went together, and had an attorney draw such a deed; that, when it was handed to defendant to sign, he secretly and fraudulently inserted, after the warranty, the words "in, under, or through me,"—thereby making it a special warranty; that plaintiff, in ignorance of the insertion, paid the purchase price, and accepted the deed; that subsequently D. brought suit against plaintiff, and, under a superior title, recovered a portion of the land. Defendant answered and gave evidence to prove that in the suit between plaintiff and D. he was a party defendant, the same grounds being alleged for relief as in this suit; that under plea that the agreement was only for a special warranty, and on the evidence, the court in that suit adjudged that he go hence without day, and recover his costs. *Held*, that the question as to the character of the warranty agreed upon was *res adjudicata*.—*Monks v. McGrady*, (Tex.) 617.

5. In a proceeding to revive a judgment against a city, and for *mandamus* to compel payment in full, the city pleaded that plaintiff was only entitled to a *pro rata* payment, there being other creditors; that the revenues on hand were insufficient to pay all; that his right to only a *pro rata* share was determined in the original judgment, and was therefore *res adjudicata*. *Held*, that plaintiff was not precluded by the former judgment, it appearing that the judgment only determined the validity of plaintiff's claim, and how much of the city funds then on hand he was entitled to have appropriated to his judgment.—*City of Houston v. Voorhies*, (Tex.) 109.

6. After a general demurrer to a petition had been overruled, the defendant answered, setting up matter that constituted no valid

defense. The case was tried by the court, and the petition was dismissed; no reason for the decision being given. On appeal, this decision was affirmed on the ground that the petition did not state a cause of action. *Held*, that this judgment was no bar to another suit on the same cause of action; the case not having been determined upon its merits.—*Pepper v. Donnelly*, (Ky.) 441.

7. The recitals in a decree in a suit between husband and wife, in which there was no real litigation, and which had the effect to declare a resulting trust in her favor, and to divest her husband of title to lands, are *prima facie* evidence of the facts stated therein, and the burden of proof is upon the creditors of the husband, who attack the decree for fraud, to overcome the effect of such recitals by proof.—*Old Folks Society of Shelby County v. Millard*, (Tenn.) 851.

Lien

8. Under Rev. St. Mo. § 2497, declaring conveyances made with intent to defraud creditors void as against such creditors; and section 2790, making judgments liens upon the judgment debtor's land from the day of rendition,—a judgment rendered after the judgment debtor has conveyed his land in fraud of his creditors is a lien on such land, superior to that of an attachment levied on the land after entry of the judgment, but before levy of execution.—*Slattery v. Jones*, (Mo.) 554.

9. Under Rev. St. Tex. arts. 3157, 3158, particularly providing for recording and indexing judgments, and article 3159, providing that, "when any judgment has been recorded and indexed as provided in the next preceding articles," it shall operate as a lien, a judgment is not a lien as against a deed recorded before the judgment is indexed.—*Nye v. Moody*, (Tex.) 606.

10. Under Rev. St. Tex. art. 1113, requiring indexes of judgments, etc., to be made by the clerks of county courts, a judgment duly filed and recorded, but not indexed, creates no lien on lands of the judgment debtor.—*Nye v. Gribble*, (Tex.) 608.

Collateral attack.

11. In an action to set aside a conveyance fraudulent as to creditors, notice was served on defendant by publication, under Rev. St. Mo. § 8494, providing that if plaintiff shall allege in his petition, or file an affidavit stating, that part or all the defendants are non-residents, the court, or clerk in vacation, shall make an order of publication. The decree setting aside the conveyance recited that defendants had been duly notified by publication. The order of publication was good on its face, carrying the inference that an affidavit of non-residence had been filed. *Held*, in a collateral proceeding, that, the court being one of general jurisdiction, whose judgments were presumptively regular, such decree was not void for want of jurisdiction, where defendants had acquiesced therein for some 15 years, though no affidavit of non-residence was to be found among the papers of the cause, and the petition contained no allegation of non-residence.—*Adams v. Cowles*, (Mo.) 711.

12. In a suit to enjoin an execution issued from justice's court, it appeared that judgment had been rendered therein against plaintiff for \$13, disallowing his counter-claim for \$23, and that the county court had dismissed an appeal therefrom on the ground that, the judgment being for less than \$30, it had no jurisdiction to review the same. *Held*, that the judgment of the county court, although erroneous, was conclusive until set aside, and could not be thus collaterally attacked.—*Roberts v. McCamant*, (Tex.) 543.*

Correction.

13. A judgment entered for a sum in excess of the amount of the verdict should be reformed.—*Stevens' Ex'rs v. Lee*, (Tex.) 40.

Scire facias.

14. *Scire facias* to revive a judgment is properly brought in the court in which the judgment was rendered, although some of the defendants live in another county.—*Schmidtke v. Miller*, (Tex.) 638.

Vacation.

15. Under Code Pr. Ky. § 391, providing that "an infant, other than a married woman, may, within twelve months after attaining the age of 21 years, show cause against a judgment;" and sections 520-523, providing that any such proceeding shall be by petition; that a judgment shall not be vacated until it is found that there is a valid defense to the action, or, if plaintiff asks its vacation, that there is a valid cause of action; that the court may pass upon the grounds to vacate or modify the judgment before deciding upon the validity of the defense or cause of action; and that "on the petition the proceedings shall be the same as those in the action in which the judgment was rendered,"—a defendant in such proceeding is not limited, as under the old practice, to a demurrer, or plea of release of error, but may, by answer, controvert the allegations of such petition where it brings in question matters of fact considered by the court at the time the judgment was rendered.—*Park v. Bolinger*, (Ky.) 914.

16. Such sections do not require an infant to wait until her majority before bringing an action to annul a judgment affecting her rights.—*Id.*

Judicial Sales.

See *Executors and Administrators*, 18-19.

JURY.

Custody and conduct, see *Criminal Law*, 37-39.

Province of jury, see *Negligence*, 5, 6.

Summoning talemen, see *Criminal Law*, 20, 21.

Competency.

1. Talemen summoned by a sheriff cannot be objected to on the ground of the sheriff's bias, where the only evidence of prejudice is that the prisoner, having been arrested for an assault, was in the custody of the sheriff, who upon the death of the person assaulted made

the affidavit upon which the prisoner was held for murder.—*Mabry v. State*, (Ark.) 823.

Summoning and impaneling.

2. Under Rev. St. Tex. arts. 3091-3094, when 12 jurors are present, and their names have been drawn and entered on the slips, the parties may be required to exercise their peremptory challenges, and cannot require the entire panel to be placed in the box, and their names drawn by the clerk, nor that talesmen be summoned until the number is reduced by challenge.—*Gulf, C. & S. F. Ry. Co. v. Greenlee*, (Tex.) 129.

Province of jury.

3. Where an interrogatory submits to the jury the question whether there is any evidence tending to prove an alleged fact, the answer will be disregarded, the question being one of law for the court.—*Bowen v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 280.

Right to jury trial.

4. Where a judgment by default was taken in an action involving unliquidated damages, and the record failed to show that defendant demanded a jury, and deposited the proper fee, a jury was properly refused, and the court properly assessed the damages.—*Bumpas v. Morrison*, (Tex.) 596.

JUSTICES OF THE PEACE.

Jurisdiction *see Set-Off and Counter-Claim.*

Appointment.

1. By Rev. St. Mo. § 2810, no person is eligible to the office of justice of the peace who shall not have been an inhabitant of the township for which he is chosen six months before his election. Section 2805 divides the city of St. Louis into districts for the election of justices of the peace. By section 2806 a justice elected under section 2805 must hold his court in the district for which he is elected, and, if he removes his office out of the district, his office will be deemed vacated. Section 3065 provides that the powers and jurisdiction given by that chapter to county or township officers are also given to the like officers in any city not within a county, or any district in such city. *Held* that, to be eligible to the office of justice of the peace of a district in St. Louis, a person must have been a resident of such district six months before his appointment or election.—*Mullery v. McCann*, (Mo.) 774.

Jurisdiction.

2. Under Code Tenn. § 4130, limiting the jurisdiction of justices in replevin to cases in which the property sought to be recovered does not exceed \$500 in value; and section 4183, providing that if the justice adjudged the property to belong to defendant, and plaintiff fails or refuses to deliver it up, the justice shall render judgment against plaintiff and his sureties for double its value,—a justice may render judgment against a plaintiff in replevin for the value of the property as established on the trial, in any amount not exceeding \$1,000, where plaintiff, in his affidavit for the writ, has laid the value of the property at \$500, and defendant claims judgment only

for \$905, the established actual value of the property.—*Godsey v. Weatherford*, (Tenn.) 385.

3. A justice of the peace has no jurisdiction to determine the rights of a defendant debtor to exemptions in a garnishment proceeding, and where the debtor has no notice, and is not a party to the proceedings, and interposes no claim, his rights are not adjudicated thereby.—*State v. Barnett*, (Mo.) 767.

4. Where an appeal from a judgment in justice's court is dismissed by the county court for want of jurisdiction, the justice has no authority to issue execution for costs incurred in the county court.—*Roberts v. McCamant*, (Tex.) 543.

Procedure.

5. After a justice has issued a *supersedeas* staying an execution against property claimed as exempt, he has no power to recall it, and the execution plaintiff, if aggrieved, must appeal to the circuit court, as provided by Mansf. Dig. Ark. § 8006.—*Cox v. Lee*, (Ark.) 400.

6. Under act Tex. 1870, (Pasch. Dig. 6340,) providing that a justice shall, when required by a party having a judgment in his court, issue execution to enforce such judgment, an execution may properly issue upon a judgment which did not specifically direct the issuance of execution.—*Roberts v. Connelle*, (Tex.) 626.

7. Rev. St. Tex. art. 1613, requiring a judgment of a justice of the peace to direct the issuance of such process as may be necessary to carry the judgment into execution, does not apply to a judgment rendered before the statute was enacted, notwithstanding the execution was issued after its enactment.—*Id.*

8. Justices' courts in Texas, not being courts of special jurisdiction, in which all the facts giving them jurisdiction must appear, the fact that a transcript from the justice does not show expressly that all defendants in an action were cited to appear does not invalidate the judgment.—*Hance v. Galveston Wharf Co.*, (Tex.) 76.

Laches.

See Estoppel, 1; *Equity*, 5; *Trusts*, 5.

LANDLORD AND TENANT.

Rights and liabilities.

1. In an action to recover possession of land, defendant answered that a third person, relying on plaintiff's representations that he was the sole heir of the owner, went into possession under a contract of purchase from plaintiff; that defendant had succeeded to this contract under like representations made by plaintiff to him; that in fact plaintiff was one of several heirs, and only the owner of an undivided one-third interest. *Held*, that defendant was not estopped to deny plaintiff's title, and it was error to strike out the answer.—*Bryan v. Hanrick*, (Tex.) 232.*

2. In an action by a tenant against his landlord for injury to goods of the former, caused by the falling of a wall of the leased building, the admission of evidence that an agent of defendant, who made the contract of lease, repre-

sent to plaintiff at the time the lease was executed that the building was safe and secure, is reversible error, as, there being no allegation of fraudulent representations or concealments on the part of defendant, the rights of the parties must be determined by the written lease.—*Lynch v. Orlieb*, (Tex.) 515.

3. One in possession of land as tenant of one of the joint owners conveyed his tenancy to another, and he to another, who attorned to the defendants. The plaintiff acquired the title under which the first tenant entered. *Held*, that the attornment to defendants did not subordinate their title to that of plaintiff.—*Maverick v. Flores*, (Tex.) 636.

Tenancy at will.

4. In ejectment, it appeared that defendant leased the premises in controversy to plaintiff, and subsequently, by permission of plaintiff, took possession of the same premises for no specified time. *Held*, that defendant was at least a tenant by sufferance or at will, and was entitled to notice, under Rev. St. § 3073, providing for a written notice of one month to terminate such tenancy.—*Tarlotting v. Bokern*, (Mo.) 547.

Rent.

5. Under Code Tenn. § 4283, providing that a person entitled to rent may recover from the purchaser of the crop the value of the property to the amount of the rent, a purchaser of a crop is liable to the landlord to the amount of unpaid rent, though he had no notice of such claim against the crop.—*Davis v. Wilson*, (Tenn.) 151.

6. Code Tenn. § 4283, providing that a person entitled to the rent may recover from the purchaser of the crop the value of the property to the amount of the rent, gives the landlord a right of action against the purchaser personally, which is not limited by the duration of the landlord's lien against the crop, which, under section 4281, only continues for three months.—*Id.*

Landlords' lien.

7. Under Code Tenn. § 4283, providing that "the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property, so that it does not exceed the amount of the rent and damages," the transferee of a note given for rent may maintain an action against the purchaser of the crop for its value, to the extent of the unpaid rent,—the purchase having been made within three months of the maturity of the rent; and this, independently of sections 4280-4282, providing for a lien on the crop for rent, to continue three months after the debt becomes due, and to be enforced by attachment or judgment at law.—*Biggs v. Piper*, (Tenn.) 851.

8. In an action, under Code Tenn. § 4283, by the assignee of a note given for rent, against one purchasing the crop within three months of the maturity of the rent, to recover the value of such crop, parol evidence of the true date of the note is admissible.—*Id.*

Right to possession.

9. The fact that rent was due, had been demanded, and was unpaid, does not entitle a

landlord to possession, and ejectment cannot be maintained.—*Tarlotting v. Bokern*, (Mo.) 547.

LARCENY.

What constitutes.

1. On a trial for stealing a steer, where the only evidence as to the taking is that of a witness, who testifies that he saw defendants driving the steer towards their pen, and that one of them told him that they were taking the steer for the purpose of fastening a board over its face to keep it out of the fields, and other witnesses testify that they saw the steer the day after "loose on the range," with a board tied over its face, the jury should be instructed that, to constitute theft, the taking must be with fraudulent intent, and that if the steer was taken and driven away for the purpose mentioned, though without the owner's consent, it would not be theft.—*Bryant v. State*, (Tex.) 987.*

2. On a trial for theft from the person, it appeared that defendant snatched money from the vest pocket of complaining witness, and offered to bet with it; that they stood talking at arms-length for about 10 minutes, when, after taking a drink, witness asked for his money. Defendant said he had returned it, and asked to be searched. He afterwards went away a short distance, out of sight of witness, then returned, and was searched, but the money was not found. *Held*, under Pen. Code Tex. art. 727, providing that, if the taking was lawful, to constitute theft the property must be obtained by some false pretext, or with the intent to deprive the owner of the same, that the evidence did not warrant a conviction.—*Graves v. State*, (Tex.) 471.

3. On trial for theft of cattle, where it is clear that defendant took the animal with intention of appropriating it to his own use, and did so appropriate it, the offense is theft, as defined by Pen. Code Tex. arts. 724, 747; and a charge in relation to the offense defined by article 749, of willfully taking possession, driving, or removing live-stock from its accustomed range, is properly refused.—*Spoone-more v. State*, (Tex.) 280.

4. On an indictment for larceny, it appeared that defendant stole certain goods from the office of an hotel kept by one O.; that the hotel was owned by, and the license to keep the same issued to, one D. *Held*, that such theft was larceny from the dwelling-house of O.—*State v. Leedy*, (Mo.) 245.

5. One caught in the act of opening a cash drawer for the purpose of stealing money is guilty of an attempt to commit larceny, though there was no money in the drawer at the time.—*Clark v. State*, (Tenn.) 145.

Indictment.

6. An indictment charging that defendant "feloniously did steal, take, and away" one hog is not fatally defective, because it omits words of asportation, as the omission would not mislead persons of common understanding; and Mansf. Dig. Ark. § 2107, provides that "no indictment is insufficient, nor can the

trial, judgment, or other proceedings therein be affected, by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."—Walker v. State, (Ark.) 939.

7. An indictment for stealing a hog need not, in Arkansas, allege the value of the animal, as hog-stealing is there a statutory crime.—Id.

8. An indictment for attempt to commit larceny, showing an attempt on money and chattels in the cash drawer of prosecutor, and its progress to the point of pulling out the drawer with felonious intent, is sufficient.—Clark v. State, (Tenn.) 145.

9. An indictment for theft charging the taking of certain property with the intent to deprive the owner of the value thereof, and "appropriate" the same to the use and benefit of the defendant, is fatally defective, on motion to quash, in not alleging an intent to "appropriate" the property alleged to have been stolen.—Jones v. State, (Tex.) 801.

Evidence.

10. On a trial for stealing a steer, where it appears that defendant was seen driving the steer, and that shortly afterwards a hide resembling that of the steer was seen hanging on defendant's fence, the court should grant defendant a new trial, where it had refused his motion for a continuance for the absence of a witness, who, defendant alleged, would testify that he spent the night of the day on which defendant was seen driving the steer at defendant's house, and that no animal was killed there that night; that the hide was not on the fence when he and defendant left the house, on the next morning; that they did not return until late that evening, when they for the first time found the hide on the fence; and that defendant expressed surprise thereat, and disclaimed all knowledge as to the hide.—Bryant v. State, (Tex.) 937.

11. A yearling calf was killed without the consent of the owner. The hide was found by the owner at the place of killing. Under a search-warrant, fresh beef was found in defendant's possession, which the officer thought was the beef of a yearling. Defendant told him he could show the hide of the animal from which it was taken, but, on being told to produce it, said he had sold it to a certain person. The person referred to testified that he never, at any time, purchased a hide from defendant. Held, that the evidence, though strongly inculpatory, was not sufficient to support a conviction.—Bennett v. State, (Tex.) 933.

12. Upon an indictment for larceny, it appeared that the money stolen was taken from a safe in the night-time; that an overshoe track was found near the place of the crime, leading to a place where horse tracks were found, which were followed several miles to the place of defendant's home, who was there next day; that a bottle, identified as having been in his possession on the evening before, was found on the way, near the overshoe tracks; that, on the day of his arrest, defendant stated that he had got his overshoes wet, and asked a man to take care of them, who put them in the stove, though defendant did not ask him to do so; and that defendant, on the

day following the larceny, avoided the owner of the money, whom he knew well. There was also evidence to impeach the character of some of the state's witnesses for veracity. Held, that a verdict of guilty would not be set aside as contrary to the evidence.—State v. Graves, (Mo.) 789.

13. On an indictment for theft of a horse, defendant proved that he had obtained possession by purchase, and exhibited a duly authenticated and recorded bill of sale therefor, and also established a good character for honesty in the community where he lived. The state failed to show bad faith in the purchase, or disprove this explanation of his possession. Held insufficient to support a conviction.—Cudd v. State, (Tex.) 814.

14. Defendant sold a horse which, according to the state's evidence, was a bay, and according to defendant's evidence, a gray. Failing to find the horse, the vendee agreed to take in lieu thereof a gray horse, which, according to the state's evidence, defendant afterwards took and sold. Defendant's evidence tended to show that the horse taken by him was the one originally sold, and that defendant believed it to be such. Held, that a conviction for theft could not be sustained, the evidence not establishing a fraudulent intent.—Howard v. State, (Tex.) 806.*

15. Defendant was convicted of theft of a calf. It was found in a pen near where he lived, with the original brand barred out, and another brand, consisting of the first three letters of defendant's given name, placed on it. The marks in the ears had also been changed. There was evidence that defendant had formerly claimed a horse which had the same brand as that which had been placed on the calf, but defendant proved that such altered brand and mark were recorded as that of a brother of his, who lived near by. Held, that the evidence was not sufficient to sustain a conviction.—Lacey v. State, (Tex.) 803.

16. On indictment for stealing a cow from one R. it is admissible for defendant to testify that he had purchased a due-bill on R., having been informed that R. would let the cow go in payment of the bill, and that he took her under the belief that this was so, and with no intent to steal.—State v. Williams, (Mo.) 217.

17. Conviction of theft of corn, in the total absence of proof as to its value, will be set aside.—Ellison v. State, (Tex.) 462.

— Of accomplices.

18. On a trial for stealing cattle, the evidence to corroborate the testimony of an accomplice was that defendant was hide and cattle inspector of the county; that he stated that he had inspected the cattle, and that they were all right; that he wrote a bill of sale of the cattle from M., the accomplice, to a third party, signing M.'s name to the same, he being present and assenting; that he received part of the purchase money on the sale of the cattle, which he explained by proving that M. was indebted to him. It was not shown that defendant knew the owner of the brand on the cattle when he reported them all right; nor was it shown that M. had no cattle, was dishonest, of bad reputation, or unlikely to be honestly in possession of the cattle. Held,

that the testimony of the accomplice was not sufficiently corroborated to warrant a conviction.—*Buchanan v. State*, (Tex.) 665.*

19. On a trial for theft, where the only evidence against defendant is that given by a witness whose testimony raises a strong presumption that he was an accomplice, a conviction cannot be sustained.—*Pool v. State*, (Tex.) 817.*

Evidence—Possession of stolen property.

20. On a trial for stealing a steer, where it appears that the hide of the stolen animal was found on defendant's fence, about 100 yards from his house, and in a thickly settled neighborhood, but defendant at the time repudiated all knowledge of or claim to the hide, there is nothing from which defendant's possession of the hide can be inferred, and consequently there can be no inference of guilt, though upon the owner of the steer identifying the hide defendant remarked that he "did not see how he [the owner] could be so positive, as he [defendant] had a red-speckled heifer just like his, [the owner's]."—*Bryant v. State*, (Tex.) 937.

21. Where witnesses differed in their statements of defendant's explanation made when first seen in possession of the alleged stolen property, some of the state's witnesses agreeing with the version of defendant's witnesses, defendant's statement on the following day is admissible to corroborate his first explanation.—*Andrews v. State*, (Tex.) 828.*

22. On a trial for theft, it appeared that defendant, having been found in possession of the goods alleged to have been stolen, explained his possession, and introduced evidence tending to corroborate such explanation. There was no evidence rebutting or contradicting his testimony. *Held*, that the evidence was insufficient to support a conviction.—*Tarin v. State*, (Tex.) 473.*

23. Where a horse, alleged to have been stolen, was found three years afterwards in the possession of defendant, who sold it, without explaining his right of possession, and there was no proof of the taking, except the unexplained possession, the evidence was not sufficient to support a conviction for theft, as the possession of stolen property, to raise a presumption of guilt, must be recent.—*Romero v. State*, (Tex.) 641.*

24. Evidence that defendant was found in possession of property two years after it was stolen will not sustain a conviction for theft, especially where he accounted for his possession by stating that he bought the property of a negro man, S., and by showing a bill of sale for it, and no contradictory evidence is offered except evidence tending to show flight.—*Matlock v. State*, (Tex.) 818.*

25. Where the evidence shows the contemporaneous disappearance of defendant and certain horses, and where defendant, when arrested, had the horses in his possession, and was trying to sell them, a conviction for theft of the horses will be sustained, though defendant committed the crime in company with another, and there is evidence that defendant was of a very weak mind, and easily influenced.—*Gentry v. State*, (Tex.) 925.

Instructions.

26. On an indictment for theft of a watch, it appeared that defendant placed a roll of money in the hands of one person, and the prosecuting witness placed his watch in the hands of another, and that they agreed that when the roll of money, or fifty dollars of it, was delivered to the prosecuting witness, the watch should be delivered to defendant. *Held*, that an instruction containing the words, "and the watch to be delivered after the money delivered by the defendant had been counted by the owner of the watch," was erroneous, as being based upon facts not proved on trial.—*Chamberlain v. State*, (Tex.) 474.

27. On an indictment for larceny, when defendant admits taking the property, but claims to have done so innocently, thinking it belonged to a relative, it is error to charge that where property has been stolen, and is found soon after in the possession of another, such person, in the absence of exonerating evidence, is presumed to be the thief, as the question for consideration by the jury is defendant's intent, and not who took the property.—*State v. Warden*, (Mo.) 233.

28. Where defendant, indicted for theft, explains his possession of the stolen property by claiming that he borrowed it from one who had stolen it, the charge of the court is insufficient if it fails to instruct the jury that if the property was stolen by a third person, from whom defendant, knowing the facts, obtained it by consent of the thief, they must acquit defendant under the indictment.—*Fernandez v. State*, (Tex.) 667.

29. On an indictment under Pen. Code Tex. art. 736, prescribing, as punishment for the theft of property under the value of \$30, imprisonment in the county jail not exceeding one year, and a fine not exceeding \$500, or such imprisonment without the fine, it is error for the court to charge that, if the jury found defendant guilty, they would assess his punishment at not more than one year's imprisonment in the county jail, and a fine of not more than \$500, since it omitted to charge as to the imprisonment without the fine.—*Irwin v. State*, (Tex.) 681.

30. Where, on trial for theft of horses, evidence shows that defendant took a horse not mentioned in the indictment, the court should instruct the jury that defendant cannot be convicted of the theft of such horse not mentioned in the indictment; but where defendant took no exception at the trial, and asked no special charge, and his rights were not injured, an omission to give such an instruction is no ground for reversal.—*Gentry v. State*, (Tex.) 925.

LIBEL AND SLANDER.

Criminal slander.

1. There is a fatal variance where an indictment for criminal slander alleges that the slanderous words were spoken in English, while the proofs show that they were spoken in German.—*Sticht v. State*, (Tex.) 477.

2. In a trial for criminal slander, failure to prove the time of the commission of the offense is a fatal error.—*Id.*

License.

Power to license, see *Municipal Corporations*, 3-5.

To do business, see *Insurance*, 12.

Liens.

See *Judgment*, 8-10.

Of attachment, see *Attachment*, 5.
landlord, see *Landlord and Tenant*, 7, 8.

Life Insurance.

See *Insurance*.

LIMITATION OF ACTIONS.

Running of statute, see *Dower*, 2; *Guardian and Ward*, 4; *Landlord and Tenant*, 6, *Practice in Civil Cases*, 1.

Adverse possession.

1. In trespass to try title, it appeared that defendants were in constructive possession of land under a good paper title; that plaintiffs claimed under a later deed which overlapped on defendants' land, and were in actual possession of part of the land called for in their deed, but had not inclosed or improved any part covered by defendants' deed. *Held*, that plaintiffs' possession was not adverse to that of defendants.—*Howard v. Kellam*, (Tex.) 98.*

2. Where A. conveyed land to B., who bought for C., and the same day conveyed to him, C. having negotiated the purchase, and received possession from A., and there was continuous possession, under the successive parties, of a tenant of A., there is privity of title and continuity of possession, and the statute of limitations runs from the commencement of A.'s possession.—*Heflin v. Burns*, (Tex.) 48.

3. A petition alleging the execution to plaintiff of a deed in fee-simple, in which the description of the land intended to be conveyed was left blank, and authority given by the grantor to another to select the lands desired, and insert their description in the deed, and that the selection was made, though the blank was not filled, and that plaintiff went into possession thereunder, and continued therein for 10 years, shows title under the statute of limitations.—*Tarrant County v. McLemore*, (Tex.) 94.

4. Defendants in ejectment, having been in adverse possession of the property for the full statutory period, under a parol gift, will not have their claim defeated by proof that the donor had, within the statutory period, without defendant's consent, executed a mortgage and trust deed thereon, paid taxes, demanded rents of defendants, etc., as these acts, not being by defendants, do not show that they have elected to abandon their claim of title under the gift.—*International Bank v. Fife*, (Mo.) 241.*

5. In an action to recover land, three year's possession by a defendant, who cannot show his possession to be within the limits of the survey under which he claims, is not a bar under Rev. St. Tex. 1879, § 8191, which re-

quires that every suit for the recovery of real estate against a person in peaceable and adverse possession under title or color of title shall be instituted within three years from the accruing of the cause of action.—*Horst v. Herring*, (Tex.) 806.

6. One who conveys land to another by deed, and continues to live on the land in question, cultivating it and paying taxes thereon, cannot avail himself of the statute of limitations to defeat the title of his vendee.—*Voight v. Mackle*, (Tex.) 623.

7. Where two adjoining proprietors are divided by a fence, which they erroneously supposed to be the true line, in the absence of any agreement to the contrary, they are not bound by the supposed line, but must conform to the true line, though the land in question has been in actual possession, under such mistake, for more than 10 years.—*Schad v. Sharp*, (Mo.) 549.

8. When two persons claim under conflicting surveys, the defendant under a junior grant cannot set up his title by the plea of limitation, unless he can show actual occupancy of some portion of the strip in conflict, and the mere herding of sheep from time to time thereon is not such occupancy.—*Mason v. Stapper*, (Tex.) 598.*

Running of statute.

9. A defendant who is a non-resident when a cause of action accrues, though he returns after accrual, temporarily, is not within Rev. St. Mo. 1879, art. 2, § 3293, providing that if, when a cause of action accrues against a resident of this state, and he is absent therefrom, such action may be commenced within the times therein limited, after the return of such person, and if, after such accrual, such person depart from the state, the time of his absence will not be deemed part of the time limited for the commencement of the action.—*Orr v. Wilmarth*, (Mo.) 256.

10. Plaintiff, in March, 1879, began action against a foreign insurance company to recover premiums he had paid, basing his claim on false representations of defendant as to its solvency. Pending the action, the corporation was dissolved, causing the action to abate. In May, 1885, plaintiff filed new pleadings, making defendants the representatives of the dissolved corporation. *Held*, that the action against defendants was barred by limitation.—*Life Ass'n of America v. Goode*, (Tex.) 689.

11. In such a case it matters not whether the proceeding was one *in rem* because of real property within this state belonging to the dissolved corporation out of which plaintiff sought to enforce his claim.—*Id.*

12. The evidence in ejectment showed that plaintiff's mother died seized of the land in question, in 1836; that in the same year plaintiff's father conveyed his estate by the curtesy therein to defendant, and afterwards died in 1878; and that plaintiff began this suit in the year 1882. *Held*, that the statute of limitations had not run against plaintiff, since her right of action did not accrue until the death of her father.—*Smith v. Patterson*, (Mo.) 567.

13. Where one takes possession of property under a parol gift, giving a right to a deed immediately, the statute of limitations com-

mences at once, and this defense, in ejectment, will not be waived by setting up in the answer an equitable claim of title to the property.—*International Bank v. Fife*, (Mo.) 241.*

14. In an action against a railroad company for the purchase price of certain property, it appeared that defendant, by resolution of its board of directors, accepted a conveyance of the property from plaintiff's intestate; that the acceptance was entered on the corporate minutes, and signed by the president and secretary. *Held*, that such minutes constituted a contract in writing, and that an action could be brought thereon within four years; *Rev. St. Tex. art. 3205*, enacting that an action for debt, where indebtedness is evidenced or founded on any contract in writing, shall be commenced and prosecuted within four years from accrual of cause of action.—*Texas W. Ry. Co. v. Gentry*, (Tex.) 98.

15. Where plaintiff's grantors had located under a certificate in 1857, and defendant's grantor had obtained patent to the same land in 1863, an action brought by plaintiff in 1878 is not barred by the 10-years statute of limitations, as all statutes of limitation were suspended from the commencement of the civil war until March 30, 1870.—*Sickels v. Epps*, (Tex.) 124.

16. On a *quantum meruit* for services rendered under a parol contract that defendant should have certain lands in consideration of certain services to be rendered to the owner, where, without claimant's fault or consent, the owner renounced the contract, the value of the services for the entire period may be recovered, no cause of action having accrued until the renunciation.—*Stevens' Ex'rs v. Lee*, (Tex.) 40.

17. Where the injury complained of results from an illegal invasion of plaintiff's rights by defendant's agent, the cause of action accrues at, and the statute of limitation runs from, the date of such wrongful act, and the fact that the extent of the resulting damage does not become at once apparent is immaterial.—*Houston Water-Works Co. v. Kennedy*, (Tex.) 86.

18. The statute of limitations does not run against a set-off after an action is commenced, and such set-off is allowable, though not pleaded until after it would otherwise be barred, where it was not barred at the time the action was instituted.—*Paducah & M. R. Co. v. Parks*, (Tenn.) 842.

Acknowledgment.

19. A conditional promise, in writing, to pay if ever the promisor is able, coupled with proof of such ability subsequent to the promise, is sufficient to take a case out of *Rev. St. Tex. art. 3203*, limiting actions for debt not evidenced by a contract in writing to two years, even if such ability is not a continuing one.—*Lange v. Carothers*, (Tex.) 604.*

LIS PENDENS.

On vessels.

Although the doctrine of *lis pendens* applies to vessels, one who purchases a steamer without notice of the pending litigation over his vendor's title, is not affected by the

result of such litigation where it does not appear that the tug, at the time of the purchase or at any time since, was within the state. *Const. U. S. art. 4, § 1*, requiring full faith and credit to be given to the judicial proceedings of other states, and *Rev. St. U. S. § 4192 et seq.*, relating to the registry of vessels, have no application to such case.—*Carr v. Lewis Coal Co.*, (Mo.) 907.

MALICIOUS MISCHIEF.

What constitutes.

1. The destruction of a buggy harness is not an offense within *Pen. Code Tex. art. 683*, providing a penalty for the willful and mischievous injury or destruction of "any growing fruit, corn, grain, or other agricultural product or property," nor within any other statute of that state.—*Terry v. State*, (Tex.) 934.

Indictment.

2. A complaint and information charging malicious mischief in tearing down the fence of two persons, are fatally defective when they fail to allege the want of consent of each of the owners.—*Govett v. State*, (Tex.) 473.

MALICIOUS PROSECUTION.

Exemplary damages, see *Damages*, 1.

Evidence.

1. In an action for malicious prosecution, the exclusion of the transcript of the proceedings in the prosecution, showing the affidavit of defendant, return of criminal information thereon, and verdict of the jury, on the ground that the court before which such proceedings were had had no jurisdiction, is improper, as the defendant is not thereby relieved from liability.—*Wood v. Sutor*, (Tex.) 51.

2. In an action for malicious prosecution on a criminal information, where a transcript of the record of the court in which the alleged prosecution was had is introduced in evidence, an omission of the clerk to certify that the affidavit upon which the information was filed was made by defendant, and to state the officer before whom it was made, is unimportant, as the certificate is not evidence of such facts.—*Id.*

MANDAMUS.

To recorder of votes, see *Elections and Voters*, 1.

To municipal boards and officers.

1. A private citizen may be a party to a proceeding for *mandamus* to compel public officers to enforce certain city ordinances.—*State v. Francis*, (Mo.) 1.

2. In proceedings to obtain *mandamus* to compel a city to grant a ferry license, the return stated that, under the legislative power delegated to it "to regulate, tax, and license all ferries within the limits of the city," defendant had granted exclusive license to another, that public necessity did not require a second ferry, and that once before the city,

acting in its discretion, had refused to grant plaintiffs a license. *Held*, on demurrer to the return, that the discretion of the municipal corporation could not be controlled in such case by *mandamus*.—*State v. Cramer*, (Mo.) 788.

8. Where a city charter makes it the duty of certain officers to enforce the Sunday laws, leaving the method of enforcement to their discretion, a *mandamus* will not lie to compel such officers to arrest without warrant and prosecute persons for violating said Sunday laws; and a petition for *mandamus*, requesting that an order directing the police not to interfere with the sale of liquor on Sunday be vacated, though such relief, if asked alone, would be granted, will not be allowed when the request to compel the officers to arrest without warrant is made a part of the petition.—*State v. Francis*, (Mo.) 1.

Procedure.

4. Where, by the return to an alternative writ of *mandamus*, it appears that defendant, an oil inspector, is legally bound to inspect and brand certain tanks, but not all the tanks prayed for, the petition may be amended by striking out so much as relates to the latter, as the article of the practice act concerning amending pleadings and proceedings is extended by Rev. St. Mo. § 3585, to writs of *mandamus*.—*State v. Baggot*, (Mo.) 737.

5. A return to an alternative writ of *mandamus* denying "any knowledge or information sufficient to form a belief" in respect to certain material allegations of the petition is insufficient; the provisions of the practice act, permitting such answer in ordinary civil cases, not being applicable to proceedings by *mandamus*.—*State v. Williams*, (Mo.) 771.

Manslaughter.

See *Homicide*, 14-16.

Marriage.

See *Divorce; Husband and Wife*.

MASTER AND SERVANT.

Injury to servant, see *Negligence*, 1.

Negligence of master.

1. Where plaintiff, a brakeman in the employ of defendant, was thrown from the tender by an alleged low joint in the track, and it was shown that none of the other employes on the train felt any unusual jolt, and no defect was found in the track by the track inspectors, there was not sufficient evidence of negligence by defendant to sustain a judgment for plaintiff, who had assumed the risks incident to such employment.—*Texas & N. O. Ry. Co. v. Dillard*, (Tex.) 118.*

2. Plaintiff, an employe, was injured, without negligence on his part, by the falling of a temporary bridge which he was crossing on defendant's train. The bridge was designed for the passage of trains, the operation of a pile-driver, and the construction of a permanent bridge therefrom, and had been in use for

several days. All the details of the construction and inspection of the bridge were before the jury. *Held*, that it was for the jury to say whether defendant used reasonable care in the construction and inspection of the bridge, keeping in view the purpose for which it was to be used.—*Bowen v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 280.

3. In an action, by an employe, for personal injury, an instruction that plaintiff would be entitled to recover if defendant knew, "or by the use of ordinary care in the inspection of said bridge or otherwise" might have known, that it was unsafe, does not, by the use of the words "or otherwise," call for the highest degree of care possible on defendant's part.—*Id.**

4. Where defendant furnishes for his employe a temporary bridge for the passage of construction trains, and the construction of a permanent bridge therefrom, the fact that the bridge was built under a competent foreman, and competent inspectors were afterwards furnished, does not free defendant from liability to such employe for defects in the construction and repair of the bridge which defendant could, in the exercise of ordinary care, have known of.—*Id.**

5. In an action against a railroad company for the death of a conductor, it appeared that the accident occurred while deceased was running his train at an immoderate rate of speed over a bridge which was being repaired, when the bridge gave way. *Held*, that the company was not negligent in not giving notice of the condition of the track, where the conductor knew that the repairs were being made, and the "slow boards" were out.—*St. Louis, I. M. & S. Ry. Co. v. Morgart*, (Ark.) 179.

6. In such case the burden of proof is on plaintiff to rebut the presumption of negligence, and to show that the engineer was running contrary to the conductor's orders.—*Id.*

Defective appliances.

7 In an action for injuries sustained by plaintiff in being thrown from a moving hand car by the breaking of a defective handle, where it appears that the defect was out of sight, and that plaintiff was a new employe, and it is not shown that he had ever seen the handle before the morning of the accident, a charge that, if the opportunities of plaintiff and of defendant to ascertain the defect were equal, the plaintiff could not recover, is properly refused, as it is not applicable to the facts.—*Gulf, C. & S. F. R. Co. v. Silliphant*, (Tex.) 678.

8. In an action for injury sustained by the breaking of a defective handle on a hand car, so that plaintiff was thrown off and run over, a charge, in effect, that the company is bound to use reasonable diligence in keeping its machinery in reasonably safe repair; and, if defendant knew the handle of the car to have become defective, allowing it to remain would be negligence on its part; and if plaintiff knew of the defect, and still undertook to use the handle, and was injured by reason of the defect, there would be contributory negligence on his part; that if the defect was unknown to defendant, it would not be negligent unless it failed to use reasonable diligence to discover it; and, if the defect was unknown

to plaintiff, he would not be guilty of contributory negligence; and, if both or neither were negligent, plaintiff could not recover,—is a sufficiently clear statement of the law applicable to the facts.—Id.

9. In an action against a railroad company for personal injuries, it appeared that plaintiff was ordered to work at a wooden lever on a hand car, with his back towards the direction in which the car was moving; that, on raising the lever, it broke, causing plaintiff to be thrown backwards, and run over. Plaintiff's evidence tended to show that the lever had been fastened in place by a nail or bolt through it; that at the break, which was at the place penetrated by the nail or bolt, the wood was discolored, showing decay, and evidence of a partial old break; and that outside the socket there was no evident defect. Defendant's evidence tended to show that the car was new, and that there was no defect in the handle; that it looked to be good, and had not been regarded as unsafe. *Held*, in this conflict in the testimony a verdict for plaintiff will not be disturbed.—Id.

10. In an action against a railroad company by an employe for personal injuries alleged to have been sustained while running a hand car under the orders of defendant's foreman, where the only allegation of the petition as to the defective condition of defendant's hand car which was the cause of the injury is that a water-keg thereon was not in its proper position, evidence to show that the defective condition of the car was due to the disposition of the tools on the hand car is inadmissible.—*Harty v. St. Louis, I. M. & S. Ry. Co., (Mo.) 562.*

11. Where plaintiff testified that his injury was caused by the improper location of a water-keg on defendant's hand car, an instruction authorizing the jury to find a verdict for him, if they believed there was not a sufficient number of men furnished by defendant's foreman to help plaintiff to remove the hand car from the track, is erroneous.—Id.

12. In an action by an employe for injuries from neglect to construct a suitable railing around an elevated platform upon which it was necessary for plaintiff to stand while adjusting the machinery, plaintiff alleged that he had been in the employ of defendant but three or four days when the accident occurred, and that defendant had been warned of the danger, and had promised to erect a railing within a reasonable time. *Held*, that such complaint was not demurrable because of its failure to aver that defendant had not made good its undertaking, as the promise to repair placed the risk on defendant; there being no pretense that plaintiff had used the platform for such length of time as to induce the belief that defendant intended to or had violated its promise to repair, or that the danger was so imminent that one of ordinary prudence would not have continued to use the platform.—*McDowell v. Chesapeake, O. & S. W. R. Co., (Ky.) 821.*

Negligence of master—Power of sub-master.

18. In an action against a railroad company by an employe for injuries received while re-

moving a hand car on the order of defendant's foreman, an instruction predicated on the foreman's power to hire or discharge men is erroneous, where there is no evidence as to such power.—*Harty v. St. Louis, I. M. & S. Ry. Co., (Mo.) 562.*

Damages.

14. In an action for personal injuries, the petition alleged that "the injuries caused by the defendant's negligence induced great suffering, permanent ill health, and physical weakness," and the charge complained of, relating to the measure of damages, included "physical and mental disability or weakness occasioned by the injuries." *Held*, that the terms in the petition were sufficiently comprehensive to include those used in the charge.—*Gulf, C. & S. F. R. Co. v. Silliphant, (Tex.) 678.*

15. In an action against a railroad for personal injuries, the ability of plaintiff to earn wages being in issue, testimony of a witness, coming from matter elicited in cross-examination by defendant, that "he started his market in East Dallas for the purpose of giving employment to plaintiff, who needed it," is admissible to show that plaintiff's present wages are in part charity.—Id.

Negligence of fellow-servants.

16. In an action against a railroad company by an engineer of a passenger train for injuries received in a collision with a freight train, defendant is liable where the accident was caused by the negligence of those in charge of the freight train.—*Kentucky Cent. R. Co. v. Ackley, (Ky.) 691.*

17. In an action against a railroad for the death of a fireman in a collision caused by a misplaced switch, it appeared that a brakeman had properly placed the switch, and one train had passed safely by shortly before the collision. Evidence for plaintiff tended to show that this brakeman had proved careless and incompetent on other occasions, but not on the occasion of the collision. Plaintiff did not prove carelessness on the part of any one else, nor that the switch could have been misplaced by the train which passed. *Held*, that the court should have charged the jury to find for defendant.—*Galveston, H. & S. A. Ry. Co. v. Faber, (Tex.) 64.**

18. In an action against a railroad company for personal injuries sustained by one of defendant's switchmen through the alleged incompetency of K., a fellow-switchman, the jury found that K. was incompetent; that this was known by defendant's agent who employed K.; but that it was not known to plaintiff, nor had he the means of knowing it. *Held*, that under these findings the company was liable.—*Chesapeake, O. & S. W. R. Co. v. McMannon, (Ky.) 18.**

19. In an action by an employe against a railroad company for personal injuries alleged to have been received by reason of the incompetency and brutal conduct of defendant's foreman, of which defendant had, or might have had, knowledge, proof that the foreman cursed plaintiff, and compelled him to take the position in which he was hurt, and that, in unloading iron pipes from a car, the accident by which plaintiff was injured was occasioned

by a defect in the iron bar placed under the pipe, and the failure to place pieces of wood under the pipes to prevent them from slipping, varies from the petition, and will not sustain a judgment for plaintiff.—*Ischer v. St. Louis Bridge Co.*, (Mo.) 387.

Contributory negligence.

20. When a conductor runs his train at an immoderate rate of speed over a bridge which is being repaired, so that it gives way, and he is killed, the railroad company is not liable for not providing a safe track, it not appearing that the accident would have occurred if the train had been run at a proper speed.—*St. Louis, I. M. & S. Ry. Co. v. Morgart*, (Ark.) 179.

Knowledge of defects.

21. While a section foreman was returning from his work, on a hand car, his foot was caught by a broken tie, which had sprung up in the middle of the road, and he was thrown from the car, and injured. He had a short time previously, in discharge of his duty, reported the bad condition of his section of the road, (but not through any fear of injury to himself in the course of his employment,) and had demanded materials for repairs, which were promised, but never furnished. Relying on such promises, he continued in the company's employ up to the time of the injury. *Held*, that this would not preclude his recovery for the injuries sustained, in the absence of any contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. Donnelly*, (Tex.) 53.*

MAYHEM.

What constitutes—Intent.

1. A specific intent to maim is not necessary to conviction under Code Tenn. § 5857, providing that a person who unlawfully and maliciously disfigures or maims another shall be, on conviction, imprisoned, etc.—*Terrell v. State*, (Tenn.) 212.

Evidence.

2. Where the testimony of the prosecutor, corroborated by several witnesses, shows that a defendant indicted for mayhem made a violent and unprovoked assault on the former, and deprived him of his only eye, and defendant alone testifies as to provocation and apprehension of danger from the prosecutor when the assault was made, the evidence is sufficient to support a verdict of guilty. *TURNER, C. J.*, and *SNODGRASS, J.*, dissenting.—*Id.*

Mechanics' Liens.

Assignment of balance due, see *Assignment*.

Mistake.

Reformation of deed, see *Equity*, 1-3.

MORTGAGES.

See, also, *Chattel Mortgages*.

Foreclosure, see *Evidence*, 16; *Homestead*, 8.

Foreclosure.

1. Plaintiff is not entitled to a decree of foreclosure unless his petition alleges an in-

debtedness as a foundation of the mortgage.—*Nye v. Gribble*, (Tex.) 603.

2. On a plea of the statute of limitations in an action to foreclose a mortgage, where it appears that the debt secured is barred by limitation, and no facts are stated that would prevent the statute from running, a foreclosure is properly refused.—*Bitter v. Calhoun*, (Tex.) 523.

3. Under Civil Code Ky. § 694, providing that, before ordering a sale of real property for the payment of a debt, the court must be satisfied by the pleadings, by an agreement of parties, by affidavits filed, or by a report of a commissioner, whether the property can be divided without materially injuring its value, it is not error to confirm, without any showing, a partition of a tract of 106 acres, part of which was sold under foreclosure, where the owner has made no showing that its value was materially injured, as *prima facie* such a tract can be divided without injury.—*McFarland v. Garnett*, (Ky.) 17.

Redemption.

4. Under Rev. St. Mo. § 3296, providing that land sold under a deed of trust, and bought by the *cestui que trust* or his assigns, shall be subject to redemption within one year from the sale; and section 3299, providing that no party shall have the benefit of the preceding section until he shall have given security for the payment of interest to accrue after the sale, such security must be given at or within a reasonable time after the time of sale, and a bond given more than four months after the sale does not give any right of redemption.—*Uplike v. Merchants' Elevator Co.*, (Mo.) 779.

Power of sale.

5. A mortgage empowering the mortgagee, "his heirs, executors, administrators, and assigns, to sell the premises therein conveyed, in case of default, and, as attorneys for the mortgagor, to make and deliver to the purchaser a good and sufficient deed to the land," confers a personal trust, and, the contingency upon which the mortgagee's legal representatives could act not having arisen, and no assignment of the note or mortgage having been made, the mortgagee has no power to appoint another to make a sale of the land as his agent.—*Bitter v. Calhoun*, (Tex.) 523.

6. In an action to set aside a trustee sale on the grounds of inadequacy of consideration and fraud, \$3,211 being the amount realized, evidence that the land in question was sold at a trustee sale 17 months prior for \$1,396; at a private sale shortly thereafter for \$1,600; that plaintiff's ancestor purchased the land 16 months prior to the sale in question for \$1,771; and that there has been no subsequent increase in its value,—is admissible as bearing on the question of value.—*Keiser v. Gammon*, (Mo.) 377.

MUNICIPAL CORPORATIONS.

See, also, *Counties*; *Highways*.

Mandamus against, see *Mandamus*, 2, 3.

Power to license, see *Insurance*, 12.

Restraint of public improvements, see *Infraction*, 2.

Ordinances—Cruelty to animals.

1. The city of St. Louis, under the clause in its charter which authorizes the mayor and assembly to pass all such ordinances, not inconsistent with the charter or the state laws, as may be expedient in maintaining the peace and good government, health and welfare, of the city, and to enforce the same by fines and penalties, may pass an ordinance making it a misdemeanor to overdrive, overload, ill-treat, or cruelly beat any dumb animal.—*City of St. Louis v. Schoenbusch*, (Mo.) 791.

2. Though, by Rev. St. Mo. 1879, §§ 1875, 1609, it is made a misdemeanor to cruelly beat any horse, ox, or domestic animal, municipal corporations are not thereby incapacitated from prohibiting the same act by ordinance, and punishing offenders for violation thereof.—*Id.*

—Licenses.

8. Rev. Ord. St. Louis 1887, § 889, providing that no one shall keep a meat-shop in St. Louis without first obtaining a license therefor, and paying an annual license of \$50, is not invalid as made without power on the part of the municipal authorities to tax keepers of meat-shops; such power being conferred by the charter, which provides that the mayor and assembly shall have power to license and tax grocers, merchants, and retailers, and all other business, trades, vocations, or professions.—*City of St. Louis v. Freivogel*, (Mo.) 715.

4. Where one ordinance provides that a meat-shop keeper's license shall entitle him to sell meat, fish, fowl, vegetables, and fruit, and another ordinance provides that "the inner portion of all market-houses shall be set apart for butchers' stalls, and that any stall outside of any market-house may be used for the sale of vegetables, fruit," etc., "or other article except fresh meat," the former ordinance does not discriminate, in that meat-shop keepers inside the market houses are not allowed to sell vegetables and fruits, since the prohibition is contained in the latter ordinance.—*Id.*

5. Rev. Ord. St. Louis 1887, § 889, providing that no one shall keep a meat-shop in St. Louis without having first obtained a license therefor; that all persons offering for sale salt or fresh meat, fish, sausage, etc., shall be considered meat-shop keepers, except that grocers who sell ham, shoulders, dried beef, bacon, etc., shall not be included,—does not discriminate in favor of grocers, since such articles are a part of a grocer's stock.—*Id.*

Officers—Qualification.

6. Under act Ky. March 24, 1851, §§ 5, 6, 10, 15, providing that the trustees of the town of Campbellsville shall appoint such officers as they may deem necessary, and take from them good and sufficient bonds, and providing for the election of a town marshal, who, in addition to performing the duties of a constable, shall collect all taxes of said town, for which he shall have the same fees as are allowed sheriffs for collecting county taxes, and that the clerk of the board of trustees shall make

out and deliver to the collector a fair copy of the assessment book, etc., and that the board may allow the collector such compensation as they may deem proper; and act Ky. Feb. 23, 1860, providing "that said town marshal shall give bond in Taylor county court in the same manner as constables are required to do;" and act Ky. Feb. 18, 1867, providing that the trustees of the town may fill any vacancy that may occur in the office of town marshal, and require the person appointed to execute sufficient bond, etc.,—a marshal of Campbellsville, who has simply given bond in the county court to the commonwealth, as required of constables, is not entitled to a copy of the assessment book, and a warrant of the trustees authorizing him to collect the town taxes, until he has executed a further bond, distinct from his official bond, approved by such trustees, conditioned for the faithful discharge of his duties as such collector.—*Board of Trustees v. Borders*, (Ky.) 446.

Control of streets.

7. Where the owner of land had dedicated it to the public for a street, the authorities of the city cannot lawfully appropriate it to uses and purposes foreign to those for which it was dedicated.—*Arkansas River Packet Co. v. Sorrells*, (Ark.) 683.*

Defective streets.

8. Where its charter gives a city control of its streets, sidewalks, sewers, and all things usually appertaining to city supervision, and its ordinances recognize a certain avenue as a street, it is error, in an action for injuries sustained by reason of the negligent construction of a sidewalk and ditch in such avenue, to instruct the jury to return a verdict for defendant unless they find from the evidence that it constructed the sidewalk and ditch.—*Klein v. City of Dallas*, (Tex.) 90.

9. In an action against a municipal corporation for injuries received by reason of the defective condition of its streets, where the charge assumes that the streets in question were public streets and highways, and was based on that assumption, there is no error in not giving positive instructions as to the fact. If there is anything wanting in that respect, a special charge should be asked.—*Id.*

10. In an action against a municipal corporation for injuries sustained from the negligent construction of the sidewalk and ditch in one of its streets, an instruction that plaintiff cannot recover unless defendant had notice of the defective and dangerous condition of the sidewalk and ditch, without further instruction as to the law of actual and constructive notice, and without qualification as to the possible finding that the city built the walk and ditch, is error.—*Id.**

Defects in court-house.

11. Under Const. Mo., art. 9, § 23, which requires the city of St. Louis to collect the state revenue, and "perform all other functions in relation to the state in the same manner as if it were a county," the relation of the city to its court-house is the same as that of the respective counties in the state to their court-houses, and, no action being given by statute against such municipalities for injuries result-

ing from negligence in relation to their court-houses, an action will not lie against said city by one injured by falling into a pit connected with its court-house.—*Cunningham v. City of St. Louis, (Mo.) 787.*

Public improvements—Petition.

12. Under the charter of Kansas City, (Acts Mo. 1875, p. 250.) which provides that streets shall not be improved at the expense of property holders thereon, until a majority thereof, in front feet, petition therefor, after which such petition shall be published, when persons liable for the expense of the proposed improvement may make objections thereto, which the council shall hear and decide, and that when the ordinance providing for such improvement declares that the requirements, as to petition and notice, have been complied with, such declaration shall be conclusive for all purposes, if the council refuse a hearing, when demanded, to interested persons making objections, the execution of such ordinance will be restrained until such hearing is had.—*Dennison v. City of Kansas, (Mo.) 429.*

Assessments.

13. In an action to recover of a property holder the amount which his property has been benefited by the widening of a street, a charge for plaintiff that, in determining the amount, the testimony of experts, if deemed unreasonable, may be disregarded, is not error.—*City of St. Louis v. Ranken, (Mo.) 249.*

Liabilities and indebtedness.

14. In a proceeding to revive a judgment, and for *mandamus* to enforce a judgment for past-due interest on city bonds payable from certain specified funds, a large part of which had been diverted to other uses, the city cannot plead that plaintiff's claim was but a small part of the past-due indebtedness of the city which was payable from the same funds; and that plaintiff was only entitled to *pro rata* payment, the revenues of the town being all it could collect by law, and insufficient to pay all creditors in full.—*City of Houston v. Voorhies, (Tex.) 109.*

15. In a proceeding against a city to compel payment of a judgment in full by peremptory *mandamus*, it is no defense that the city had provided a revenue by a proper levy, which had not been collected, where it was shown that the city authorities had full power to require the collector to pay over moneys in a reasonable time if collected, or, if not, to remove him, and appoint another collector.—*Id.*

National Banks.

See *Banks and Banking, 6.*

NEGLIGENCE.

Accidents at crossings, see *Railroad Companies, 18-19.*

Contributory, see *Carriers, 15-22; Drug-gists, 2.*

Dangerous premises, see *Municipal Corporations, 11.*

Delay in delivery of message, see *Telegraph Companies.*

Fires by locomotive, see *Railroad Companies, 24, 25.*

Injuries from defective streets, see *Municipal Corporations, 8-10.*

to passengers, see *Carriers, 9-22.*

to persons on track, see *Horse and Street Railroads, 8-7; Railroad Companies, 20-33.*

to servants, see *Master and Servant.*

Measure of damages, see *Damages, 2-5.*

What constitutes.

1. Where a conductor controlling a train orders a new movement before his brakeman has a reasonable time to get from between the cars after making a coupling, it is gross negligence.—*Louisville & N. R. Co. v. Mitchell, (Ky.) 706.*

Dangerous premises.

2. The owner of a lot on which green millet is growing, carelessly leaving his fence down, is not liable in an action to recover the value of a cow killed by eating the millet, where the court finds as a fact that it is not generally injurious to stock.—*Fennell v. Seguin St. Ry. Co., (Tex.) 486.*

Pleading.

3. Where one is injured by the negligence of a railroad company, an allegation of negligence, without averring its degree, is sufficient to entitle him to recover for any degree of culpable negligence that may be established by the evidence.—*Louisville & N. R. Co. v. Mitchell, (Ky.) 706.**

4. Where a complaint charged gross negligence, that term embraces all lesser degrees of negligence, and plaintiff is not precluded from recovering for a lesser degree of negligence than that charged.—*Hays v. Gainesville St. Ry. Co., (Tex.) 491.*

Evidence.

5. When there is some competent evidence authorized by the pleadings that the injury complained of resulted from gross negligence, and the existence of such negligence is necessary to a recovery, the question whether the injury was so caused is properly submitted to the jury.—*Louisville & N. R. Co. v. Mitchell, (Ky.) 706.*

6. In an action for personal injuries caused by the negligence of defendants' foreman in handling giant-powder, there was evidence that the foreman placed the can containing the powder, uncovered, over the fire to thaw the powder, in a manner not usually practiced, but whether the can was over the fire at the time of ignition was uncertain, though, if not, it had been removed but five or six feet from the fire for a short time only. *Held*, that the case should have been submitted to the jury; since there was evidence tending to prove that the explosion resulted from placing the can over the fire.—*Twohey v. Fruin, (Mo.) 784.*

NEGOTIABLE INSTRUMENTS.

Acceptance, see *Frauds, Statute of, 1.*

Liability of indorser of non-negotiable bill, see *Orders, 1, 2.*

Negotiability.

1. A draft, in the following words: "Mr. L. Please pay to K. & Co. \$500, and charge the same to account. P.,"—accepted by the drawee, and indorsed by payees, is not a negotiable instrument, and need not be protested to bind the indorser.—*Kampmann v. Williams*, (Tex.) 810.

Consideration.

2. Defendant was indebted to W.'s estate, and the latter was indebted to S. W.'s administrator agreed with defendant that, if he procured S.'s claim against estate, the amount thereof would be credited on the claim of the estate against him. Defendant gave his note to S., who agreed that, if the note was equal to his claim against W.'s estate, the claim was to be delivered up to defendant, or, if less, to credit the amount of the note on the claim. Defendant showed the order to the administrator, who credited the amount of the note on W.'s claim against defendant. Afterwards W.'s widow, in the absence of the administrator in the army, paid in full the amount of S.'s claim. *Held*, that there was a total failure of consideration in the note of defendant to S.—*Cundiff v. McLean*, (Tex.) 48.

Actions on.

3. In an action on a promissory note, a charge asking a finding for defendant if the note was executed with the understanding that it was not to be paid, is properly refused, though evidence has been admitted, improperly, but without objection, to show such parol contemporaneous agreement.—*Dolsen v. De Ganahl*, (Tex.) 321.

Pleading.

4. In an action on a promissory note, a petition alleging the date of the note, and that it bore interest from date, and further that defendant, though often requested, had never paid said note, or any part thereof, except \$35 heretofore mentioned, but the same remains still due and unpaid, sufficiently alleges that the debt is due, as against a general demurrer.—*Pennington v. Schwartz*, (Tex.) 32.

NEW TRIAL.

In criminal cases, see *Criminal Law*, 46-49.

Application.

1. In a petition for a new trial, where no motion therefor was filed at the term of court at which the adverse judgment was rendered, an allegation that petitioner's counsel and other attorneys whom he asked refused to file such motion, unsupported by an affidavit of neglect of duty by petitioner's counsel, is not a sufficient excuse for the delay.—*McGloin v. McGloin*, (Tex.) 305.

Misconduct of jury.

2. A separation of the jury, without leave of court or consent of parties, consisting in a brief absence of one of the jurors, during which he conversed with no one concerning the trial, affords no ground for a new trial.—*State v. Woodward*, (Mo.) 220.

3. On motion for a new trial for misconduct

of the jury, a juror's testimony denying that he denounced defendant in the jury-room, or there said that he ought to go to the penitentiary on general principles, as testified by an eavesdropper, is admissible, as disclosing nothing in regard to the jury's deliberations, and a new trial was properly refused on the unsupported evidence of the affiant whom the juror contradicted.—*State v. Rush*, (Mo.) 221.*

4. On motion for a new trial for misconduct of the jury, evidence that a juror, after the trial, in reply to witness' remark that he "didn't believe the man had ever been robbed," said, "Don't make any difference; R. [defendant] ought to have been sent up on general principles,"—is inadmissible, since it would effect an indirect impeachment of the verdict by one of the jurors.—*Id.**

5. On a motion for a new trial for misconduct of the jury, after a juror has testified denying the allegations of an eavesdropper that he improperly denounced defendant in the jury-room, defendant's application to examine other members of the jury on that question was properly refused.—*Id.**

Misconduct of counsel.

6. In a suit against a railroad for injuries, plaintiff's counsel said to the jury "You ought to deal severely with these bloated corporations, that can run their road right through a man's house or yard," and the court did not control him, and the jury found a verdict for plaintiff "for amount sued for," (\$30,000.) *Held*, that it was reasonably evident the jury were influenced by the improper language, and the court should have given a new trial.—*Galveston, H. & S. A. Ry. Co. v. Cooper*, (Tex.) 68.*

7. A verdict will not be set aside because of objectionable language used by counsel in addressing the jury, where the judge at the time corrected the counsel, the counsel requested the jury not to consider the language, and the opposing counsel could have had the jury further cautioned by the court, the presumption being that the verdict was not affected by the remarks.—*Jackson v. Harby*, (Tex.) 71.*

Newly-discovered evidence.

8. A motion to set aside a verdict and grant a new trial for newly-discovered evidence will be overruled when only supported by two affidavits, one as to matters purely hearsay, and the other too uncertain and indeterminate to be relied on.—*Gassaway v. White*, (Tex.) 117.*

9. A motion for a new trial will not be granted, for newly-discovered evidence which is merely cumulative.—*State v. Woodward*, (Mo.) 220.

Prejudice of sheriff.

10. A new trial will not be granted on the ground of the prejudice of the sheriff against defendant, unless it appears that such prejudice was so manifested by word or act as to influence the jury or affect their verdict.—*State v. Rush*, (Mo.) 221.

Notary Public.

Evidence to contradict certificate, see *Husband and Wife*, 1, 2.

Notice.

Bona fide purchasers, see Trusts, 4; Vendor and Vendee, 5-7.

In forcible entry, see Forcible Entry and Detainer.

To quit, see Landlord and Tenant, 4.

NOVATION.

What constitutes.

1. In an action against a railroad company for the price of certain property, it appeared that plaintiff's intestate sold the property to H.; that H. assigned his interest to a construction company, and that intestate, at the special request of such company, transferred the property to defendant; and that defendant accepted the conveyance, by a resolution of its board of directors entered on its minutes, and agreed to pay money and deliver certain stock and bonds. *Held*, that defendant, by accepting the conveyance, and agreeing to provide the consideration, took on itself the fulfillment of the original contract, and was estopped to deny the consent of the construction company to its substitution.—*Texas W. Ry. Co. v. Gentry, (Tex.) 93.*

OFFICE AND OFFICER.

See, also, Justices of the Peace; Sheriffs and Constables.

County treasurer, see Counties, 5-7.

Qualification, see Municipal Corporations, 6.

Qualification.

Under Rev. St. Tex. art. 1718, providing that, at the expiration of 30 days from an election, and from time to time thereafter as the officers-elect may qualify, each county judge shall certify to the secretary of state a statement showing who were elected, to what offices, and the date of their qualification, county commissioners have at least 30 days within which to qualify for office.—*Cassin v. Zavalla County, (Tex.) 97.*

ORDERS.

Liability of assignor.

1. In an action by the holders of a non-negotiable bill of exchange indorsed to them for value by defendants, plaintiffs, under Rev. St. Tex. arts. 287, 288, to hold the assignor of a non-negotiable instrument as surety, must use diligence to collect the same, and parol testimony is inadmissible to prove that the assignor of such instrument has released the holder from his obligation to use diligence to collect it; and where no suit had been brought thereon until the third term of court after the cause of action against such indorser had accrued, and no excuse for such delay had been alleged in the original petition, parol testimony is not admissible to prove that defendants released plaintiffs from their obligation to use such diligence.—*Kampmann v. Williams, (Tex.) 310.*

2. A supplemental petition averring that

plaintiffs held a bill of exchange for collection as a favor to one of defendants, and that he never instructed plaintiffs to bring suit on it, shows that plaintiffs did not own the instrument so that they could sue either the acceptor or indorser.—*Id.*

Ordinances.

See Municipal Corporations, 1-5.

Parties.

Assignee of contract, see Railroad Companies, 11.

In ejectment, see Ejectment, 1.

Suits by minors, see Railroad Companies, 83.

To compel enforcement of ordinance, see Mandamus, 1.

Who concluded by decree, see Partition, 2.

PARTITION.

Jurisdiction.

1. Until the administration of an estate is closed, the county court in Texas has exclusive jurisdiction to decree a partition of the lands of the estate among the heirs, when the title is clear as among them, and there are no adverse claims by third persons.—*Branch v. Hanrick, (Tex.) 539.*

Setting aside decree—Rights of purchaser.

2. When a decree in partition is set aside, and a new decree entered at the same term as the former decree, and a party who receives less land by the second decree than by the first appears and objects to the proceedings, such second decree is binding upon his vendees, who purchased after the first decree was rendered, and before any steps had been taken to set it aside.—*Sharp v. Elliott, (Tex.) 483.*

PARTNERSHIP.

Between corporations, see Corporations, 4, 5.

What constitutes.

1. An agreement among a number of corporations engaged in manufacturing cotton-seed oil, to select a committee composed of representatives from each corporation, and to turn over to such committee the properties and machinery of each company, to be managed and operated by the committee for the common benefit, the profits and losses to be shared in agreed proportions, and the arrangement to last for a specified time, is a contract of partnership.—*Mallory v. Hananer Oil-Works, (Tenn.) 396.**

Authority of partner.

2. A release executed by one partner for and in the name of his firm, discharging a bank from liability for a penalty recoverable from it by the firm under act of congress prescribing the rate of interest national banks may charge, and subjecting them to penalties for receiving usury, is binding on the firm, though the other members were not willing that a

settlement should be made, provided the bank had no notice that the action of the partner was fraudulent.—*Stout v. Ennis Nat. Bank*, (Tex.) 808.

8. Where a release of the legal right of a firm to recover a penalty for usury paid by it in discharge of its moral obligation to pay the debt on which the usury was paid, such release will not be deemed fraudulent because executed by one of three members of the firm in opposition to the desires of the others, though their opposition was known to the creditor at the time the release was given.—*Id.*

4. Where a firm name is used as surety for a third person, the presumption is that such use of the firm name is outside the firm business, and the burden of proving assent, estoppel, or ratification is on the person asserting the liability of the partners who have not signed.—*Fore v. Hiteon*, (Tex.) 292.

Accounting—Purchase of firm property by partner.

5. Plaintiff, defendant, and two others, being each the owner of an undivided one-fourth interest in a tract of land, formed a partnership for mining purposes, putting in the land as capital stock, and agreeing to contribute a specific sum as working capital. Plaintiff and the two others executed mortgages on their interest to secure their individual debts, for which neither defendant nor the firm was liable, under which the land was sold, and bought by defendant, who sold it again at a large profit. *Held*, in an action to recover a share of such profit, that the sale being for the individual debts of the partners, defendant's purchase did not inure to the benefit of the firm, and that he was not liable to plaintiff for such profit.—*Rouquette v. Ryan*, (Ky.) 702.

—Payment of firm debts by partner.

6. A partner, on voluntarily paying firm debts out of his individual means, does not thereby become a creditor of the firm to the amount so paid, as partnership debts are joint and several. He has only the right to bring such payments into the partnership accounts, and, after payment of other debts due by the firm, to be credited therewith in a settlement between the partners.—*Lyons v. Murray*, (Mo.) 170.

Private creditors.

7. By the joint act of all the partners, partnership property may be applied to the payment of a debt of an individual member of the firm, if it be done in good faith, and not for fraudulent purposes.—*Sexton v. Anderson*, (Mo.) 664.*

8. On sheriff's sale of the undivided interest of a partner in firm property for his individual debt, it is the duty of the purchaser to see that there are no unsatisfied partnership debts, as he acquires only such interest in the property as would remain in the execution defendant after their satisfaction.—*McCutchon v. Davis*, (Tex.) 123.*

9. Individual creditors of a partner who administered the partnership estate on the death of a former partner cannot be considered parties or privies to the order of distribution of

the firm assets, the administering partner being alive at the date of the order, and his individual estate not being in liquidation.—*Lyons v. Murray*, (Mo.) 170.

PAYMENT.

What constitutes.

1. In an action for the balance due on the purchase money of certain notes purchased of plaintiff's agent by defendant, who, ignorant of the fact of the agency, had paid for them in part, and had claimed a debt due him from such agent as payment of the residue, not, however, pleading such claim as a set-off, a charge that if the jury find that defendant purchased the notes of plaintiff's agent, and paid for them, not knowing the fact of the agency, defendant is not liable, is erroneous as leading the jury to believe that the debt due defendant could operate as part payment of defendant's debt to plaintiff.—*Quinn v. Sewell*, (Ark.) 182.

2. It is no defense to an action of debt that defendant had applied a debt due him from plaintiff to extinguish the debt sued on, and had so informed plaintiff; such counter-debt not being pleaded as a set-off.—*Id.*

Presumption of payment.

3. S. sold land to A., executing to him a bond binding her to convey to him on payment of three notes executed by him; on suit on the first note, judgment was obtained, and the land sold to B.; B. conveyed to C., and on C.'s death the land was sold by his administrator to plaintiff; S. sued on the second note, but the execution issued on the judgment was returned satisfied; suit was also brought on the third note, but was dismissed; a deed, purporting to convey the land to C. in consideration of a sum the aggregate of the three notes, was produced as evidence of receipt of the purchase money; and the evidence showed that C., and after him plaintiff, had been in uninterrupted possession for 17 years. *Held*, that plaintiff had a good title, and that the purchase money had been fully paid.—*Morris v. Rhine*, (Tex.) 815.

PERJURY.

What constitutes—Jurisdiction.

1. Where one accused of two murders has fled, and, having been extradited for one of them, is indicted, and, without objection, tried for the other before a court which has jurisdiction of the subject-matter, false testimony therein is ground for a charge of perjury.—*Cordway v. State*, (Tex.) 670.

Evidence.

2. On a trial of defendant for perjury, in testifying upon a murder trial that the deceased was armed when shot, his testimony at the inquest, which is not corroborative of that adduced at the trial, and his statement the day after the murder that deceased was unarmed, are admissible to show the falsity of his testimony, upon which the perjury is assigned.—*Id.*

PLEADING.

See, also, *Creditors' Bill*, 1; *Fraudulent Conveyances*, 8, 9; *Negligence*, 8, 4.

Actions by and against corporations, see *Corporations*, 7, 8.

Amendment, see *Carriers*, 9.

Answer, see *Injunction*, 3.

Of custom, see *Custom and Usage*.

Pleading and proof, variance, see *Ejectment*, 2; *Master and Servant*, 19.

Surplussage.

1. Where a pleading contains details which might well have been omitted, but which merely indicate the scope of the testimony to be introduced, they cannot injure the opposite party, and it is not material error to overrule exceptions to them.—*Gulf, C. & S. F. Ry. Co. v. Pool*, (Tex.) 535.

Answer.

2. In an action before a justice on an account, an answer denying the correctness of the account, and averring "that plaintiff is indebted to defendant for failing to comply with his contract, * * * to his damage in the sum of five thousand dollars, which defendant now pleads in abatement against plaintiff's claim, if he has any, but asks no judgment against plaintiff, but reserves his right to sue for such damages in the court having jurisdiction thereof, and that the material in the account sued upon is part of such contract," sets up a good defense in bar, and the admission of evidence in support of such answer is not error.—*Collins v. Dignowity*, (Tex.) 826.

Reply.

3. Under Rev. St. Tex. art. 1197, which provides that any special matter of defense pleaded by defendant shall be regarded as denied unless expressly admitted, where the coverture of a female defendant is pleaded, the fact is in issue without a general denial.—*Brooks v. Pegg*, (Tex.) 595.

Amendment.

4. Under Rev. St. Tex. art. 1192, providing that pleadings may be amended by leave of court, on such terms as the court may prescribe, before the parties announce themselves ready for trial, and not thereafter, a court cannot, without any showing of surprise or injury by the rulings of the court, or that the party has a meritorious cause of action or defense, after announcement of ready, allow pleadings to be amended as a matter of course.—*Harris v. Spence*, (Tex.) 813.

5. Under that act, a refusal of the court to allow plaintiff to file a replication to a plea of limitation in trespass to try title, showing that plaintiff's grantor was a married woman, whose coverture had continued long enough to prevent the bar, after counsel had closed their argument to the jury, was proper.—*Heflin v. Burns*, (Tex.) 48.

Waiver of defects.

6. Failure to have the court act on a plea in abatement, when the case is called for trial, is a waiver of the plea, and it cannot afterwards be renewed, nor can there be error in the rul-

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ing of a court on such abandoned pleading.—*Stevens' Ex'rs v. Lee*, (Tex.) 40.

POWERS.

Presumption of existence.

1. An instruction, in effect, that, from great lapse of time (nearly 80 years) and the circumstances attending the title sought to be established, the jury may find that a power of attorney existed, authorizing a conveyance made by persons purporting to be attorneys in fact, although such power cannot now be produced, is correct.—*Harrison v. McMurray*, (Tex.) 612.

Construction.

2. Where testator's will gives his executrix power to sell any portion of his estate, not devised to his children, the power is unrestricted, except as to property specifically devised to said children.—*White v. Guthrie*, (Ky.) 274.

PRACTICE IN CIVIL CASES.

See, also, *Appeal*; *Costs*; *Exceptions, Bill of*; *Jury*; *New Trial*; *Pleading*; *Removal of Causes*; *Trial*; *Witness*; *Writs*.

Dismissal—Limitation.

1. The plaintiff in an action to recover land died September 24, 1878, and the case was dismissed in December, 1879. Before his death he had conveyed the property to his son. No application was ever made by his representatives, nor by his son, to set aside the order of dismissal. *Held*, that as to them the order of dismissal was final and valid; and, as the action was not prosecuted to effect, it did not stop the running of the statute of limitations.—*Harrison v. McMurray*, (Tex.) 612.

Filing pleadings.

2. Plaintiff, on the fifth day of the term, moved for judgment by default, when an attorney stated that he had been retained in the case, and asked leave to file an answer forthwith, which was refused, and plaintiff's motion was granted. *Held*, that under Rev. St. Tex. arts. 1263, 1280-1282, he was entitled to the whole of the fifth day in which to file his answer, and that the judgment was erroneous. *Railway Co. v. Scott*, 66 Tex. 565, 1 S. W. Rep. 663, followed.—*Rowe v. Spencer*, (Tex.) 60.

Preferences.

See *Assignment for Benefit of Creditors*, 8-10.

Presumption.

Of jurisdiction, see *Judgment*, 11.

payment, see *Payment*, 3.

On appeal, see *Appeal*, 29-32.

PRINCIPAL AND AGENT.

Delegation of agency, see *Mortgages*, 5.

Set-off against agent, see *Payment*, 1.

Ratification.

1. Where a conveyance is made by one acting under an alleged power of attorney, a subsequent conveyance to the same grantee by the owner, for the nominal consideration of one dollar, although it does not purport to be a ratification of the act of the alleged attorney, must be presumed to have been intended for that purpose.—*Talbert v. Dull*, (Tex.) 530.*

Authority of agent.

2. The evidence in an action to recover for medical services showed that defendant, whose wife was sick, ordered his brother to procure a certain physician to attend her. The brother could not get the physician required, and so engaged plaintiff. When plaintiff reached defendant's house the latter told him the trouble was over, and his services not needed. *Held*, that the evidence did not show that the brother so exceeded his authority, or such a repudiation of his act by defendant, as to warrant taking the case from the jury.—*Bartlett v. Sparkman*, (Mo.) 406.

PRINCIPAL AND SURETY.

See, also, *Bail*.

Liability of surety, see *Executors and Administrators*, 2, 3.

Release of surety, see *Bail*, 8-5.

What constitutes, see *Husband and Wife*, 6.

Liability of surety—Estoppel.

1. When the name of a person is signed to an administrator's bond without his knowledge, and afterwards, and before its approval by the probate court, he is informed thereof, and does not object, it is too late to demand relief from liability after the administrator has committed waste.—*State v. Hill*, (Ark.) 401.

2. Where the sureties on the bond of an executor, who was directed to hold and loan out the balance of the estate for the payment of certain legacies, at periods of from 10 to 19 years, the estate being otherwise fully administered, brought a bill in equity to restrain the misappropriation of the sums loaned, on the ground that they were liable on the executor's bond, and the legatees filed cross-bills seeking to make them so liable, but alleging no breach of the bond, for which reason the judgment holding the sureties liable was reversed, the sureties are not estopped, on the return of the case and the filing of answers and cross-bills by the legatees presenting a cause of action, to set up that the fund in question is held by the executor as trustee, and that their liability has therefore ceased.—*Allen v. Kennedy*, (Ky.) 883.

—Co-surety.

3. The fact that lands, descended to the heirs of one or two deceased sureties, were partially exonerated from liability for a debt by personalty having been paid over to distributees, for which refunding bonds were taken, in accordance with Code Tenn. §§ 2316, 2317, does not operate as a payment of any part of the debt, or affect the right of the creditor to collect the whole of his debt, not actually paid, from the other surety.—*Maxwell v. Smith*, (Tenn.) 340.

Release of surety.

4. When the county court dismisses an appeal from a conviction in a justice's court, because of insufficiency of the appeal-bond, and remands appellant to the custody of the sheriff until the fine imposed by the justice is paid, as provided for in Code Crim. Proc. Tex. art. 816, the sureties on the appeal-bond are discharged.—*Childers v. State*, (Tex.) 926; *Phipps v. State*, (Tex.) 929.

5. In a suit against a surety on a note, negligence of the holder in collecting the note, and in selling certain whisky left as collateral, is not shown, so as to discharge the surety, when it appears that the whisky was sold at its full market value, though defendant testifies that it was worth to him greatly more than it was sold for.—*Gillon v. Kentucky Nat. Bank*, (Ky.) 193.

6. Where defendant is surety on a note held by a bank, representations by the president, three months after defendant became surety, that he would not hold defendant, as the collateral would be sufficient, will not discharge him.—*Id.*

7. In a suit against a surety on a note, usury in the note cannot affect the surety where the claim of the payee amounts to more than the note for which the surety is bound.—*Id.*

8. A purchaser of mortgaged lands at judicial sale paid a price sufficient to satisfy the mortgage and accrued taxes, executing bonds with surety for the purchase money. Being unable to pay the bonds, he and the surety surrendered the lands into court to be resold. On the second sale, the amount realized was insufficient to pay the mortgage and taxes. *Held*, that the mortgagee's failure to issue execution upon the bonds for the deficiency within one year after maturity did not release the surety; the delay having been at the latter's instance, to enable him to contest the claim for taxes, and he having agreed in writing to remain bound.—*City of Louisville v. Kaye*, (Ky.) 866.

9. In such case the purchaser at the second sale excepted to the report of sale because of the accrued taxes. It was ordered that he pay the purchase money into court, a sum sufficient to pay the taxes to be there held. The city of L., claiming the taxes as due to itself, was allowed to withdraw the fund. *Held*, that the city, not being a party to the suit, had no right to withdraw the fund, as the surety, being liable to the mortgagee for the excess of the proceeds of the first sale over that of the second, should be allowed to contest its claim, and that it was properly required to return the fund.—*Id.*

Promissory Notes.

See *Negotiable Instruments*.

PUBLIC LANDS.

Lease of county lands, see *Counties*, 9.

Grants to railroad companies.

1. The act of congress of June 10, 1852, granting certain public lands in Missouri to the state, for the purpose of aiding in the con-

struction of the Hannibal & St. Joseph Railroad, passed the title to the state *in present*, though such title was not perfected until the definite location of the road; and the subsequent entry of a portion of such lands in the public land-office, and the grant of a patent thereto, were invalid. Following *Wright v. Gish*, 6 S. W. Rep. 704. — *Wright v. Howe*, (Mo.) 561.

2. A designation of lands under act Tex. Feb. 4, 1854, incorporating the Memphis, El Paso & Pacific Railroad Company, and granting it all vacant lands within eight miles on each side of the extension line of its road, is sufficient which describes the line of the road as extending from a given point, a certain course and distance, to another point, and affords all information necessary for the exact location of the line, though no actual survey was made, under section 15 of said act, which provides that all the vacant public land within eight miles of each side of the extension line of said road shall be exempt from location or entry from and after the time when such line shall be designated by survey, recognition, or otherwise. — *Houston & T. C. Ry. Co. v. Texas & P. Ry. Co.*, (Tex.) 498.

Location of certificate.

3. A survey was made, recorded, and returned to the general land-office, together with the certificate authorizing it, and rejected by the board created by act Tex. Feb. 4, 1858, (Pasch. Dig. art. 872 *et seq.*) On appeal to the district court it was declared valid, but the judge omitted to indorse his approval on the certificate, as required by the same act, so that no patent could issue thereon. *Held*, that the obstacle was removed by Gen. Laws 1871, p. 61, (Pasch. Dig. 7089; Rev. St. art. 3921,) providing that patents should issue on surveys made under valid certificates on file in the general land-office. — *Sickels v. Epps*, (Tex.) 124.

4. Where a location under a land-grant certificate was rejected by commissioners acting under act Tex. Feb. 4, 1858, (Pasch. Dig. art. 872,) and during the pendency of an appeal from such rejection, under the same act, defendant's grantor located on the same land, taking the chances of his title being superior to plaintiff's, defendant is chargeable with constructive notice that plaintiff was equitable owner as against the state, and cannot complain that by Rev. St. art. 3921, certain defects preventing the issuance to plaintiff of a patent were removed. — *Id.*

5. Where a location had been made under a valid certificate, and defendant's grantor locates on the same land, believing the first location to be invalid, but having constructive notice to the contrary, in the absence of proof that defendant paid a valuable consideration, his claim as innocent purchaser cannot be considered. — *Id.*

6. Where plaintiff's grantors had obtained a land-grant certificate in 1857, made location thereunder, and endeavored to procure a patent until suit, in 1873, against defendant, whose grantor had located on the same land in 1863, defendant cannot maintain title on the ground of abandonment of plaintiff's claim. — *Id.*

7. One Burrell located a land certificate in 1838, but the patent by mistake was issued to Barrett. Defendant purchased the interest of Burrell, and held possession since 1876. *Held*, under Const. Tex. art. 14, § 2, which provides that "all genuine land certificates heretofore or hereafter issued shall be located, surveyed, and patented only on vacant and unappropriated public domain, and not upon any land titled, or equitably owned under color of title, from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land-office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him," that such located land was "titled," and a subsequent location thereof made in 1884 was void, though the Barrett patent was afterwards canceled. — *Winsor v. O'Connor*, (Tex.) 519.

8. Where there are two conflicting surveys, and the evidence of a surveyor who ran the lines of both showed with reasonable certainty the true location of the disputed boundary to be as claimed by plaintiff, and there is no evidence to establish a different line, judgment should be for plaintiff. — *Houston v. Brown*, (Tex.) 818.

Qui Tam and Penal Actions.

Obstructing highways, see *Highways*, 4.
Pulling down fences, see *Fences*.

RAILROAD COMPANIES.

Condemnation proceedings, see *Eminent Domain*.

Injuries to employees, see *Master and Servant*.

Liabilities as carriers, see *Carriers*.

Railroad land grants, see *Constitutional Law*, 2; *Public Lands*, 1, 2.

Contracts with officers and employees.

1. Rev. St. Mo. § 818, provides that no officer or employe of any railroad corporation shall be interested in furnishing supplies to such company, nor in the business of transportation, as a common carrier, of freight or passengers over the works owned, leased, or operated by the company of which he is officer or employe. Plaintiff was stock agent of defendant, a railway corporation existing under the laws of Missouri, and operating a road in Texas; and, while so employed, he made a contract with defendant whereby he leased for a term of years certain of defendant's stock-yards in Texas, defendant to pay him one dollar per car for loading and unloading stock, for which he was to furnish forage, to be charged against shippers, and collected by him. *Held*, that the contract of lease was void under the Missouri statute. — *Rue v. Missouri Pac. Ry. Co.*, (Tex.) 588.

Construction of road.

2. In an action against a railroad company for negligence in so constructing its road-bed as to dam up and hold water on plaintiff's land, which lay between defendant's road and

a river, causing the destruction of plaintiff's crops, the petition alleged that the crops were cultivated by plaintiff and his tenant. On the trial plaintiff was permitted to prove the destruction of crops in which the tenant was not interested. *Held*, that the averments as to the cultivation of the destroyed crops by plaintiff and his tenant limited the evidence to such crops only.—*Gulf, C. & S. F. Ry. Co. v. McGowan*, (Tex.) 57.

8. It was error to permit plaintiff to prove that defendant's road-bed was negligently constructed at a point six or seven miles above plaintiff's farm, which caused the water to flow back across the channel of the river, and on plaintiff's land, when the specific acts alleged in the petition for damages were the negligent construction of the road-bed adjoining the lands upon which the crops were growing.—*Id.*

Municipal aid.

4. Under Const. Mo. 1865, and Gen. St. Mo. 1865, § 17, authorizing county courts to subscribe stock to railroads upon two-thirds of the qualified voters of the county voting therefor, two-thirds of the qualified voters as shown by the registration books is meant, and not two-thirds of those actually voting; and, where two-thirds of the registered voters do not vote in favor of the proposition, the order of the county court subscribing for the stock is without authority.—*State v. Harris*, (Mo.) 794.

Lease of road.

5. A railway company cannot, without legislative authority, lease the right to use its road so as to absolve itself from its duties to the public. Following *Railroad Co. v. Morris*, 3 S. W. Rep. 457.—*International & G. N. R. Co. v. Eckford*, (Tex.) 679.*

6. In an action for damages against a railroad company for killing a cow, it appeared that the road on which the injury occurred was operated at the time by defendant as successor of a company whose charter prescribed a limitation of six months within which such actions could be brought, but that the road was originally owned by another company, whose charter did not contain such limitation. *Held*, in the absence of evidence as to the terms under which defendant held possession, that it must be presumed that the road was operated under authority of the charter of the company originally owning the same; that the fact that such company still has a corporate existence shows that it retains an interest in the road; and that such action may be maintained if commenced within one year after the cause arose.—*Kentucky Cent. R. Co. v. Kinney*, (Ky.) 201.

Bonds and mortgages.

7. In an action against a railroad company to foreclose an equitable mortgage, it appeared that plaintiff's intestate conveyed a certain line of railway property to defendant, the purchase money to be secured by mortgage on the line conveyed, and "upon such proposed extensions as the company owning and operating the same may elect to include in such mortgage." At a stockholders' meeting it was voted to issue bonds of the same character as

those sued on, to be secured on all the property of the company from H. to F., both constructed and to be constructed, which included the only extension made by the company. *Held*, that plaintiff's equitable mortgage extended to the part of the line afterwards constructed.—*Texas W. Ry. Co. v. Gentry*, (Tex.) 98.

8. In an action against a railroad company to foreclose a mortgage, it appeared that plaintiff's intestate sold defendant a certain railway as unincumbered when there was a right of way still unacquired. The evidence showed that the directors of the defendant company knew that all the rights of way had not been paid for, and that there were small claims that the intestate had been unable to settle, and that the line had been operated for 10 years, and no action for the land over which it ran or for damages had ever been brought. *Held*, that a judgment for plaintiff for full amount claimed, was proper.—*Id.*

9. Rev. St. Tex. art. 4320, enacts that no mortgage of a railroad company shall be valid unless authorized by resolution adopted by a vote of two-thirds of all the stock of such company. Yet where, in pursuance of a resolution to issue bonds secured on mortgage not so adopted, a contract has been executed, and the company has had the benefit thereof, it is estopped to deny its authority to make the contract.—*Id.*

10. Where plaintiff's intestate conveys a railway to defendant, and agrees to accept, as part of the purchase money, bonds secured by mortgage on the line, plaintiff is entitled, the bonds never having been given, to recover their full par value, though they are below par in the market.—*Id.*

Receivers—Equitable owner of bonds.

11. In an action against a railroad company for the amount of certain bonds which defendant agreed to execute in consideration of the conveyance of certain property by plaintiff's intestate, it appeared that intestate had assigned his interest in the bonds, which were never delivered, to third persons, that the petition alleged insolvency of defendant, and asked that a receiver be appointed. *Held*, that the court properly granted the relief asked, and ordered a sale of the property, holding the proceeds until the equitable owners of the bonds could set up their title thereto, though such equitable owners were not made parties to the suit.—*Id.*

Negligence—Bridges.

12. In an action against a railroad company for personal injuries from a falling bridge, evidence that the piles, under a part of the bridge that did not give way, leaned down the river, and were braced before the accident, is admissible to show the general character of the structure, the weight to be given the evidence being for the jury.—*Bowen v. Chicago, B. & K. C. Ry. Co.*, (Mo.) 280.

Accidents at crossings.

13. Where, in an action against a railway company for personal injuries sustained at a crossing, the court submitted the hypothetical case of a collision between the engine and

plaintiffs' wagon, and plaintiffs testified that they thought the engine struck the oxen drawing the wagon, the charge is not misleading, to the prejudice of defendant.—*Gulf, C. & S. F. Ry. Co. v. Greenlee, (Tex.) 129.*

14. In such case the court need not instruct that it was plaintiff's duty to look and listen for approaching trains, but it is sufficient to charge that he must exercise ordinary care to avoid danger.—*Id.**

15. Where one is driving on a road parallel to a railway track, he is not guilty of negligence in not looking for approaching trains before he discovers a crossing, but it is sufficient if, after discovering the crossing, he uses ordinary diligence to avoid danger.—*Id.**

16. And an instruction that, if neither party was guilty of negligence, the injury was the result of accident, and no recovery can be had, is not prejudicial to defendant.—*Id.*

Contributory negligence.

17. Where, in an action for negligent killing, the evidence shows that deceased, on arriving at defendant's railroad crossing, saw its train moving towards him at a distance of 40 paces, and, thinking he could drive across the track before it would reach him, whipped up his horses for that purpose, and was killed in the attempt, a clear case of culpable negligence on the part of the deceased is made out.—*International & G. N. Ry. Co. v. Kuehn, (Tex.) 484.**

Punitive damages.

18. Plaintiff attempted, on a dark night, to cross defendant's track on a village street; he lacked but one step of clearing the train when struck; the train was running on a down grade, approaching a flag station; before reaching the crossing the air-brakes were released, increasing the speed of the train to 17 miles an hour; the engineer could have seen plaintiff and slowed the train, but was not looking out, and did not see plaintiff until he was struck. *Held*, that the facts established a case of ordinary negligence only, and that a judgment for punitive damages should be reversed.—*Louisville & N. R. Co. v. Roberts, (Ky.) 459.**

Obstructions to view of track.

19. It was error to instruct the jury that it is negligence in a railroad company to permit brush or tall weeds to grow upon its right of way, so as to materially obstruct the view of approaching trains by persons about to cross its track; and if defendant permitted brush and tall weeds to grow on its right of way, and but for such obstruction the injury would not have happened, defendant was liable, where the only evidence was that some hackberry trees were growing along the line, from 10 to 20 feet outside of the right of way, and that, at the time of the injury, they were bare of leaves, and were no obstruction.—*International & G. N. Ry. Co. v. Kuehn, (Tex.) 484.*

Injuries to persons on track.

20. Plaintiff testified that he was struck by a train at a point where a highway crossed defendant's track. There was evidence that

none of his bones were broken; that he moved himself after he was struck, and before he was discovered; that he was found, unable to move, 80 feet from the crossing; that his hat was found some distance from the crossing; that the shock rendered him unconscious for a time. *Held*, that a finding that he was struck at the crossing was not against the weight of evidence.—*Louisville & N. R. Co. v. Roberts, (Ky.) 459.*

21. Decedent was walking on defendant's track. As a train, approaching him from behind, whistled to indicate that it would stop at the station near by, decedent went upon the side track. The switch was not closed at that time, but as the train passed the switch it switched off a car, and the car ran on it by its own momentum. The engineer endeavored, by whistling and shouting, to attract decedent's attention to the detached car. The conductor left the brake on the detached car, and ran forward to shout at decedent, but failed to make him hear, and before he could regain the brake decedent was struck. *Held*, that decedent's death resulted from defendant's negligence, and the refusal of the trial court to instruct the jury peremptorily to find for defendant was not error.—*Louisville & N. R. Co. v. Colman's Adm'r, (Ky.) 876.**

22. In an action against a railroad company for personal injuries, where the petition charges that the place of injury was "near" the regular crossing, and plaintiff's evidence shows that it was 100 feet distant from the street crossing, at a temporary opening in a train of cars standing on the track, and there is no evidence that the public was accustomed to cross there, an instruction as to an injury occurring at a place where the public was accustomed to cross is erroneous, as not confining the jury to the injury and negligence alleged in the petition.—*Dahlstrom v. St. Louis, I. M. & S. Ry. Co., (Mo.) 777.*

23. One who crosses a railroad track in a city at a point 100 feet distant from the street crossing, at an opening in a train of cars standing on the track, there being no evidence that such opening was made for pedestrians to pass through, or that it was ever used for that purpose, is a trespasser, and crosses at his peril.—*Id.*

24. An instruction that "although a person may be improperly or unlawfully upon a railroad track, that alone will not discharge the company * * * from the observance of reasonable care, and, if such person is * * * injured, the company will be responsible if its employees could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness," should be qualified by the addition of, "after discovering the danger or peril of the injured person on the track at the time, or if by the exercise of ordinary diligence his peril could have been discovered in time to have avoided injuring him."—*Id.*

25. An instruction that, if the injury was caused by the negligence of defendant's servants, as charged in the declaration, and without any greater want of care on plaintiff's part than was reasonably to be expected from a person of ordinary care and prudence in his situation, plaintiff was entitled to recover, is erroneous.—*Id.*

Injuries to persons on track — Evidence.

26. In an action for injury caused by a railroad train, the engineer swore, at one trial, that he was 100 yards from the plaintiff when he first saw him, and at the second trial he swore he was 50 or 60 feet distant, and that he saw him just as soon as he could from the nature of the ground. The mail agent on the train swore that he saw plaintiff on the ties several hundred yards ahead of the train. The jury found specially that plaintiff was at least 200 yards from the engine when seen by the engineer. *Held*, that the evidence was sufficient to sustain the verdict.—*Sibley v. Ratliffe*, (Ark.) 686.

27. In an action against a railroad company for negligently backing a train against a track-repairer, causing personal injuries, where the evidence is conflicting as to whether the bell was rung, or a man was stationed on the car furthest from the engine to give danger signals, the question is for the jury, and an instruction by defendant in the nature of a demurrer to the evidence is properly overruled.—*Kelly v. Union Ry. & T. Co.*, (Mo.) 490.

28. In an action for injuries, by defendant's train, to plaintiff while repairing the track between the Union depot and Eighth street, in St. Louis, an ordinance of the city regulating the rate of speed of trains within its limits, and providing for the giving of danger signals, is properly admitted in evidence.—*Id.*

Contributory negligence.

29. In an action against a railroad company for personal injuries, instructions are properly given authorizing a recovery for plaintiff, notwithstanding his contributory negligence, if defendant knew of the danger, and by the exercise of ordinary care could have averted the injury to plaintiff, or if through the carelessness of its employees it failed to discover the danger in time to avert the injury.—*Id.**

30. In an action against a railroad company for killing plaintiff's husband, it appeared that deceased was run over while on defendant's track, that, at the place where the accident occurred, the train could have been clearly seen approaching; that deceased, without reasonable care, walked on the track in front of an approaching train, and was struck down and killed. There was conflicting evidence as to any warning having been given of the approaching train. *Held*, that it was error to refuse to charge that if deceased, just before the accident, stepped on the track in front of an approaching train, which he could have seen or heard had he looked or listened, and that he went on the track without looking or listening, and was struck by the train, then the verdict should be for defendant, unless the jury found from the evidence that the train could have been stopped by those in charge, by the exercise of ordinary care, in time to prevent the injury, after they became aware, or might have become aware, by the exercise of ordinary care, of the peril of deceased.—*Guenther v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 871.

31. In an action for damages against a railroad company for injuries sustained by plaintiff, an infant, while crossing defendant's

track at a path used by the public, where the evidence, though conflicting, shows that there was no lookout on the train, and that no warning was given of its approach, a verdict against defendant will not be set aside, as it was for the jury to say whether plaintiff contributed to the injury, or whether defendant did not use that care which, under the circumstances, should have been used.—*Houston & T. C. Ry. Co. v. Boozer*, (Tex.) 119.*

32. Where there is evidence of contributory negligence on the part of one killed on a railroad track, an instruction ignoring the fact of contributory negligence is erroneous.—*Guenther v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 871.

Parties.

33. *Manuf. Dig. Ark. § 5539*, provides that, "when any person shall be wounded by a railroad train running in this state, he may sue for damages in his own name; or, if he be a minor, his father, if living, may sue; and, if the father be dead, then the mother may sue; and, if both father and mother be dead, then the guardian of such minor may sue." A minor sued, by next friend, for injuries caused by a railroad train, and the company moved to dismiss the action because not brought by the proper party. The minor having come of age since the suit was brought, the motion was denied, and he was permitted to prosecute the suit in his own name. *Held* proper, since, under the above statute, two rights of action accrue: one to the minor for the personal injury, and one to the father, mother, or guardian for losses suffered by him or her.—*Sibley v. Ratliffe*, (Ark.) 686.

Fires.

34. In an action against a railway company for injury to plaintiff's grass by fire alleged to have been set by sparks from defendant's engine, the evidence showed that defendant's road passed through plaintiff's land; that the fire occurred soon after the train passed; that dry grass and weeds were permitted to accumulate on defendant's right of way at and about the place where the fire occurred; and that at the time and before the fire it was not unusual for defendant's engines to throw sparks and coals of fire on its right of way. The trial court found that the fire occurred through the negligence of defendant. *Held*, that the supreme court, on appeal, could not say that the evidence, although circumstantial, was insufficient to support the finding.—*Missouri Pac. Ry. Co. v. Ayers*, (Tex.) 538.*

35. In addition to the value of the grass on the ground at the time the fire occurred, plaintiff was entitled to damages resulting from injury to the grass roots, whereby the ground was rendered less productive.—*Id.*

RAPE.

Evidence.

1. At a trial for rape, evidence that defendant had said five years before that he had a drug that would cause any woman who took it to yield to his desire, was irrelevant and improper, as tending to prejudice the jury.—*Tomlin v. State*, (Tex.) 361.

2. On an indictment for rape on the person of a child between 18 and 14 years of age, where the evidence discloses that defendants did have intercourse with her, and, from her testimony, compelled her to submit to their embraces, the court properly refused to instruct the jury, after the testimony of the state has been closed, to find defendants not guilty.—*Pugh v. Commonwealth*, (Ky.) 840.

RECEIVERS.

Actions against.

Where permission has been obtained from the United States circuit court to bring an action against its receiver, the failure of plaintiff to obtain permission on the resignation of such receiver, and appointment of another, is not such error as to require a reversal of the judgment, in the absence of exceptions or assignment of error.—*Fordyce v. Dixon*, (Tex.) 504.

RECEIVING STOLEN GOODS.

Evidence.

Proof of defendant's possession of property 12 months after it was stolen will not sustain a conviction for receiving stolen property, where there is no evidence that defendant knew it to have been stolen.—*Tolliver v. State*, (Tex.) 806.

Recognizance.

See *Bail*.

Records.

On appeal, see *Appeal*, 20, 21.

REMOVAL OF CAUSES.

Jurisdiction of state court.

When a petition and bond for the removal of a cause to the federal court are presented in apt time, and it appears on the face of the whole record that petitioner is entitled to removal, the state court loses jurisdiction; and, if it afterwards render judgment against petitioner, such judgment will be vacated on appeal, although the petitioner neither excepted to the refusal of the petition, nor protested against the subsequent proceedings, but filed an answer, and contested the case upon the merits.—*Little Rock, M. R. & T. Ry. Co. v. Iredell*, (Ark.) 21.

Replevin.

Jurisdiction of justice, see *Justices of the Peace*, 2.

Res Adjudicata.

See *Judgment*, 4-7.

Rescission.

Of contracts, see *Contracts*, 8; *Equity*, 4.

RESCUE.

What constitutes.

1. Act Ark. Dec. 17, 1838, (Mansf. Dig. § 1768,) which provides for the punishment of any one who shall by force, or by any other unlawful means, set any one at liberty who is in lawful custody after a lawful arrest, either before or after conviction, applies as well to the rescue of a prisoner confined in jail, by whatever means, as to a rescue from the actual custody of an officer accompanied by personal violence.—*Hillian v. State*, (Ark.) 884.

2. A prisoner who assisted defendants in liberating prisoners confined in jail, and who himself escaped, though his escape was not contemplated by the original plan, is, under said section 1768, and Mansf. Dig. § 1508, which provides that all persons present, aiding and abetting the commission of a felony, are principals therein, an accomplice in the crime of rescue; and, under Mansf. Dig. § 2259, providing that the testimony of an accomplice, uncorroborated by other evidence tending to connect the accused with the crime, shall be insufficient to convict of felony, the testimony of such accomplice alone will not support a verdict of guilty.—*Id.**

ROBBERY.

Indictment.

1. It is not essential to the validity of an indictment for robbery, which charges the robbery to have been done by force, that it should also state that the person robbed "was put in fear."—*Young v. State*, (Ark.) 828.

2. Under Rev. St. Mo. 1879, § 1817, providing that when, in an indictment, an averment is necessary "as to any money or any note purporting to be made or issued by any bank incorporated by law, or made or issued by virtue of any law of the United States, it shall be sufficient to describe such money or note simply as money," the offense, in an indictment for robbery, is well charged by a description of "one piece of current gold coin of American coinage, of the value of ten dollars; and three pieces of current gold coin of American coinage, of the value of five dollars each; and four genuine United States legal tender notes, commonly called 'Greenbacks,' of the value of twenty dollars each."—*State v. Rush*, (Mo.) 221.

Evidence—Confessions.

3. An officer testified that, when he arrested defendant, he asked him who helped him to commit the robbery, and he replied, "Will Allen and Alf. McNair;" that defendant then said "he would like to pay a fine, and get out of it." Held admissible; the officer having made no threats or promises to defendant to induce him to make the confession.—*Young v. State*, (Ark.) 828.*

4. On trial for robbery, a witness testified that, the next morning after the robbery, an officer told him that "he was onto the fellows that committed the robbery; and, if they didn't whack up with him some of the money they had, he would pull the whole party;" that the officer did not give the names of the

persons suspected; that, on the same morning, defendant and several others were at witness' house, and he repeated to them what the officer had said; that, on the night following, defendant and two others went to his house, called him out, and gave him eight dollars, and requested him to give it to the officer "to hush the robbery up." *Held*, that this testimony was admissible.—*Id.*

SALE.

Judicial sales, see *Executors and Administrators*, 18-16.

Of real property, see *Vendor and Vendee*.

Tax sales, see *Taxation*, 11-14.

Vendor's lien.

1. A purchaser contracted to give the seller a mortgage on certain cattle purchased, and on certain land, and the seller, without consideration, agreed that the purchaser might sell that portion of the cattle sold which had been delivered. The purchaser, after selling the cattle delivered, refused to execute the mortgage or receive the other cattle. *Held*, that the seller did not, by his permission to sell a portion of the cattle, waive his lien.—*Parks v. O'Connor*, (Tex.) 104.

Action for price.

2. In an action on a contract for the delivery of "yearlings," it is admissible to show by persons engaged in the cattle business that when a contract is made between cattle-men, in the section of country where the contract sued on was made and to be executed, for the delivery of "yearlings," that they are expected to deliver cattle born at any time from January 1st to June 1st of the year previous.—*Id.*

3. Plaintiff contracted to deliver a large number of cattle to defendant under an agreement that defendant should secure the payment therefor by giving his note, bearing interest at 12 per cent. after a certain date, and executing a mortgage on all the cattle and on certain land. After the delivery and acceptance of a portion of the cattle, defendant refused to receive the balance, or to execute the note and mortgage. *Held*, that plaintiff could recover, as damages for the cattle accepted, the contract price, and interest thereon at the rate and from the date agreed on.—*Id.*

Scire Facias.

See *Judgment*, 14.

SEQUESTRATION.

Rent of land sequestered.

When, upon suit to foreclose a lien on land, the land is sequestered, and not replevied by defendants, the latter cannot at the trial prove the rental value of the lot during the time it has been sequestered, with a view to recover rent therefor, when they have set up no claim for such rent in their pleadings.—*Bumpas v. Morrison*, (Tex.) 596.

SET-OFF AND COUNTER-CLAIM.

Set-off against agent, see *Payment*, 1.

When allowable.

In an action in a justice's court for the rent of a farm, it is no objection to a counter-claim, based on the fact that the farm was smaller than the lessor had represented, that such claim constitutes an action of tort, over which the justice had no jurisdiction, as such defense may be regarded as a plea of failure of consideration; or, if demanding more than the balance due plaintiff, as an action on an implied promise to repay sums wrongfully received.—*Harris v. Simpson*, (Ark.) 177.

SHERIFFS AND CONSTABLES.

Right to attorney's fees, see *Attachment*, 9.

Levy of malicious attachment.

1. The owner of property taken under an attachment, where the proceedings are regular, has no recourse against the sheriff for damages caused by the seizure and detention of the property, though the sheriff knew that the person suing out the writ had no cause of action against the owner, and took out the writ with a malicious intent.—*Rice v. Miller*, (Tex.) 317.*

Unlawful seizure.

2. In an action for personal injuries to plaintiff, a married woman, inflicted while defendants were making a levy on her husband's exempt property, an instruction that "if, by the seizure and stopping of the wagon and team, the plaintiff was seriously injured in her person," the jury should allow her actual damages, is erroneous, since it is not necessary to plaintiff's right of recovery that her injuries should be serious.—*Brown v. Bridges*, (Tex.) 502.

3. In such an action, evidence on the part of defendants tending to justify the suing out of the attachment is inadmissible; the issues being not as to a wrongful suing of the writ, but as to an illegal levy upon exempt property.—*Id.*

4. In such case, if the levy was oppressively made, and the conduct of the officer was malicious or oppressive in respect to plaintiff, and the creditors, knowing the facts and the injury, ratified the acts of the officer, they would, equally with him, be liable in exemplary damages; and acceptance by them of any benefit in consequence of the levy, with knowledge of the facts, would amount to such a ratification.—*Id.*

5. In such case, defendants are not responsible for any damages to plaintiff not the natural and proximate result of the injury, nor for such as resulted from her own want of care after the injury.—*Id.*

Actions on bond.

6. Under Code Tenn. § 3431, providing that upon judgment of ouster against an officer *de facto*, at the suit of the officer *de jure*, the lat-

ter may recover of the former such damages as he may have sustained by reason of his wrongful act; and section 854, which provides that the bond of a sheriff shall be conditioned to * * * pay all fees and sums of money by him received to the person entitled thereto, and for the faithful execution of his office of sheriff,—the sureties on the official bond of a sheriff *de facto*, against whom such judgment has been rendered, are not liable for such damages.—Curry v. Wright, (Tenn.) 598.

7. Rev. St. Mo. § 2346, gives a debtor who is the head of a family the right to select property, not exceeding \$300 in value, as exempt from execution; section 2347 makes it the duty of an officer holding an execution to notify the debtor of his rights, and set apart the property selected by him; and section 2519 makes wages for 30 days exempt from garnishment. A constable having an execution for \$100 garnished the debtor's employer, but the debtor was not notified of the garnishment, or of his rights. Judgment was rendered by default, execution was issued, and, upon payment by the garnishee, returned satisfied. The debtor then notified the constable that he was the head of a family, that the money collected was due as wages for the last 30 days, and that he selected the wages as his exemption. The constable paid the money to the debtor, and amended the return, showing these facts. *Held*, in a suit by the execution creditor against the constable on his official bond, that it was the duty of the officer to protect the debtor in his rights, and that the facts constituted a valid defense to the action.—State v. Barnett, (Mo.) 767.

SPECIFIC PERFORMANCE.

Jurisdiction, see *Courts*, 1.

Jurisdiction.

1. The specific performance of a title bond to convey a homestead, entered into by a husband and wife, can be enforced against the husband if, at any time before the bond should become barred, such homestead is abandoned, and a new one acquired—Goff v. Jones, (Tex.) 525.

Requisites of contract.

2. A promise by plaintiff's husband, since deceased, to defendant, his son-in-law, of a gift of certain land, on condition that he would buy an adjoining tract, which he bought, and on which he made improvements, will not be specifically enforced in equity after the promisor's death; it appearing that defendant had the use of the promised land, but made no improvements thereon, and there being no proof that the improvements on the purchased land were made on the faith of the gift.—Anderson v. Scott, (Mo.) 235.*

3. Plaintiff, desiring to purchase a tract of land owned by defendant, wrote to inquire his lowest price, and received a reply fixing the price; whereupon plaintiff, by mail, accepted the proposition. After defendant received the letter of acceptance, he agreed to sell the land to another party, and refused to comply with his offer to plaintiff. *Held*, that the letters constituted a complete contract

for the sale of the land, and equity would compel its specific performance.—Otis v. Payne, (Tenn.) 848.

4. Defendant was the owner of certain lands which were in litigation. Part of them had been sold for taxes, and part under execution, and deeds therefor executed. He agreed with plaintiff's firm (attorneys) that when they "shall have relieved said lands, or any part thereof, from the cloud of title that hangs over them by reason of said tax deeds and sheriff's deeds, or shall have prosecuted the suits involved by said deeds to final judgment, then their services as such attorneys shall be at an end." In consideration of the attorneys' services, defendant obligated himself to execute to them a deed to one-third of all the land recovered "in said litigation." *Held*, that the attorneys were entitled to specific performance of the contract after relieving the lands from the tax and execution sales, though this was done through negotiations, without the necessity of litigation.—Cockrill v. Sanders, (Ark.) 881.

Evidence.

5. In an action by the vendor for specific performance of a contract for sale of land, the vendee may show that the vendor falsely represented that the property was clear of tax liens, although the contract calls only for a quitclaim deed.—Isaacs v. Skrainka, (Mo.) 427.

6. Such defense is sufficiently proved where three witnesses testify that plaintiff so represented, although plaintiff and two witnesses, who were in a position to hear the conversation, deny that such representations were made, and where it appears that plaintiff would agree to give only a quitclaim, not a warranty, deed; that defendants were to pay full value; that, at the time of making the contract, defendants were aware that work had been done for which tax bills could be issued; and that the tax liens for another year were considered by the parties in making the contract.—Id.

7. Defendants in ejectment testified that the disputed property had been given to them in fee, and that the donor had agreed to make a deed to them. Other witnesses testified that the donor had admitted making the gift. It also appeared that he was under obligations to defendants for support furnished him during minority. The donor alone testified that the gift was conditional. *Held*, that the evidence showed an intention in the donor to convey an absolute estate to defendants.—International Bank v. Fife, (Mo.) 241.

Decree.

8. On judgment on appeal in an action for specific performance, reversing the judgment below for plaintiff because of false representations that the title to the land contracted for was clear when there were in reality tax liens against it, and holding that plaintiff is not entitled to specific performance so long as the property remains incumbered with the tax liens, the case will be remanded, and specific performance may be decreed if the title be perfected before judgment or decree.—Isaacs v. Skrainka, (Mo.) 427.

STATUTES.

See, also, *Constitutional Law*.

Repeal—Conflict.

Act Mo. March 4, 1857, § 1, provides that certain corporate authorities may grant permission to open an establishment for the sale of refreshments of any kind (distilled liquors excepted) on any day in the week, and section 4 provides for the repeal of all laws in conflict with this act. *Held*, that section 4 of the act, when construed with section 1, will not of itself repeal the law forbidding the sale of fermented liquors on Sunday.—*State v. Francis*, (Mo.) 1.

Stock.

See *Corporations*, 10-12.

Street.

See *Municipal Corporations*, 7-10.

Subscription.

To stock, see *Corporations*, 10-12.

Summons.

See *Writs*.

SUNDAY.

Sale of liquor on Sunday, see *Statutes*.
Sunday laws, see *Constitutional Law*, 2.

Works of necessity.

1. Under Pen. Code Tex. arts. 183, 184, which prohibit laboring on Sunday, except "works of necessity and charity," operating an ice factory on Sunday is a work of necessity; it appearing that to close the factory over Sunday would result in losing from 24 to 30 hours after resuming operations, that time being required to reduce the temperature after such an interruption.—*Hennersdorf v. State*, (Tex.) 926.

2. Under Pen. Code Tex. arts. 183, 184, prohibiting labor on Sunday, works of necessity excepted, it is a work of necessity for a blacksmith on Sunday to shoe horses used by a stage company engaged in the transportation of the mail, the horses arriving at their destination late Saturday, lame, and with loose shoes; schedule time, as arranged by the post-office department, requiring the mail coach to leave Monday morning before 4 o'clock, there being no other horses available for the journey, and it being impossible to make the trip on schedule time without the horses being shod.—*Nelson v. State*, (Tex.) 927.

TAXATION.

Constitutional powers, see *Constitutional Law*, 4-8.

Of reorganized bank, see *Banks and Banking*, 6-8.

Qualification of collector, see *Municipal Corporations*, 6.

Exemptions.

1. Act Ky. Feb. 2, 1860, incorporating the Masonic Temple Company, and empowering it to purchase the temple and corporate rights of the Masonic Fraternity of Louisville, whose successor it was to be in case of such purchase, does not entitle the purchasing corporation to the exemption of said lot from taxation granted the Masonic Fraternity of Louisville by act Ky. March 10, 1856, as immunity from taxation is a personal privilege, not running with the property exempted, and does not, in the absence of express provision to that effect, pass with the sale of corporate rights.—*Commonwealth v. Masonic Temple Co.*, (Ky.) 699.

Assessment and levy.

2. Under Rev. St. Tex. art. 1517, providing that "no county tax shall be levied except at a regular term of the [county] court," a tax levied at a called term of the court is illegal.—*Free v. Scarborough*, (Tex.) 400.

3. The failure of the assessor, in listing property, to give the survey number of the grant, when it can be ascertained, as required by Rev. St. Tex. art. 4711, renders the proceedings invalid.—*Morgan v. Smith*, (Tex.) 528.

4. Act Ky. Feb. 17, 1866, provided that a board of tax commissioners should be appointed to hear and determine complaints of improper assessments; notice of its sittings to be given by said board by public advertisement. *Held*, that a notice given by the city assessor in his own name, he being an *ex officio* member of said board, was insufficient, and taxes assessed for the year for which notice was so given could not be collected.—*Slaughter v. City of Louisville*, (Ky.) 917.

5. Said board for the year 1882 gave such notice in due form, but failed to meet at the time fixed by law for its meetings. *Held*, that the levy for that year was invalidated thereby.—*Id.*

6. By act Ky. March 29, 1882, the city assessor of Louisville was directed to reassess any real estate not previously assessed, or upon which taxes had not been paid; and a board of commissioners was provided for, consisting of the auditor, treasurer, and chairman of the committee on assessments, whose duty it was to be in continuous session to hear appeals, etc. This board never having met or organized, any reassessments made under said act were void.—*Id.*

7. Act Ky. April 8, 1882, provided for assessments in said city for each year, of date September 1st, requiring the books to remain in the assessor's office from the 15th to the 30th November for tax-payers to complain of erroneous assessments. It provided for a board of equalization, with power to hear appeals from assessments, to be appointed by the mayor, with the consent of the board of aldermen, the appointment to be made in September. In November, the mayor, without the approval of the aldermen, appointed such board. *Held*, that the appointment and sittings of the board being without authority, tax-payers were not required to file complaint, as required by said act, and an assessment under such circumstances was invalid.—*Id.*

8. Act Ky. April 19, 1884, attempted to legalize the appointment of said board by the mayor without the consent of the aldermen, and to validate the acts of said board, the act further providing that the board, during the months of June and July, should have power to reduce any unpaid assessments for 1883 and 1884 upon petition by the aggrieved party filed with said board. *Held*, that the board's failure to meet on the 1st day of June was equivalent to a refusal to act, and a meeting on the 10th was not a compliance with the act, and tax-payers were not required to take notice of it.—*Id.*

9. Act Ark. July 23, 1868, providing for the levy of taxes, by the county court, having been repealed April 3, 1869, except so far as it applied to the collection of taxes due for 1868, county courts had no authority to levy taxes in July, 1869, for the year 1868.—*Parr v. Matthews*, (Ark.) 22.

Equalization.

10. Under Act Ky. May 10, 1884, directing the state board of equalization to consider separately three classes of property in equalizing values, viz., personal property, lands, and town and city lots, and to equalize the assessed value of the personal property by means of a rate obtained from the aggregate value and the whole number of each kind of personal property enumerated, with discretion to add to or deduct from the value so obtained, and to perfect the result in such manner as they may deem best to reach a just equalization, *held*, that stores are properly classed as personal property, and the addition of 56 per cent. to the assessed value of the personal property in complainant's county is a proper exercise of the board's discretion, and chargeable upon complainant's store.—*Russell v. Carlisle*, (Ky.) 14.

Sale.

11. Where a purchaser of land at a tax sale sues for its recovery, claiming no lien on the property for the taxes paid by him, and it appears that, before the suit was commenced, defendant offered to reimburse the purchaser for the amount so paid, and that the purchaser may still recover it, the failure of the court, after finding that the purchaser has no title to the land sued for, to render judgment against the property for the amount of taxes paid by him, is not error.—*Wheeler v. Bramel*, (Ky.) 199.

12. Under Gen. St. Ky. p. 749, § 1, providing that land must be listed for taxation in the county where it lies, and that the assessor, to ascertain the proper person in whose name to list it, may swear witnesses, etc., a tax sale of land which has been listed in the name of a person who is neither the owner nor an agent will not pass a valid title to the purchaser at such sale.—*Id.*

13. A sale of land for taxes, where no effort was made to first subject the personal property of the owner to the payment of the tax due, and no tax receipt was tendered him before the sale, is invalid, and passes no title to the purchaser.—*Id.*

14. Where once S. owned an undivided one-half of certain land, and failed to pay taxes due on it, an assessment and sale of the num-

ber of acres he owned in the survey did not invest the purchaser with his interest, and subrogate him to an undivided one-half interest in the land with the other owner, and he is not entitled to the assistance of a court of equity to aid a defective sale or conveyance.—*Morgan v. Smith*, (Tex.) 528.

Tax titles.

15. A tax deed, which describes the land sold as "part of the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 15, tp. 8 N., R. 32 W.," is void on its face for indefiniteness and uncertainty of description, and does not constitute such color of title as would enable one claiming under it to recover for taxes paid and improvements made on the land.—*Hershy v. Thompson*, (Ark.) 689.

16. A sheriff's deed to a purchaser at a tax sale under an execution on a judgment rendered in the circuit court on a back-tax bill, for a tax properly levied and assessed, extended and returned delinquent, against a non-resident owner, properly served by publication, cannot, in ejectment by the purchaser, be defeated by showing that the taxes for that year had been paid before the land was returned delinquent and the tax suit instituted. Following *Jones v. Driskell*, 7 S. W. Rep. 111. *Sherwood, J.*, dissenting.—*Hill v. Sherwood*, (Mo.) 781.

17. S. and C. each owned an undivided half interest in a 640-acre survey. S. made no rendition, and paid no taxes thereon for 1881, but C. paid the taxes on 320 acres. The assessor returned on list of unrendered lands for 1881 as follows: "Owner's name, unknown; abstract number, 319; certificate number, 259; number of acres, 640; acres unrendered, 320." The land was duly advertised and sold, and the tax collector gave the purchaser a deed conveying 320 acres off of the west end of the survey, described by metes and bounds. *Held*, that the deed did not convey title to any part of the survey.—*Morgan v. Smith*, (Tex.) 528.

18. Although a tax deed is, by statute, *prima facie* evidence of title, yet where the sale was made to collect a county tax of 1 per cent., and other taxes, and the records of the county court show an illegal levy of such a tax a few months before the sale, it will not, in the absence of further evidence, be presumed that the sale was based on any other levy, and the deed will be held void.—*Parr v. Matthews*, (Ark.) 22.

19. Mere lapse of time does not validate a tax deed based on an illegal tax, when the purchaser does not take possession of the land, though the deed is good upon its face, and the purchaser has paid all subsequent taxes.—*Id.*

20. A purchaser at a sheriff's sale, on execution in a tax suit acquires only the title of defendant in the suit, and Rev. St. Mo. 1879, § 6889, declaring that his deed "shall be *prima facie* evidence of title, and that the matters and things therein stated are true," does not make the deed evidence of title in such defendant.—*Powell v. Greenstreet*, (Mo.) 176.

Lien of purchaser for taxes and improvements.

21. Mansf. Dig. Ark. §§ 2640-2651, allowing compensation to a purchaser for taxes paid

and improvements made on lands sold by collectors or auditors of public accounts for the non-payment of taxes, or purchased from the state by virtue of any act providing for the sale of lands forfeited to the state for non-payment of taxes, or held under a donation deed from the state, does not apply to taxes paid and improvements made on lands sold for delinquent taxes by a county clerk before forfeiture to the state. — *Hershy v. Thompson*, (Ark.) 689.

22. Under Mansf. Dig. Ark. § 5789, providing that a purchaser at a sale of land for taxes, which shall prove invalid for informality in the proceedings of any officer having any duty to perform in relation thereto, shall be entitled to receive from the owner of the land the amount of taxes for which the same was sold, and the amount of taxes subsequently paid by such purchaser thereon, a purchaser at a tax sale, invalid for insufficient description of the land sold, must show what land was sold to him, in order to charge the owner with such taxes; and evidence that the tract sold was the only land claimed by such owner in the legal subdivision of which it was a part is insufficient to show what land was sold. — *Id.*

Remedies for erroneous taxation.

23. Persons having a valid claim for over-paid taxes are simply creditors to that amount, which they may recover in whatever manner the law provides, but they are not entitled to a decree rendering such claim a set-off against future taxes. — *McVeigh v. Lanier*, (Ark.) 141.

TELEGRAPH COMPANIES.

Liability for delay in delivering message.

1. In an action against a telegraph company, plaintiff alleged that W. delivered a message to defendant, directed to her, informing her that her brother was in a dying condition; that, through defendant's negligence, the message, and also a subsequent one informing her of her brother's death, both sent at her expense, and paid for by her, were not delivered until too late to enable her to be present at his death or at his funeral, — "to her damage ten thousand dollars." Code Tenn. Mill. & V. § 1541, requires telegraph companies to transmit and deliver all proper messages "correctly, and without unreasonable delay;" and, for a failure to do so, section 1542 declares the defaulting company "liable in damages to the party aggrieved." *Held*, that mental suffering caused by plaintiff's inability to reach her brother in time, on account of defendant's negligence, was a proper element of damage, and the court erred in sustaining a demurrer to the declaration. — *Wadsworth v. Western Union Tel. Co.*, (Tenn.) 574.*

2. As the statute gives the right of action to "the party aggrieved," the fact that the message was sent at the instance of a third party does not defeat plaintiff's right of action on the ground of want of privity of contract. *LUTON and FALKE, JJ.*, dissenting. — *Id.*

3. In an action against a telegraph company, plaintiff alleged that his wife's son, danger-

ously ill at M., wrote a message dated October 2: "Come immediately. I am very sick," — which was delivered to the agent at M. at 4 P. M. of that date for transmission. That the agent was informed of the relationship between the parties. That on that day plaintiff and his wife were in W., within 600 yards of defendant's office, as was well known by the agent at that place. That the message could have been delivered within half an hour from its receipt at M. That, if it had been so delivered, plaintiff's wife could, by the usual course of travel, have reached her son before his death, on the 3d. That, by the negligence of defendant, the message was not delivered until 6 P. M. on the 3d. That she took the next train for M., but learned, at an intermediate point, that her son was dead, and that the body had been sent to E. for burial. That she started at once for E., but was unable to reach there until after the body had been interred. That she suffered great hardship in being compelled to travel on a freight train a part of the way, and great mental anguish by being deprived of the privilege of being with her son in his last moments, etc. *Held*, that the petition stated a good cause of action, and that a demurrer thereto was improperly sustained. — *Loper v. Western Union Tel. Co.*, (Tex.) 600.*

4. It being affirmatively alleged that, if the message had been promptly delivered, plaintiff's wife would have arrived before her son's burial, any subsequent default on the part of the railroad company in making connections on the trip actually made, could not be urged in defense. — *Id.*

5. Although the allegations in the petition in regard to the death and burial of the son may have been insufficient if specially excepted to, yet it appearing, by reasonable intendment, that he died about noon of October 3d, and had been buried when his mother arrived, the allegations must be treated as sufficient on general demurrer. — *Id.*

Tenancy in Common and Joint Tenancy.

See *Partition*.

Sale of tenant's interest for taxes, see *Taxation*, 14.

Theft.

See *Larceny*, 1-25.

Torts.

See *Death by Wrongful Act*; *Negligence*.

TRESPASS TO TRY TITLE.

See, also, *Ejectment*.

Executor's authority, see *Executors and Administrators*, 4.

Improvements.

1. Where, owing to a mistake as to boundary line, defendants improved plaintiff's land under an honest belief that it was their own,

they are possessors in good faith within the reasoning of the statute; and, on recovery of the land by plaintiff, they are entitled to compensation for improvements. — *Houston v. Brown*, (Tex.) 818.

Pleadings.

2. On trespass to try title, where plaintiff alleges ownership generally, he may show that he had either the legal or equitable title, and his petition need not specifically allege payment of purchase money. — *Morris v. Rhine*, (Tex.) 816.

8. Defendants answered that the deed under which plaintiff claimed was in reality only a mortgage. *Held*, that plaintiff may amend his petition so as to demand foreclosure in case his deed should be declared a mortgage. — *Nye v. Gribble*, (Tex.) 608.

4. In such case plaintiff is entitled to have his grantor made a party defendant under the new pleadings. — *Id.*

Evidence.

5. In trespass to try title, a deed to plaintiffs bearing date after the entry alleged in the petition, but before the filing of the suit, is admissible in evidence. — *Jenkins v. Adams*, (Tex.) 608.

6. Plaintiff cannot introduce in evidence, in support of his title, a deed made to him by a third party after the institution of the suit. — *Harrison v. McMurray*, (Tex.) 612.

7. The deed under which plaintiff claims, and evidence of his continued possession thereunder until defendant's entry, are admissible, and sufficient to show a *prima facie* title. — *Parker v. Fort Worth & D. C. Ry. Co.*, (Tex.) 541.

8. Where defendant claims title through plaintiff, the deed of plaintiff's grantor is admissible in evidence, although no abstract of plaintiff's title was filed when it was demanded by defendant. — *Bitter v. Calhoun*, (Tex.) 528.

9. In an action of trespass to try title, where defendant's wife claims under deeds reciting the purchases to have been made with her separate means, and the evidence offered by defendants shows that she derived them from her father, a verdict and judgment in her favor will not be set aside as contrary to the evidence, merely because there was some impeaching evidence. — *Batts v. Beck*, (Tex.) 544.

Hearsay.

10. Plaintiff's grantor obtained from defendant's ancestor, B., a land certificate, made the survey, and received the patent in his own name, and, as alleged by plaintiffs, subsequently, for valid consideration, received a deed from B. for half of the land, which deed was afterwards lost. In trespass to try title, a son of B., who was then dead, was permitted to testify that he had heard his father say that "he had given his certificate to a man to locate, but had never heard from it;" that he had heard his father claim it since 1851. Another son testified that he had heard his father say "he had lost his land certificate, and did not know where it was located, and had not received it." *Held*, hearsay, and inadmissible. — *Reed v. Appleby*, (Tex.) 388.

Practice.

11. In trespass to try title where the court submitted special issues in relation to fraud and adverse possession, which were decided in favor of defendant, and also required a general verdict, which was also for defendant, the practice though irregular is no ground for reversal, the judgment being sustained by the special findings. — *Heffin v. Burns*, (Tex.) 48.

12. In trespass to try title, where there is a plea of limitation, it is proper to charge that the deeds under which defendants claim were duly filed and recorded on certain days, stating also the date of the commencement of the action, although there is no controversy about such facts. — *Id.*

13. In trespass to try title, where defendants disclaim as to all the land save that which they lay claim to by metes and bounds in their answer, and it is found that they are entitled to the land claimed, the judgment should be that defendants recover so much of the land as they claim, and that plaintiffs recover the residue of the land sued for. — *Dodge v. Richardson*, (Tex.) 80.

TRIAL.

See, also, *Appeal; Exceptions, Bill of; Judgment; Jury; New Trial; Witness.*

In criminal cases, see *Criminal Law*, 20-24. Instructions, see, also, *Trespass to try Title*, 13.

Right to open and close.

1. A plaintiff in attachment, whose answer to an interplea admits an assignment under which the interpleader claims, but alleges it to be fraudulent and void, is entitled to open and close the case both in the introduction of evidence and in argument to the jury. — *Hazell v. Bank of Tipton*, (Mo.) 173.

Failure of jury to agree.

2. A jury, after being out nearly two days, reported that they could not agree, whereon the court told them that it seemed very difficult for juries to agree at the present term; that they ought to agree and decide cases; that he had no idea of discharging them, but would keep them together during the entire term if they did not sooner agree. The next evening the jury announced a verdict. *Held*, that such remarks on the part of the court were reversible error. — *Chesapeake, O. & S. W. R. Co. v. Barlow*, (Tenn.) 147.

Objections to evidence.

3. Where deeds offered in evidence have been exhibited to counsel for the adverse party at a former term, and examined by him, under a parol agreement that they need not be filed in the case, he cannot object to their introduction on the ground of failure to file them before the trial, and to give notice of such filing. — *Jenkins v. Adams*, (Tex.) 603.

Instructions.

4. An instruction giving the rule of damages if the jury should find for plaintiff, does not so emphasize such a finding as to exclude from the minds of the jury the alternative of

finding for defendant.—*Gulf, C. & S. F. Ry. Co. v. Greenlee, (Tex.)* 129.

5. Where, in an action to enforce the liability of members of a firm on a contract of suretyship, signed by one of the members, and relating to a matter outside the firm business, there is no evidence to show that defendants ever authorized the signature, or ratified the act, instructions as to the doctrine of estoppel, though correct as propositions of law, are uncalled for, and will be treated as having misled the jury.—*Fore v. Hittson, (Tex.)* 292.

6. When the court by its instructions properly defines what would constitute gross and ordinary negligence on the part of a conductor, interrogatories as to whether the injury complained of resulted from the gross negligence of said conductor are not improperly misleading or suggestive, the jury having also been instructed as to the burden of proof.—*Louisville & N. R. Co. v. Mitchell, (Ky.)* 706.

7. Where, in an action for negligence, the court, in its general charge, gives the law applicable to the case as made by the evidence, it is not error to reject additional charges requested, as to the duty and degree of care and skill required of defendant, and the conditions of its liability.—*Gulf, C. & S. F. Ry. Co. v. Pool, (Tex.)* 535.

8. Where, in an action to recover damages for the wrongful death of plaintiffs' child, the court had charged that plaintiffs could recover only for medical expenses, and the reasonable value of the child's services during minority, but neither for the physical or mental suffering of the deceased, nor for the anguish caused them by the death of their child, it is not error to refuse to repeat the same charge.—*Brunswig v. White, (Tex.)* 85.

9. Where, in an action for damages for injuries occasioned by negligence of defendant, the jury are instructed that, in case they answer certain interrogatories in a certain way, they will then find "what sum will reasonably compensate plaintiff for the injuries sustained because of such negligence,—the bodily and mental suffering (if any) resulting directly from such injuries; and the impairment of capacity (if any) to labor and enjoy life resulting also from such injury,"—evidence that plaintiff had a family is thereby withdrawn from the consideration of the jury, and its improper admission is no ground for reversal of judgment.—*Louisville & N. R. Co. v. Mitchell, (Ky.)* 706.

Instructions—Invading province of jury.

10. An instruction in the nature of a demurrer to the evidence is properly refused where there is some evidence, though slight, justifying the submission of the issue to the jury.—*Hazell v. Bank of Tipton, (Mo.)* 173.

11. A charge that the jury are the sole judges of the weight of evidence, and the credibility of the witnesses, is improper, as the jury may take it as an intimation by the court that some of the witnesses are not entitled to credit, and some of the testimony without weight.—*Smith v. Commonwealth, (Ky.)* 192.

12. In an action for personal injuries, a charge that, though plaintiff was knocked down by defendant's street car, and was seen by the driver in time to stop the car before it ran over him, yet, if the emergency was sudden, it must appear that the negligence of the driver in failing to stop the car was more than slight to make him guilty of negligence, is a charge on the weight to be given to the driver's omission, and violates the Texas statute providing that a judge "shall not charge or comment on the weight of evidence."—*Costley v. Galveston City R. Co., (Tex.)* 114.

13. It is not error to refuse the following instruction in a suit for injuries on a railroad track: "The positive testimony of a witness who said he heard the whistle blow, is entitled to more weight than the negative testimony of a witness who says he did not hear it,"—since it is the province of the jury to pass upon the weight and credibility of the testimony of every witness.—*Sibley v. Ratliffe, (Ark.)* 686.

14. Where a party has been convicted of a felony, and is thereby disqualified from testifying in his own behalf, an instruction that a pardon makes such party a competent witness, whose credibility is for the jury to determine from all the facts in the case, is not a charge on the weight of evidence, but is only informing the jury what was the effect of the pardon.—*Costley v. Galveston City R. Co., (Tex.)* 114.

Special findings.

15. The finding of a special verdict, in an action on an insurance policy, that the assured, prior to the loss, had no notice of any limitation upon the authority of the local agent who procured the insurance, and also that they knew the extent of the agent's powers when the application for insurance was made, and knew it was limited, is inconsistent, and the cause must be reversed.—*Phoenix Ins. Co. v. Spiers, (Ky.)* 453.

Trial by court.

16. Where neither party demands a jury trial, it is the duty of the court to hear the evidence, and determine the facts as well as the law.—*Brooks v. Pegg, (Tex.)* 595.

17. The court may make any additional findings that are warranted by the law and the evidence at any time during the term, even after its conclusions have been filed.—*Bitter v. Calhoun, (Tex.)* 533.

18. Under Rev. St. Tex. art. 1333, providing that, on a trial by the court, the judge shall, at the request of either party, state separately in writing his conclusions of law and of fact, it is not error for such court to fail to find a certain issue claimed by counsel to be material when there is nothing in the record to show this court that it was material.—*Goode v. Lowery, (Tex.)* 73.

TRUSTS.

Resulting trusts.

1. In an action to establish a resulting trust in land, alleged to have been paid for with money of M., and the title, in violation of agreement, taken in the name of T., there was

evidence that T. had agreed with M., his wife, to purchase the land, using her money, and have the deed made to her; that he often promised to make her a deed to the land, and, a short time before her death, told her he had done so. There was also evidence that he had said that he had paid for the land with a crop of tobacco raised on the farm. *Held*, that the proof of the agreement, consisting of the recollection of witnesses 26 years after it is alleged to have been made, of what they heard T. and M. say about it, and the admissions of T. being at most in general terms, was not sufficiently clear and satisfactory to establish the trust.—*P'Pool v. Thomas*, (Ky.) 193.

2. A resulting trust in land may be established by clear and satisfactory parol evidence.—*Id.*

Powers of trustees—Actions by.

3. An authority granted to a trustee to receive rents, and sell, at his discretion, the property held in trust, the proceeds to be for the benefit of the *cestui que trust*, does not imply a power to defend alone a suit to set aside the deed under which he holds; and the *cestui que trust* must be made a party defendant.—*Ebell v. Bursinger*, (Tex.) 77.

—Pledge of trust property—Notice.

4. A note payable to certain trustees, and secured by a deed of trust, was by them indorsed, as trustees, to their successor in the management of the trust-estate. After maturity, the new trustee pledged both note and deed of trust to secure his private debt, the person receiving the same being ignorant of the trust. *Held*, that the person receiving said note was charged with notice that it was held in trust and liable for its conversion.—*Turner v. Hoyle*, (Mo.) 157.

Rights of beneficiaries.

5. Where a party, under whom plaintiffs claim as heirs, in an action for partition having made a deed to defendants' grandfather, under whom defendants claim, held the land for many years in trust for defendants, and those under whom they claimed, and during that time did not repudiate the trust, such deed is not a stale demand, and is available to defendants as a muniment of title.—*Goode v. Lowery*, (Tex.) 73.

USURY.

Discharge of surety, see *Principal and Surety*, 7.

Penalty.

Under the act of congress prescribing the rate of interest national banks may charge, and subjecting them to penalties for receiving usury, the offense of taking usury is consummated when a payment is made and appropriated to usurious interest, and the right to the penalty is then fixed, and it may be recovered by the person by whom the usury was paid, though the entire debt has not been paid.—*Stout v. Ennis Nat. Bank*, (Tex.) 303.

VENDOR AND VENDEE.

See, also, *Deed; Fraudulent Conveyances; Specific Performance.*

Agreement relating to land, see *Frauds, Statute of*, 2.

Rights of purchaser after decree in partition, see *Partition*, 2.

Construction of contract.

1. The equity of redemption to premises sold at an execution and tax sale having been sold by the execution debtor, the execution purchaser offered to sell his interest in the land to the redemption purchaser at the price bid at the execution sale, which offer was accepted, more than the bid paid, and a receipt therefor given, which recited only a sale of the execution purchase, and not of the tax-sale interest, and the execution and tax-sale purchaser afterwards procured a tax deed, and brought an action for possession. *Held*, that the action should be dismissed, as plaintiff sold all his interest in the land, irrespective of the receipt given by him.—*Hunter v. Ryan*, (Ky.) 695.

Rights and remedies — Failure of title.

2. In an action to enforce a vendor's lien, it appeared that defendant, with full knowledge of the facts and without fraud or mistake, took a defective tax title, and, being aware of the danger of loss thereby, accepted a deed with special warranty; plaintiff having refused to convey with general warranty. *Held*, that defendant could not avoid payment of the purchase money on the ground of failure of title.—*McIntyre v. De Long*, (Tex.) 622.

Vendor's lien.

3. In an action to enforce a vendor's lien securing \$1,600, deferred payments on land, evidenced by P.'s four notes, it appeared that B. sold the land to P., the agent of S. and others, his co-defendants; that the deed from P. to S., as "trustee for himself and others," recited that "for the further consideration of \$1,600 * * * to be paid to myself or to B. as follows, by said S., trustee, for himself and others," that, when the first of P.'s notes fell due, S. and his co-defendants paid it, and afterwards they executed their obligation in payment of the second note. *Held*, that S. was personally liable to B., but that there was no personal liability on any of his other co-defendants for any deficiency after sale of the land.—*Benjamin v. Birmingham*, (Ark.) 138.

4. On sale of land on which a vendor's lien existed, the lienholder released the land from his lien by deed poll. The consideration for the sale was paid to the owner of the land; who promised to pay it to the lienholder, but failed to do so. On suit by a judgment creditor of such owner, whose judgment was recorded in the county where the land lay at the time the vendor's lien was created, to subject this land to the lien of his judgment, *held*, that the purchaser had become subrogated to the rights of the lienholder, and that, if the property was sold under said judgment, the proceeds should first be applied to repay him

the purchase price that he gave for the land.
—*First Nat. Bank v. Ackerman*, (Tex.) 45.

Bona fide purchasers.

5. When a purchaser of land does not receive the deed, and pay the purchase money, until after he has full knowledge of plaintiff's rights, he is not an innocent purchaser, entitled to the protection of equity.—*Otis v. Payne*, (Tenn.) 848.

6. Where the records disclose a conveyance and a deed of trust by the owner of land, which are followed by conveyances by the grantee in one, and trustee in the other, a subsequent purchaser from the administrator of such owner is affected with notice of whatever defect in his title was caused by such instruments.—*Jenkins v. Adams*, (Tex.) 608.

7. The title of a purchaser for valuable consideration, claiming under a deed executed by the former owner before, but not recorded until after, rendition of a judgment against such owner, and the issue and levy of execution thereon, is superior to that of one who purchased at the execution sale, made after recording the deed, where such purchaser took actual possession shortly after obtaining his deed, and held the same, by his tenant, for some time previous to the rendition of judgment, and continuously until sale, the execution purchaser having notice of such adverse title before sale.—*Clendenning v. Bell*, (Tex.) 824.*

Verdict.

See *Criminal Law*, 40; *Trial*, 15.

Voters.

See *Elections and Voters*.

WILLS.

Construction, see *Charities; Evidence*, 19.

Description of devisees and legatees.

1. Declarations by a testator, about the time his will was executed, are inadmissible to show what persons he intended should take under the will.—*Peet v. Commerce & E. S. Ry. Co.*, (Tex.) 208.

2. A wife devised to her husband her half of the homestead for life, "with remainder to my legal heirs," and also certain property "in trust for my legal heirs," and directed the revenue of the property paid "to my legal heirs, with remainder after my husband's death, or the relinquishment of said trust, * * * to my legal heirs." The husband was authorized to sell any of the property, and reinvest the proceeds as he might deem beneficial to her "legal heirs." The wife had no descendants at her death, but her father, mother, brothers, and sisters survived her. *Held*, that the husband did not take, under the will, as "legal heir," under Rev. St. Tex. art. 1646, providing that, in the distribution of separate estates, the surviving husband shall take all the separate personal estate, etc., where the deceased wife leaves no descendants.—*Id.*

Nature of estate.

3. A testator devised lands to his daughter "and the lawful heirs of her body," declaring his wish that her husband should have no control or management of the property, and appointing a trustee for his daughter and "her heirs" in the management of the same. *Held*, that such devisee took an absolute estate in the lands, "heirs" being used as a word of limitation.—*McCauley v. Buckner*, (Ky.) 196.

4. Gen. St. Ky. c. 31, § 12, relating to dower, provides that, "nothing herein shall preclude the widow from receiving her dowerable and distributable share, in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will, or necessarily inferable therefrom." But when a testator provided that "my wife remains in possession and enjoyment of all my immovable property until my youngest child, B., shall have attained his twenty-first year;" and that, "when the time for the division of my immovable property shall come, my wife shall keep in possession, and use as long as she shall live, the house and lot on Twelfth street,"—it is clearly the intention of the testator that the devise should be in lieu of dower.—*Huhlien v. Huhlien*, (Ky.) 260.

Rights of devisees and legatees.

5. In trespass to try title to real estate by one claiming as residuary legatee in a will, plaintiff's title is made out by showing ownership of testator, a will devising "the balance of my estate" to a certain person, and plaintiff's identity with the person intended; the words "balance of my estate" conveying both personality and realty, and it is immaterial that the executors failed to comply with a provision of the will requiring them to sell the land and invest the proceeds in securities.—*Grimes v. Smith*, (Tex.) 88.

6. In trespass to try title, brought in 1884 by one claiming title to land under a will devising the land after payment of specific legacies, the facts that the will was probated in 1883, and that the last act appearing in the administration was in 1883, are sufficient to raise the presumption that the specific legacies have been paid, and the administration closed.—*Id.*

7. A testator gave his wife the use of his real estate until the youngest child should arrive at the age of 21 years, when he directed that it should be divided among his children, with the exception of a portion reserved for the wife. The will directed that the wife should undertake the care of her imbecile step-daughter, H., and in the event of the wife's death one of the children should support such daughter and be reimbursed from the daughter's share in the estate. When the youngest child came of age, and partition was made, the widow asked that she should be allowed for the support of H. out of her portion of the estate. *Held*, that she was not entitled to such allowance, the support of H. during the minority of the youngest child being an executory charge on the devise to the wife.—*Huhlien v. Huhlien*, (Ky.) 260.

8. Nor was the widow, in such case, entitled to compensation for the support of said step-

daughter after the youngest child became of age, as such continued support was not mandatory on her under the will.—*Id.*

9. But the widow was not chargeable with interest on the sums collected by her from the personal estate of the testator belonging to said step-daughter.—*Id.*

10. Where a testator makes a devise of real estate to his wife, and bequeaths to others the proceeds of a policy of insurance which was payable to her, and she accepts the devise, she thereby relinquishes her rights under the policy.—*Id.**

Contract to make will.

11. Under an oral agreement that defendant should have certain lands at the owner's death in consideration of services to be rendered to the owner, defendant continued to perform services for eight years, when, without his fault or consent, the owner renounced the contract. *Held*, that the value of such services may be recovered on a *quantum meruit*, though the contract was within the statute of frauds, and could not have been enforced.—*Stevens' Ex'rs v. Lee*, (Tex.) 40.

WITNESS.

See, also, *Evidence*.

Competency.

1. Parties against whom were shown circumstances strongly criminative, jointly indicted with defendant, who is being tried separately upon an indictment charging a conspiracy, are incompetent witnesses for the defense.—*Pearce v. Commonwealth*, (Ky.) 893.

2. The fact that a witness is to receive a reward in the event of conviction may affect his credibility in the minds of the jury, but does not disqualify him as a witness.—*State v. Rush*, (Mo.) 221.

3. Evidence will not be excluded because a witness remained in the court-room after an order of court directing all witnesses to withdraw until called, where such act of the witness was not the fault of the party calling him.—*O'Bryan v. Allen*, (Mo.) 225.

4. In an action for dower and specific performance of an alleged oral gift of land to plaintiff's husband from his father, where the heirs of the deceased father and son are defendants, the husband of plaintiff's daughter, an heir to an undivided interest in the land either under her father or grandfather, is a competent witness for plaintiff, being an interested party to the suit, under Rev. St. Mo. § 4012, providing that a party may compel an adverse party to testify in his behalf.—*Id.*

Privileged communications.

5. S., an attorney, testified that, in conducting negotiations for certain mortgages from the assignors to defendants, the subject of an assignment was never raised between the parties until he told the assignors that they could make an assignment; that this was several days after the mortgages were executed, and after the assignors had failed to agree with their creditors; that in all the transactions he was acting as counsel for the mort-

gagees, and did not represent the assignors, though he afterwards drew the deed of assignment. *Held*, that the evidence was proper, as it was not shown that he was acting as counsel for the assignors at the time.—*Simmons Hardware Co. v. Kaufman*, (Tex.) 233.*

Transactions with decedents.

6. In an action against the maker of a promissory note by the administratrix of the payee, her testimony, that deceased had stated, but not in the presence of defendant, that defendant had admitted the note, and promised to pay it, is inadmissible, if objection is made, even to rebut improper evidence which has been admitted without objection.—*Dolsen v. De Ganahl*, (Tex.) 321.

7. Plaintiff, with her present husband, brought an action for dower, and for specific performance of an alleged oral gift of land to her former husband from his father. Both the father and son were dead. *Held* that, the widow being the real party in interest in the suit, and not a party to the original contract, was a competent witness, under Rev. St. Mo. § 4010, providing that, in an action where one of the original parties to the contract is dead, the other party shall not testify in his own favor.—*O'Bryan v. Allen*, (Mo.) 225.

Examination.

8. It is within the discretion of the court to permit a witness to be recalled to correct his evidence previously given.—*Gulf, C. & S. F. Ry. Co. v. Pool*, (Tex.) 535.

9. So, also, to require counsel to cease cross-examining a witness upon a matter about which the witness has answered fully several times.—*Id.*

Credibility.

10. Where there is a direct conflict of testimony, it is not error to instruct a jury that, if they believe from the evidence that a witness has knowingly testified to a falsehood, they may disregard his entire testimony.—*State v. Hickam*, (Mo.) 252.

11. Where a relative testifies for the accused, it is error to instruct the jury to give to the testimony of each witness the weight they deem it entitled to, in that it in effect leaves them to conclude as a matter of law that the statements of one interested are entitled to less weight than statements made by those disinterested in the result.—*Barnard v. Commonwealth*, (Ky.) 444.

Impeachment.

12. Where defendant in a criminal case testifies in his own behalf, evidence of his general reputation for truth and veracity, chastity and morality, may be introduced by the state.—*State v. Rider*, (Mo.) 723.

13. Statements of plaintiff purporting to be contained in her deposition partly taken, and then abandoned, are inadmissible to lay a foundation for impeaching her testimony, where she denies making such statements, and there is no other proof that she did.—*Owens v. Kansas City, St. J. & C. B. R. Co.*, (Mo.) 850.*

14. Where, on cross-examination of plaintiff, defendants sought to leave the impression

that plaintiff testified differently in a deposition taken by defendants to be used in the case, but not offered in evidence, plaintiff may read such deposition in rebuttal.—*Schmick v. Noel*, (Tex.) 88.

15. Where evidence was introduced by defendant to show that the principal witness for the prosecution had given contradictory testimony on the examining trial, it is error to instruct the jury that the evidence was not for the purpose of proving that the witness had sworn falsely, but to enable them the better to judge of the credibility and worthiness of belief of the witness.—*Howard v. State*, (Tex.) 929.

WRITS.

See, also, *Attachment*; *Execution*; *Habeas Corpus*; *Injunction*; *Mandamus*.

Notice of plaintiff's claim.

Rev. St. Tex. art. 1215, requires that, where all the defendants reside in the county in which the suit is brought, the citation shall state the "nature of the plaintiff's demand." Plaintiff brought an action against J. & C. to recover certain land, and also made his grantor, M., a party defendant, alleging that M. conveyed with covenants of warranty, and praying that, in the event his title failed, he might have judgment against M. for the purchase money. The citation was as follows: "The nature of the plaintiff's demand is * * * for the title and possession of [describing the property,] for damages in the sum of \$500, for costs, and general relief." *Held*, that this was insufficient to apprise M. of the nature of the relief sought against him, and that a judgment by default against him was error.—*Miles v. Kinney*, (Tex.) 542.

